

VERDICTS & SETTLEMENTS

Judge approves jury's condemnation award that exceeds any single appraiser's figure

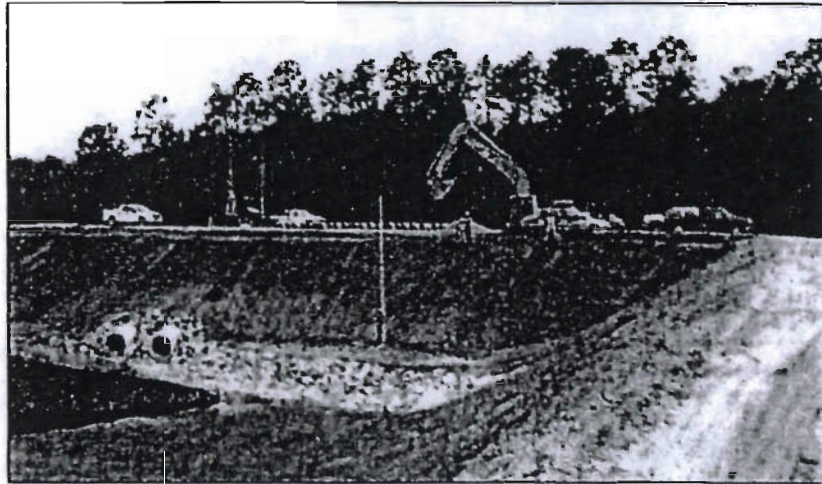


Photo provided by Lewis & Babcock

The jury in *SCDOT v. The Kellogg Corporation* awarded the landowner more than any individual expert said would be just compensation for the highway department's taking of this Aiken County parcel.

An Aiken County jury properly awarded a landowner \$265,506 more than any appraiser's highest value in a condemnation case, even though state law requires the award to be within the range of the experts' testimony, a trial court has ruled.

The decision breaks new (condemned) ground in South Carolina, said the landowner's attorneys and another lawyer who concentrates on eminent domain cases.

The case, *SCDOT v. The Kellogg Corporation*, Aiken County civil action No. 07-CP-02-492, dealt with the condemnation of 62 acres for construction of Interstate 520, also known as the Palmetto Parkway, in North Augusta.

The highway department's taking carved the landowner's property into four parcels, the largest of which was more than 427 acres, the smallest just less than two.

The trial court said it was OK for jurors

to cherry-pick different components of two appraisers' valuations to reach a figure that was larger than the total put forth by any appraiser.

The biggest appraisal was for \$1,071,012. The jury awarded the landowner \$1,336,518.

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which Judge Clifton Newman upheld in a June 23 order.

There was no published precedent for that in South Carolina, according to Columbia attorneys Keith M. Babcock and Brady R. Thomas, who both represented the landowner.

"It was a strange set of circumstances that led to it," Thomas said. "The fact that the taking divided the land into four different parcels, and then the fact that you had mul-

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tiple appraisers offering opinions as to each of the four different parcels, created the perfect storm that led to what the jury actually did.

"Our two appraisers had different opinions on the per-acre valuation of the land as well as different opinions on the amount of damages that were suffered by the four different remainders," Thomas said.

Apparently, the jurors took the high figures from one appraiser for three of the remainders and combined them with a larger figure for the fourth section from another expert.

"The old mix-and-match theory," said Mount Pleasant attorney Rick Bybee. He was not involved in the case, but his practice concentrates on eminent domain law.

Bybee said other jurisdictions have approved the tabulation method, but

South Carolina appellate law is silent on the practice.

"It's consistent with the basic approach because the charge to the jury is that you can believe part of what witness A says and part of what witness B says. I thought it had a good logical foundation," he said.

Though Judge Newman's ruling lacks value as precedent, Thomas said it is a good indicator as to how appellate courts might rule if the issue came before them.

"If we were to try another case and have the same result, we could use this order as at least some persuasive authority," he said.

According to Thomas, SCDOT has decided not to appeal and has already paid the verdict, attorney fees, costs and interest.

"This is sheer speculation, but the reason they did not appeal may be because they did not want this case to become binding precedent that could be applied to every condemnation across

the state," he said.

"If the DOT were to get an adverse ruling from an appellate court, they could potentially have to deal with a jury instruction in every condemnation case from here on out."

SCDOT's lawyer had not returned *Lawyers Weekly's* call by press time.

Bybee said it is not clear that the ruling, if it became binding law, would help only landowners.

"I think it's to the benefit of both sides because oftentimes these cases go to a mediator.

"If the mediator has some evidence that this is a proper way of looking at it, instead of the parties looking at particular numbers, the high and the low, if the facts and the appraisals would dictate that the exposure was something different, then I think that's a benefit to both sides to recognize the exposure level," he said.

Thomas said there could be a benefit for condemning authorities as well.

"In theory, the jury could have come back with a combination of the elements that could have gone the other way," he said.

Thomas turned to Georgia and Arizona law to support the notion that the jury could take a smorgasbord approach to the appraisers' testimony.

"The Georgia case was right on point, saying that the jury can accept as little or as much from the different appraisers' testimony on the different elements of damages to reach a total award," he said.

That case is *Ideal Leasing Services Inc. v. Whitfield County*, 562 S.E.2d 790 (Cl.App.Ga. 2002), where the court upheld a \$160,000 jury verdict, even though the landowner's appraiser said the taking should be valued at only \$120,000

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