DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60314 ~~099414~~

FILE: B-118653 DATE: DEC 19 1975 99308

MATTER OF: Highway relocation costs--Rosemont corridor, Baltimore City, Maryland

DIGEST: (1) Ordinarily, State proposing alternate Interstate Highway route to one already approved by Secretary of Transportation must bear financial burden of change. Unusual role of Federal officials in encouraging route change to bypass residential area was recognized by Secretary's decision, concurred in by GAO in B-118653, May 3, 1971, to participate in costs incurred in bypassed area up to date City determined to seek alternate route. However, in absence of similar extraordinary involvement in City's decision to continue property acquisition in area sought to be bypassed, Transportation Department is not liable to participate in these additional acquisitions.

(2) Having obtained State and Federal Highway Administration concurrence therein, decision of December 24, 1968, by Mayor that City would seek alternate route for Interstate Highway was sufficiently final that City should have discontinued acquisition of properties along initially selected route, even though City still had to study alternate routes, hold public hearings, and repeal old and enact new condemnation ordinances. Costs of continued acquisition must be borne by City or State, not by Federal Government.

(3) City contends that property acquisition in proposed Highway route, where route is later abandoned, created "condemnation blight" phenomenon which, in turn, obligated City to acquire remaining properties in neighborhood. However, consequential damages resulting from governmental action, in absence of physical encroachment on property or severe impairment of its use, is not compensable in absence of bad faith, extreme negligence or default in legal duty. Moreover, even if City acted in bad faith, Federal Government is not liable unless it participated in bad faith activities. See court cases cited.

(4) In absence of authoritative support therefor, GAO cannot agree with City's contention that when value of property is diminished by "condemnation blight" as result of governmental action in acquiring surrounding property which action does not actually encroach on or substantially impair use of property, City becomes legally liable to acquire remaining property in area. See court cases cited. Hence, Department of Transportation is not liable to pay Federal share of costs of acquiring remaining property in abandoned Interstate Highway route inasmuch as once City decided to bypass this area, it should not have made new acquisitions.

We have been asked by the Mayor of the City of Baltimore, Maryland, to review and modify our decision of May 3, 1971, B-118653, relating to participation by Federal-aid highway funds in the cost of acquisition of properties for rights-of-way for Interstate Highway I-70N through the Rosemont area of Baltimore City.

At the time we rendered our 1971 decision we were advised that on December 24, 1968, Baltimore City authorities--in a statement by the Mayor--finalized their decision to bypass the Rosemont area and not to use the properties acquired for highway purposes. This decision was concurred in by the Maryland State Roads Commission and approved by the Federal Highway Administration (FHWA) on January 17, 1969.

The statutory role of the Federal Government is to approve or disapprove the State's proposals for Interstate Highway System routes. As a general rule, when a State proposes a route alternative to one already selected by the State and approved by the FHWA, the legal responsibility and the financial burden for any change rests with the State.

It was in view of this general rule that the Secretary of Transportation requested our concurrence in his recommendation that in view of the unusual facts and circumstances surrounding this road relocation, Federal-aid highway funds be used to participate in the costs of acquisition of properties in the bypassed Rosemont area where the acquisition occurred as of December 24, 1968, the date on which FHWA stated the City determined to bypass the area.

In our decision we did not object to payment to the extent recommended by the Secretary because of a variety of factors making

the case unusual: (1) the extraordinary departmental involvement in having the route relocated; (2) the unique and unusual nature of the personal involvement of the then Federal Highway Administrator; (3) the Secretary of Transportation's affirmative recommendation; and (4) the assurances we received that a similar situation would not be likely to occur again.

The Mayor states that on February 3, 1972, he asked the State to request that FHWA review this matter and seek a change in our decision to allow greater participation of Federal-aid highway funds. The State made the request shortly thereafter but did not receive a reply until March 14, 1975, from FHWA declining to seek such a modification. Hence, the City is now requesting that modification directly, seeking a decision holding that the City is entitled to Federal participation in all acquisitions in the Rosemont corridor. In the course of developing this case, we met on June 4, 1975, with representatives of the City, the State of Maryland, the United States Department of Transportation (DOT) and the FHWA. We have also received, at our request, reports from representatives of the City and DOT.

As we understand it, the City sets forth three major arguments: First, that the December 24, 1968, statement by the former Mayor did not represent a final decision to bypass the Rosemont area and that the final decision was not made until February 22, 1971, although land acquisition had effectively ceased as of July 20, 1970. Second, that FHWA's role in obtaining an alternate route was so great that it must now be estopped from contending that it has no responsibility for participating in the costs of acquisition which took place after December 24, 1968. Third, that even if December 24, 1968, is construed to be the date of decision for bypassing Rosemont, the City was legally and morally responsible for completing the acquisition and Federal-aid highway funds must be used to participate therein.

As to the final date of decision, we note that the Condemnation Ordinance for the original alignment of the Highway was enacted by the Baltimore City Council and became effective on June 21, 1967. On September 11, 1967, FHWA authorized the acquisition of rights-of-way for the highway through Rosemont under a Stage 1 program. Under this alignment a total of over 800 residential properties in Rosemont would be taken for highway construction. The FHWA Stage 1 authorization precludes payment for property acquired but not necessary to accommodate ultimate construction. DOT states that the project never advanced to Stage 2, which would have permitted payment for property acquired under normal circumstances.

Subsequently, considerable controversy arose concerning the alignment of this and other interstate highways through Baltimore City. As a result, a number of consulting engineers known as the Urban Design Concept Associates (UDCA) were employed to work together to form a recommendation for a new plan. The Mayor, in his May 26, 1975, letter to us, described the selection of alternate routes as follows:

> "On December 24, 1968, the City selected a Highway System, designated as the 3-A System, from a group of several alternative highway systems developed by the Urban Design Concept Associates and delineated in the UDCA report dated October 18, 1968. At that time the City Administration also publicly stated its intent to modify the 3-A System to the extent necessary to bypass the Rosemont community. These basic decisions were subsequently concurred in by the Policy Advisory Board, the State Roads Commission, the Bureau of Public Roads, and on January 17, 1969, by the Federal Highway Administration."

In his April 3, 1975, letter to us, the Mayor states, however, that it would be erroneous to consider the December 24, 1968, decision as final. He contends that it was merely an expression by the then Mayor that a bypass of Rosemont "should be sought." He points out that alternate routes had yet to be studied, public hearings to be held, and the original condemnation ordinance to be repealed.

We cannot agree with the Mayor that the City had no alternative but to proceed to acquire the properties in this area since a bypass, although desirable, may not have proved to be feasible until studied. Once a decision was made to seek an alternate route--a decision for which the Mayor sought and obtained the official concurrence of the State and FHWA--the only prudent course, in our view, was for the City to discontinue acquisition of property until the final alignment was chosen. Hence, continuation of acquisition, where not legally required, must be at the City's, not FHWA's, risk.

As to the estoppel argument, the City maintains that there has been active Federal participation throughout the life of the project. In a legal memorandum of May 25, 1970, the Baltimore City Solicitor and the Special Assistant Attorney General for the Maryland State Roads Commission contend that it would be unjust to permit FHWA, having approved the Rosemont location and authorized the State to proceed with right-of-way acquisition and then to seek an alternative route, to deny Federal participation in this case. The memorandum

concludes that the Federal Government, in all equity and good conscience, should be estopped from refusing to honor the City's claim for reimbursement of the funds expended for the acquisition of commercial and residential properties occasioned by the decision to bypass the Rosemont community.

It was the unusual participation of the Federal Government in the decision to bypass Rosemont that led the Secretary of Transportation, with the concurrence of this Office in the aforementioned decision, to authorize Federal participation in acquisition costs incurred up to December 24, 1968, in properties which would not be utilized for highway purposes.

While FHWA readily acknowledges its active role in encouraging the City to seek an alternate alignment and in finding another alignment, FHWA has stated that it did not encourage the City to continue acquisitions in the Rosemont area for this Highway. At the June 4, 1975, meeting mentioned above, FHWA representatives stated that among other things, it was their belief at the time that whatever acquisition was continuing was for purposes other than for Interstate Highway I-70N.

In our view the City has not presented sufficient evidence of unusual and extraordinary involvement by FHWA officials in its continuing to acquire properties to justify an estoppel argument with respect to the involved properties. The equitable position of the City with respect to the demonstrated Federal involvement was recognized in our 1971 decision. If, as it appears, the City chose to proceed farther than the Federal Government actively encouraged it to, we must hold that it did so at its own risk and expense.

The City's final contention is that even as of December 24, 1968, it was morally and legally obligated to continue acquisition and that, in any event, the acquisition process may not be shut off at will and can come to conclusion only by a gradual slowdown. The factual situation is described in the Mayor's letter to us of May 26, 1975, as follows:

> "At the time the decision to bypass Rosemont was made, the City, relying upon the aforementioned FHWA Stage I Program approval, had already acquired 249 of the some 800 residential properties under the authority of the 1967 Condemnation Ordinance. As of that time, as could have reasonably been expected, a substantial number of additional properties had reached an advanced property acquisition stage and many of these had been negotiated to or near to the point of option. As a result of the decision, the City halted further acquisition of commercial and residential properties

owned by absentee landlords as of January 22, 1969. This policy was followed except in a few hardship cases. As of the January 16 date, a substantial number of owner-occupants were also actively engaged in advance negotiation for the sale of their property to the City, and more importantly, were in the process of purchasing new homes or making other relocation arrangements. In order to reduce the hardship involved in these cases, the City determined that owner-occupants, upon written notice to the Interstate Division prior to March 1, 1969 could complete the sale of their properties to the City. Property owners availed themselves of this option. In other words, the work was in the pipeline and could not be stopped.

"The total number of properties acquired by the City in the Rosemont area is 486. Approximately 290 of these were owner-occupied residential properties."

In his letter to us of June 6, 1975, an Assistant City Solicitor again noted that appraisals had been made, people had been notified that the City would be purchasing their homes and they had made commitments to go elsewhere and, indeed, some properties were under binding option agreements. He states that several suits had been filed by property owners whose properties were not purchased by the City, contending that there had been in effect an inverse condemnation by virtue of the blight which was created by the abortive project. We were provided with a memorandum prepared by plaintiffs in Harold A. Sirkin, et. al., v. Mayor and City Council of Baltimore, et. al., filed in the United States District Court for the District of Maryland (Civil Action No. 72-441-B), which, the Assistant City Solicitor advises, the City settled rather than face "the possibility of a almost certain adverse ruling." The Assistant City Solicitor states that this decision was based in particular on the cases of Foster v. Herley, 330 F.2d 87 (6th Cir. 1964) and Foster v. City of Detroit, 254 F. Supp. 655 (1966), aff'd. 405 F.2d 138 (6th Cir. 1968). With reference to the Foster cases he states in part:

"* * * The theory of these cases is that when a governmental agency initiates a project which will involve the condemnation of a large number of properties, there is a predictable phenomenon referred to in the cases as 'Condemnation Blight' which results in the diminution in value of properties in the neighborhood to the extent that they become virtually worthless in many cases. * * *

"* * * We contend that the 'condemnation blight' phenomenon /in Rosemont/ created a legal liability on the part of the

City to acquire the remaining properties in the Rosemont Corridor, and therefore, the Federal Highway Administration should participate in these payments. * * *"

In our view the two Foster cases cited do not establish the rights asserted by the City. In the Foster cases Detroit initiated condemnation proceedings in 1950. However, it did not pursue the matter and in 1960 the City dismissed the cases. Two years later it again initiated condemnation proceedings. The main issue of the cases, insofar as here relevant, went to the losses incurred in market value of the lands in the intervening years as a result of their being subject to condemnation proceedings and whether Detroit was liable therefor. The court found the City guilty of unreasonable delay and of lack of good faith and held it liable for the losses. Essentially, then, the Foster cases involved due process violations concerning the right to, and amount of, compensation on the part of property owners whose lands were in fact ultimately taken, Gibson and Perin Co., v. City of Cincinnati, 480 F.2d 936 at 942 n. 3 (6th Cir. 1973). In fact, in a case related to the two Foster cases cited above, the Sixth Circuit pointed out that it had held in Woodland Market Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970) that the alteration of a neighborhood by condemnation proceedings does not give rise to a claim for depreciation in the value of surrounding property. Foster v. Harley, 491 F.2d 174 (6th Cir. 1974).

The other cases cited in the Sirkin memorandum, supra, are also concerned with the concept of "just compensation" when, for example, the condemning authority has so interfered with the use of the subject property that essential elements of ownership have been destroyed with a resultant decrease in the market value of the property. The courts have refused to allow the governing authority to acquire the property in the condemnation proceedings at its lower value. See, e.g., City of Buffalo v. J. W. Clement Co., 311 NYS 2d 98 (1970).

The general rule in condemnation cases is that acts properly done in exercise of governmental powers, and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a taking and do not entitle the owner (where the property is not actually acquired) to compensation. This is the rule in Maryland:

"On the other hand, this Court has held that consequential damages resulting from a public project, in the absence of a physical encroachment upon the property, is not compensable. Krebs v. State Roads Commission, 160 Md. 584, 154 A. 131 (1931). See Friendship Cemetery v.

City of Baltimore, 197 Md. 610, 617, 81 A.2d 57, 60 (1951) (Friendship Cemetery I)." Arnold v. Prince Georges County, 311 A.2d 223, 228 (1973).

See also Ridings v. State Roads Commission, 240 A.2d 236, 238 (Md. 1968). In Friendship Cemetery I, cited in the above quote, the City of Baltimore condemned land all around the cemetery for an airport, causing the value of the cemetery's land to decrease. Nonetheless, the Maryland Court of Appeals held that the cemetery was not entitled to compensation for this lessening in value. This holding, in that specific factual context, was modified by the so-called Friendship Cemetery II case in which the same court in a subsequent condemnation proceeding held the City liable for damages for this loss in value but only after finding that the City had acted unreasonably and in bad faith and that it had made a deliberate effort to depreciate the value of the cemetery's property prior to actually acquiring it. Friendship Cemetery v. City of Baltimore, 90 A.2d 695 (1952). The holding in Friendship Cemetery I still appears to be the law in Maryland in the absence of a showing of bad faith.

There may, however, be some liability in Maryland on municipal corporations to landowners for special damages actually suffered by them through the city's delay in electing either to abandon the condemnation of the properties or to proceed with condemnation and pay the awards provided therefor. However, this liability arises only when the delay was unreasonable due to bad faith, negligence or default in some legal duty on the part of the municipal corporation. Petroli v. Mayor and City Council of Baltimore, 171 A. 45, 47 (1934). It is not clear to us that the record sustains the conclusion that the City of Baltimore acted out of bad faith, negligence or default in some legal duty so as to make it liable for special damages. In any case the Federal Government may not, in our opinion, be held liable for participating in special damages incurred by the City if the City acts out of bad faith, negligence or default in some legal duty not caused by the Federal Government.

More to the point, the City has not cited and we have not found any authoritative support for the view put forth by the City that when the value of property is diminished as the result of governmental action not actually encroaching on or substantially impairing the use of the property, a legal liability is created on the part of the City to acquire that property. In our view the Friendship Cemetery I and Petroli cases, supra, run counter to that position. Other cases, not here discussed in detail, hold that to have a de facto taking of property--from which the City must actually acquire the property--there must be an actual encroachment on the land or a substantial impairment of the use of the land such as a deprivation

(but not a mere diminution) of light and air; those elements are not involved here. Hence, we cannot conclude that the City, as of December 24, 1968, was legally obligated to continue acquisition of properties in the Rosemont corridor and therefore, we cannot state that FHWA should participate in such acquisition. Moreover, even if we were to find such an obligation, we would be unable to determine which, if any, of these properties were so affected by condemnation blight as to require their acquisition. Such a determination would necessarily have to be made by a tribunal capable of taking evidence and rendering a decision in an adversary proceeding.

In summary, the State (and its political subdivisions) and not the Federal Government must shoulder the legal responsibilities and financial burdens for the costs of any change in an Interstate Highway route selected by the State and approved by FHWA. Based on its role in encouraging a change from the previously selected route through the Rosemont corridor of Baltimore City, the Department of Transportation felt that it had a responsibility to participate in those costs incurred up to December 24, 1968, when the former Mayor announced the decision to seek an alternate route. In our May 3, 1971, decision, B-118653, we concurred in the use of Federal-aid highway funds for this purpose. The Department advises that it has concluded that the City was obligated to acquire 115 properties--involving those already acquired and those whose purchase had been approved by the City's Board of Estimates--as of December 24, 1968.

Based upon all of the foregoing discussion, even as viewed through the Department's decision to participate up to the subject date, we cannot say that FHWA is legally obligated to extend its participation by reference either to a date later than December 24, 1968, or to an earlier step in the acquisition process than the Board of Estimates' approval of the City's offer and the seller's acceptance. Nor, of course, would it be precluded from selecting, on a reasonable basis, reference points more favorable to the City. This decision is, however, for administrative determination by the Department which we would not question in the absence of a showing of arbitrariness or lack of good faith which we have not found in this case.

Accordingly, we cannot modify our earlier decision in this matter, B-118653, supra, so as to require increased participation by Federal-aid highway funds in the costs of acquisition of properties for the right-of-way for Interstate Highway I-70N through the Rosemont area of Baltimore City.

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States