

THE ROLE OF COST OF CURE AND DUTY TO MITIGATE DAMAGES IN PARTIAL TAKINGS

By John J. Reilly

In a partial taking, the measure of just compensation has been expressed alternatively as:

1) the difference in value of the property before and unaffected by the taking and the value of the remainder as affected by the taking; or 2) the sum of the value of the property taken and any damages to or loss in value of the remainder caused by the taking. Village of South Orange v. Alden Corp., 71 N.J. 362, 367 (1976); State v. Cooper Alloy Corp., 136 N.J. Super. 560, 567-68 (App. Div. 1975); State by Com'r v. Weiswasser, 149 N.J. 320, 329 (1997). The assessment of just compensation for a partial taking requires broad inquiry. In State v. Silver, 92 N.J. 507 (1983), the Court stated:

Therefore, in the case of a partial taking, the market value of property remaining after a taking should be ascertained by a wide factual inquiry into all material facts and circumstances-both past and prospective – that would influence a buyer or seller interested in consummating a sale of property.

Silver, 92 N.J. at 515

In a partial taking, the broad inquiry to ascertain the value of or damages to the remainder implicates the concepts of a cost of cure and the duty to mitigate damages.

In State v. Sun Oil Company, 160 N.J. Super. 513 (Law Div. 1978), and the cases relied on therein, the cost of cure had to do with reasonable work that the owner could do on the remainder to mitigate or reduce severance damages, and which cost of cure would be considered as affecting the value of the remainder, but which the owner was not required to implement. In State v. Birch, 115 N.J. Super. 457 (App. Div. 1971), the costs the owner would have to incur to improve a paper street to unlandlock the owner's remainder were considered. In State v. Weiswasser, the cost of cure concept was expanded to include consideration of the availability of replacement or substitute property in determining the value of the remainder.

Cost of cure and duty to mitigate concepts are relevant to the determination of just compensation. The cost of cure arises from the duty to mitigate damages or the doctrine of avoidable consequences and has been found to be an appropriate factor affecting the value of the remainder. The cost of cure, however, must be less than the severance damages to the remainder without the cure. The cost of cure also must be reasonable and practicable. The property owner need not actually implement the cure; and the condemnor cannot implement the cure on the remainder, unless it has the consent of the owner or has condemned the right to do so.

In State v. Sun Oil, 160 N.J. Super. 513 (Law Div. 1978), the State acquired a portion of a corner gasoline station for highway purposes. The taking consisted of a parcel in fee simple, a construction easement for a temporary diversionary road, and denial of access along one of the street frontages. The property owner claimed damages contending that the remainder was rendered an interior lot, it did not conform to the minimum lot size and setback zoning requirements for an interior lot, and the remainder's highest and best use was no longer for a gas station.

The specific issue of the cost of cure arose as a result of the highway contractor having severed the water and sewer lateral lines during the course of the highway project construction prior to trial. After the severance of the laterals, the State's contractor entered the owner's remainder and without the owner's consent installed new lines. It was thereafter determined, however, that the sewer line and an underground tank needed to be relocated. The Sun Oil court described the water and sewer service for the property as municipal utilities with the owner having to carry the lines from the building to the shut-off valves or connections in the public easement. The lines at issue for the cost of cure were the private property of the owner and on the privately owned remainder. At trial the State proposed an amendment to the complaint to allow for entry upon the owner's remainder by the State's contractor to do the work. Although the water and sewer lines issue could have been the subject of a separate action for trespass or inverse condemnation, the court allowed a continuance of the trial to afford the parties an opportunity to address the issue. The trial court identified the cost of cure issue as follows:

In connection with a highway construction program, may the State replace existing sewer and water pipe laterals beyond the public easement, relocate electric lines beyond the public easement, and replace an underground gasoline storage tank where the cost for such work is less than the diminution in market value of the remainder of the parcel rather than pay damages in cash?

Id. at 516.

The State contended that it had the right to do the cure work beyond the public easement area and within the owner's private property and that the owner was not entitled to any damages. The owner contended that the State was prohibited from doing a cost of cure within the owner's remainder, that the taking should be considered an entire taking, and objected to the State's shifting to a cost of cure approach or more accurately a replacement in kind to cure approach.

The Sun Oil court disagreed with the positions of both parties. The court concluded that the condemnor had no right to do the cure on the owner's remainder. Also, the property owner had no affirmative duty to actually do the corrective work. Instead, the proper analysis is that the owner is entitled to damages and may be regarded as under a duty to mitigate damages where it is reasonable to do so, whether or not the owner actually does the curative work. The cost of cure must be less than the damages to or loss in value that the taking would otherwise cause to the remainder. The proposed cure must also be reasonably certain and practicable. The Sun Oil court stated as follows:

This court concludes that the authorities referred to by the State mean that the evidence as to the cost of constructing facilities which will probably reduce, or minimize, the damage to the remaining parcel where the cost is less than the decrease in value of the remaining parcel is admissible and the jury should be properly instructed as to its use. It does not mean that the State may enter the private property of the condemnee and do the work.

Id. at 533-54.

The court concluded: "If the State is to do this work, then it must exercise its power of eminent domain, absent the consent of the owner." Id. at 535.

The court denied the State's motion to amend the complaint and awarded as part of the just compensation damages of \$1,700 for the sewer costs and \$5,850 for the relocation of the underground tanks. (Apparently the water line on the property was in a trouble free area and Sun Oil did not complain about the relocated waterline or the pavement restoration completed by the State.) In reaching its decision the Sun Oil court referred to Pima County v. De Concini, 79 Ariz. 154, 285 P.2d 609 (Ariz.1955); Kennedy v. Commonwealth, 336 Mass. 191, 143 N.E.2d (Mass.1957); State Highway Comm'n v. Pinney, 84 S.D. 311, 171 N.W.2d 68 (S.D.1969); Mayer Co. v. State, 18 N.Y.2d 393, 223 N.E.2d 881 (N.Y.1966) and 4A Nichols, The Law of Eminent Domain, 14.22 (3ed rev. 1976).

In Pima County, the partial taking was for the widening of a highway with the construction of a 48 feet wide by 3-4 feet deep ditch that completely denied access to the owner's remainder. The owner's valuation positions were as follows: 1) the entire property before the taking had a value of \$80,500; 2) the land taken had a value of \$2,584.40; 3) the remaining land before the taking had a value of \$77,915.60; 4) as a result of the drainage ditch, the remainder had little, if any, value. However, if a series of access bridges were constructed to partially restore access to the remainder at an estimated cost of \$21,356.50, the remainder would have a value of \$36,009.10. As the cost of cure did not completely mitigate damages, there were still damages to the remainder of \$20,550.

The trial court awarded \$2,584.40 for the land taken, and severance damages of \$41,906.50 (the sum of the cost of cure of \$21,356.50 and the uncured damages to the remainder of \$20,550).

On appeal, the court affirmed the trial award concluding that it had restored the owner as nearly as possible to the owner's position before the taking. The court indicated that, if damaged property can be reconstructed or rearranged, the costs of such should be considered, not as specific items of claim, but as affecting the value of the remainder. In Pima County, the court stated as follows:

The rule also is that in arriving at the market value of land which has been damaged by the exercise of the right of eminent domain the court has a right to admit evidence of possible expenditures which, if expended, would diminish the damages. While the measure of severance damages is the difference between the market value before and after the taking, evidence of expenditures which, if made, would cause a change in market value are admissible and should be considered by the court in arriving at such value. The limitation of the rule is that the expenditures must be made in such an amount as will not exceed the difference between the market value before and after taking which would have existed without the expenditure. In other words, the class of evidence cannot operate to increase the damages above what they would be without the expenditure.

Pima County, 285 P.2d at 611.

Another case cited by the Sun Oil court was Kennedy v. Commonwealth, 336 Mass. 181, 143 N.E.2d 203 (Mass. 1957). In Kennedy, the partial taking was to widen an intersection corner. The area of the remainder adjacent to the taking was left with a steeper slope than before, no vegetation could grow in the area, and the area was subject to soil erosion. At trial there was evidence that the before value of the property was \$26,500 and the remainder had a value of \$21,500, or a difference of \$5,000. The property owner had sought to introduce evidence of the cost to construct a retaining wall to prevent further erosion and for landscaping in the amount of \$4,000.

The trial court denied the owner's proffer and the jury awarded \$1,250.

The Massachusetts Supreme Judicial Court reversed stating in part as follows:

If the evidence had been admitted, the jury could have disregarded it or they could have accepted the whole or any part of it in determining whether it was reasonably necessary and an economical method to make such a repair in adapting the premises to the new condition created by the taking. The evidence was competent in bearing upon the diminution in value caused by the taking and as corroborative of other testimony upon that issue.

Kennedy, 143 N.E.2d at 204.

Another case cited by the Sun Oil court was State Highway Commission v. Pinney, 84 S.D. 311, 171 N.W.2d 68 (S.D. 1969). In Pinney, the partial taking consisted of 19 acres on which were located trees, buildings, a spring, two shallow wells and four dams. The owner contended that the tract before the taking had a water supply which allowed for the grazing of livestock and the remainder no longer had water. The State, however, introduced evidence that new wells could be dug on the remainder for \$350 and that test holes had indicated a sufficient supply of water was available. The jury awarded \$8,750. On appeal, the court reversed by reason of the trial court's having failed to give the following jury charge that the State had requested:

The landowner has a duty to minimize his damages and to use all reasonable exertion and steps to protect himself, and avert, as far as practicable, the injurious consequences of the taking. However, any expenses which the landowner reasonably and in good faith incurs in an effort to minimize his loss, are to be taken into account in computing the compensation to be awarded him.

Pinney, 171 N.W.2d at 69.

In concluding that the requested jury charge should have been given, the Pinney court reasoned as follows:

The admission of such evidence and argument to the jury thereon would be of little avail to a party without an instruction as to the effect. These expenditures while admissible and properly to be considered by the jury in determining the diminution in the market value of the land not taken, must not exceed the difference in market value before and after the taking. However . . . that would not occur in the instant case. This guide fulfills the purpose of just compensation by restoring owners to as good a position as they were in prior to the taking.

Id.

In addressing the nature of the duty to mitigate which is also referred to as the doctrine of avoidable consequences, the Pinney court referred to it as “. . . one of the limitations on the amount of recovery; it may be stated that a party may not recover damages which he could reasonably have avoided.” Id. at 70. While the jury charge at issue in Pinney referred to the owner’s “duty” to minimize damages, the owner was not under an affirmative obligation to incur such costs or to actually undertake the work. The Pinney court stated:

. . . the failure to take reasonable action to limit damages creates no affirmative right in anyone. The only result of such a failure is that the court will not allow damages for those consequences of the injury which it believes the plaintiff could reasonably have avoided.

Id. at 70, citing 22 Am.Jur. 2d, Damages §30.

The Sun Oil court also cited Mayes Co. v. State of New York, 18 N.Y.2d 549, 223 N.E.2d 881 (N.Y.1966). In Mayes Co., the property owner operated a manufacturing plant that used substantial quantities of water in its processes and the land had springs which fed a pond that supplied the water. The State’s partial taking for highway purposes took most of the pond and a spring. Although conceding there was considerable underground water in the area of its plant, the owner’s position was that it was nonetheless too speculative to justify the expense of drilling wells. The owner instead sought damages in the amount of the capitalized cost of having to purchase water from the public supply in the amount of \$200,000 along with the additional expense of a water storage tank, a plant for treating the municipal water and for necessary connections.

At the trial, there was uncontradicted testimony by the State’s expert that the cost of drilling a well to supply sufficient water for the owner’s needs along with the construction of a pump house and necessary electrical connections would be approximately \$13,500. The State’s additional estimate of the cost of a water storage tank and the value of the land taken would bring the State’s estimate of just compensation to approximately \$53,600. The trial court awarded the owner \$284,000.

The New York Court of Appeals reversed and remanded for a new trial. The Court was very wary of the uncommon capitalization of future costs approach employed by the owner, especially when there appeared to be a reasonably available alternative. On retrial, the Court directed the trial court to carefully re-examine the potential water resources on the remainder and the cost of their development. In order to utilize the capitalization of future expense approach, the owner would have to present sufficient proof as to the physical inadequacies of the remainder as a source of water. The Court also indicated that the State should be allowed to conduct control tests of the water potential of its land as a condition of allowing consideration of the owner’s capitalization of expenses approach.

Even assuming that both sides agree that a cost of cure should be considered in determining the value of the remainder in a particular matter, there will be issues as to whether the cure eliminates or merely reduces the damages to the remainder. See, e.g. Pima County, 79 Ariz. 154. There will also be disputes as to what are the necessary and reasonable cost elements associated with a reasonable and practicable cure. State v. Birch, 115 N.J. Super. 457 (App. Div. 1971) illustrates this point.

In Birch, the State’s partial taking for highway purposes left the owner with two remainders, one of which consisted of 15 landlocked acres improved with the owner’s home and out buildings. Before the taking, the property enjoyed access along a sand and gravel road maintained by the municipality. Access to the 15 acres remainder, however, could only be through the construction and improvement of a paper street, dedication of which was uncertain.

While both the State and the owner employed a cost of cure, the estimates were widely disparate. The State proposed the construction of a 20 feet wide gravel road having a length of approximately 1700 feet at an estimated cost of \$6,860. The State assumed the road would be maintained by the Township. The owner, however, pointed out that the construction of the road was subject to numerous contingencies. These included the cost of construction; whether the owner would have the right to construct such a road; whether such right over the paper street would survive a vacation by the Township; whether the Township would maintain the road; whether the municipal land subdivision ordinance governed the size and type of the road proposed; and whether the Township could impose as a prerequisite to its maintaining the road the owner’s compliance with street standards in the ordinance. The State had originally contemplated constructing the road itself, but when the Township insisted that it be constructed in conformity with the street standards set forth in the subdivision ordinance, the State decided not to do so and left the issue of building the road to the owner.

The State argued that, by reason of the dedication, the owner had a right of access and the condemnation did not subject the owner to the subdivision ordinance. The trial court charged the jury that the subdivision ordinance was not applicable to the case and that the owner did not have to comply with the ordinance in building the access road. The Supreme Court reversed and remanded concluding that the jury charge was erroneous, noting that dedication is a matter of intent and nothing was known of the nature or extent of the dedication of the paper street at issue.

As can be seen, even assuming that both sides agree that a cure is an appropriate factor affecting the value of the remainder, there can be substantial dispute as to the appropriate elements to be considered in calculating the cost of the cure.

In State by Com'r v. Weiswasser, 149 N.J. 320 (1997), an issue on appeal included, “whether evidence of damages, or the mitigation thereof, may include the availability and value of replacement property”. Id. at 323. The Court also expressed the issue as:

The issue raised by the State’s offer is whether, in determining severance damages, there is a duty to mitigate damages, and, if so, whether that duty includes a duty to accept substitute or replacement property or its monetary equivalent in measuring the value of the property taken.

Weiswasser, 149 N.J. at 329.

Before the State’s partial taking for highway purposes, the property consisted of 112 acres with interrupted highway frontage of 110, 54, 278 and 62 feet. A 0.37 acre parcel owned by one Firth was located between the 62 feet and the 278 feet frontages. The subject property also had 135 frontage feet along a side road. Approximately 19 acres along the highway frontage to a depth of 500 feet were zoned commercial, with the balance zoned residential.

The partial taking consisted of a fee parcel of 0.39 acre for a jug handle along 255 feet of the property’s stretch of 278 frontage feet before the taking.

The owner contended the taking damaged the commercial remainder in the amount of \$267,380 by reason of no longer being viable for commercial use, but only for residential. The owner also contended that taking caused the loss of what would have been a high quality entrance to the residential development from the highway frontage as a result of which the residential portion suffered a loss in value of \$107,380. The owner contended severance damages were in the total amount of \$374,760.

Subsequent to the hearing before commissioners, the State proposed to purchase the Firth property (having 150 frontage feet), which in combination with the other adjacent frontage segments would provide a continuous stretch of 236 frontage feet for the remainder.

The State purchased the Firth property for \$84,000 to replace the lost frontage and to cure the owner’s claimed severance damages of \$374,760.

In dealing with the issue of not being able to force the condemnee to accept the conveyance of the replacement parcel and what should be the measure of just compensation if the owner declines the conveyance, the State in Weiswasser proffered alternative value positions. On the one hand, if the owner accepted the Firth property, the State contended that just compensation should be the conveyance of the Firth property plus \$3,700 (the value of the slope easement and the value of the size differential between the taking parcel and the slightly smaller Firth property). This approach reflected that the provision of the Firth property would not be a complete mitigation of damages as there was additional payment for the differential in the size of the parcel taken and the replacement parcel to be conveyed. On the other hand, if the owner declined to accept the conveyance of the Firth property, the State contended that just compensation should be \$114,000, the sum of the State’s purchase price of the Firth property of \$84,000 and the cost to cleanup the property of hazardous substances and to restore it to an undeveloped state of \$30,000.

At trial, the court granted the owner’s motion to exclude evidence of the State’s purchase of the Firth property. The jury awarded \$204,000 from which the State appealed. The Appellate Division affirmed in State v. Weiswasser, 287 N.J. Super. 287 (App. Div. 1996), from which the State petitioned for certification.

In Weiswasser, the Supreme Court analyzed the “duty to mitigate” in the setting of a condemnation action which duty is sometimes referred to as a “cost of cure” or the “doctrine of avoidable costs”. Citing Sun Oil and Birch, the Court noted that mitigation of damages is typically based on actions that the property owner can take relating directly to the owner’s remaining property. Weiswasser, however, presented an issue of first impression because the duty to mitigate implicated not only the subject remainder, but property not owned by the condemnee. The Court discussed several decisions from other jurisdictions sustaining consideration of the availability or cost of replacement or substitute property as an element reasonably affecting the value of the remainder. Such evidence of replacement property can be probative of the issue of just compensation, but the condemnee cannot be compelled to take the substitute land.

In Weiswasser, the Court identified the fundamental issue as the property owner’s entitlement to just compensation based on the fair market value of the property:

Market value is determined by what a willing and reasonable buyer and seller, both unconstrained, would agree is the fair price of the property. What should be critical in that determination is not whether a property owner may be compelled to acquire substitute property, but whether, under all of the surrounding circumstances, reasonable and willing parties would consider the availability and use of such property as bearing on the market value of the owner’s remaining property.

Weiswasser, 149 N.J. at 333-34.

The Court rejected any concerns about the use of replacement property in determining severance damages as being tantamount to specific performance, stating:

Evidence of available replacement property in mitigation of damages does not equate with compelling the condemnee to purchase the property. Cost-of-cure damages, for example, authorize the introduction of evidence that a condemnee can reduce its damages by taking corrective measures to improve the remainder property even though such action need not be taken.

Weiswasser, 149 N.J. at 335.

The Court also stressed that the proposed mitigation of damages must be “fair and reasonable.”

Id.

The fact that no two properties are identical (i.e., the replacement parcel as compared to the parcel acquired) is also not fatal to the consideration of the availability of the replacement parcel, but rather goes to whether the replacement parcel is sufficiently similar. In this regard the Court stated:

The similarity of such property bears on whether it may be considered useful and available in conjunction with the remainder property. The basic issue is whether it is reasonable and fair to consider that property as a substitute for the property taken.

...

The issue of similarity of replacement property is primarily factual. The degree of similarity is relevant to the issue of whether under all of the circumstances it would be reasonable for the condemnee to accept property that is available and contiguous to the remainder property as a suitable substitute or replacement for the property taken when that will reduce or eliminate the damages to the remainder property.

Weiswasser, 149 N.J. at 336-37.

The quote immediately above refers to the availability of replacement property to “reduce or eliminate the damages to the remainder property.” This is significant as it concedes that the replacement property may not completely mitigate damages but instead may merely reduce them.

As its ruling was a matter of first impression, the Weiswasser Court indicated that its decision would be applied prospectively.

In conclusion, the determination of just compensation for a partial taking requires broad inquiry into the issue of severance damages to the remainder. The analysis allows consideration of the duty to mitigate damages in the form of a cost to cure or the availability of a replacement parcel, which would reduce or eliminate the severance damages otherwise caused by the taking. The cost of cure must be in an amount less than the severance damages it seeks to cure. As a cost to cure is merely a value factor that can be considered in the determination of the monetary award of just compensation, it need not be actually implemented by the owner. The cure, of course, is subject to scrutiny as to whether it is reasonable and practicable and adequately addresses all of the elements of cost and any assumptions that may be necessary to implement it. The condemnor cannot perform the actual cure on the owner's remainder, unless it has taken the right to do so or the property owner has given consent.

Likewise, as to the consideration of the availability of a replacement or substitute parcel, the property owner cannot be compelled to accept its conveyance, but its availability and use by the owner can be considered as affecting the value of the remainder. In such circumstances, there will also be the full range of factual issues relating to the similarity or comparability of the substitute parcel to the parcel taken. Such analysis would be similar to that employed in assessing the comparability of sales, including physical factors, permitted uses, as well as the environmental status and potential liability of the condemnee in accepting the conveyance of the replacement parcel. This analysis is also relevant to the issue of whether such availability of the replacement parcel completely mitigates or only reduces the severance damages. Lastly, when a condemnor relies on the availability of a replacement or substitute parcel as a factor to be considered in the determination of just compensation, and the property owner has not determined at the time to either reject or accept the conveyance, there may need to be two alternate awards of just compensation based on the assumptions of the owner either accepting or rejecting the replacement property.