May 16, 1962

David H. Stevens, Chairman — State Highway Commission

L. Smith Dunnack, Ass't. Atty. Gen. — State Highway Commission

Use of a State's Appraiser by Landowner

Although this may be a moot question in Maine as affecting appraisers, it is my opinion that our Court would accept the reasoning set forth in L'Etoile v. Rhode Island, and the cases cited therein.

The right to compel witnesses to testify as to "facts" must be distinguished from the right to compel expert witnesses from testifying as to "opinions". "Opinion" testimony can only be given by experts and is an exception to the general rule that "conclusion testimony" is inadmissable. There is considerable doubt as to the right to subpoena an expert witness, so called, even when that witness had not been employed by the other party, and an offer of compensation is made. The opinion of the expert is a personal thing, and his expression of that opinion is a matter he is entitled to contract for, and even refuse to give. There are special circumstances where this rule has exceptions (notably in criminal cases).

However, where an appraiser has been retained by one party, a confidential relationship is established. 262 Pa. 439. The state has contracted for his opinion and that opinion becomes the property of the state to use in its determination of fair value. It should be noted that when the legislature enacted the "open door" legislation re governmental activities, it exempted the records of the right of way division (which would include appraisals) insofar as they applied to pending settlement of claims and court cases. (1959 c. 223 § 2)

The statutory statement that these records shall be confidential would have considerable weight if our Court had this question before it. To permit the subpoenaing of the appraiser to testify as to the appraisal, which the Legislature has declared to be confidential, would be in derogation of the statute and in effect a repeal of its provisions as to appraisals.

Even if our Court was not too much impressed with the Rhode Island decision, the finding by the Legislature that the records of that appraisal were confidential would lead it to decide that the testimony re that appraisal would also be confidential. It should be further noted that when the Land Damage Board was created, and many new and unusual obligations were imposed on the state in re notice to the condemnee, no statements regarding appraisers" opinions were required.

L. SMITH DUNNACK, Ass't. Atty. Gen.

LSD/js

STATE OF MAINE

Inter-Departmental Memorandum Date May 23, 1962

To George C. West, Deputy Dept. Attorney General

From L. Smith Dunnack, Ass't. Atty. Gen. Dept. State Highway Commission

Subject Use of a State's Appraiser by Landowner

I am enclosing herewith a letter from the U. S. Bureau of Public Roads to Mr. David H. Stevens which contains the question answered by my opinion of May 16th.

Enclosed also is a copy of an opinion forwarded to us by the Bureau and a copy of Mr. Stevens' letter to them.

L. Smith Dunnack.

L. SMITH DUNNACK, Ass't. Atty. Gen.

LSD/js
Encs.

May 21, 1962

L. Smith Dunnack, Asst. Att. Gen. — Highway

George C. West, Deputy — Attorney General

We have a copy of your memo of May 16th to David H. Stevens, Chairman State Highway Commission, on the subject "Use of a State's Appraiser by Landowner."

We would appreciate it very much if you would tell us the question that was asked. From your opinion we are not able to deduce the question, and the opinion without the question really does not give any information.

George C. West
Deputy Attorney General

GCW:H

REGION ONE
CONNECTICUT
MAINE
MASSACHUSETTS
NEW HAMPSHIRE
NEW JERSEY
NEW YORK
RHODE ISLAND
VERMONT
PUERTO RICO

U. S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS

Room 202, Post Office Bldg.
[illegible]

April 17, 1962

Mr. David [illegible], Chairman
Maine State [illegible]
[illegible]

Dear Mr. Stevens:

Subject: [illegible] Island Supreme Court as to whether or not an appraiser for the State could be required to testify [illegible] for the property owner.

As you know the above subject has been the source of much discussion and has upon occasion been a factor in offers being made on the basis of a high appraisal which were not entirely satisfactory to the reviewing appraiser. We think that the above problem is common to several states and has been solved in at least one. Our Regional Office has therefore taken this opportunity to provide each State with a copy of an opinion rendered by the Rhode Island Supreme Court on this subject, plus a copy of the respondent's brief and a copy of the Regional Engineer's memorandum discussing the above opinion, all of which are attached.

While it is understood that the law in various states differ and that such a case if presented to the Maine Supreme Court might result in an entirely different verdict, we feel that the subject is sufficiently important to warrant a study of this phase of the Maine law. Will you please, therefore, provide the Assistant Attorney General assigned to the Highway Department with the enclosures and request his opinion as to the law on this subject in the State of Maine. We are especially interested in that portion of the Rhode Island opinion which deals with the possible usage of a State's appraiser by the property owner and the obligation of the State to provide the property owner with all information that may have been developed by the State in its efforts to determine just compensation.

We will appreciate receiving a copy of his opinion in these matters.

Sincerely yours,

for R. D. Hunter
Division Engineer

Enclosures

May 21, 1962

R. D. Hunter, Division Engineer
Bureau of Public Roads
Post Office Building
Augusta, Maine

Dear Mr. Hunter:

This is in reply to your letter of April 17, 1962 in which you request an opinion from our Assistant Attorney General assigned to the Highway Department as to the law in the State of Maine in regard to whether or not an appraiser for the State could be required to testify as an expert witness for a property owner.

Enclosed is a copy of an opinion under date of May 16, 1962 from L. Smith Dunnack, Assistant Attorney General, which I think is self-explanatory.

Very truly yours,

David H. Stevens, Chairman
Maine State Highway Commission

b
enc.

cc. Dunnack
Bedford

Ex. & c. No. 9959

Osias J. L'Etoile et ux.

v.

Director of Public Works
of the
State of Rhode Island

OPINION

Osias J. L'Etoile et ux	.	Supreme Court
v.	.	Ex. & c. No. 9959
Director of Public Works of the State of Rhode Island	.	

OPINION

POWERS, J. This is a petition under public laws 1953, chapter 3105, sec. 11, for the assessment of damages caused through the taking by eminent domain on December 20, 1956 of the petitioners' real property by the state for freeway purposes. The condemnation was effected pursuant to the provisions of said P. L. 1953, chap. 3105, and general laws 1938, chap. 75, sec. 2., as amended. The case was heard by a superior court justice sitting with a jury and resulted in a verdict for the petitioners in the sum of $32,000 with interest. The petitioners filed a motion for a new trial which was denied. The case is here on their bill of exceptions to such denial and to evidentiary rulings during the trial. The respondent herein will sometimes be referred to as the state.

The property in question consisted of a parcel of land with a two and one-half story apartment house thereon, situated on the southeasterly corner of Cottage and Underwood streets in the city of Pawtucket. The land on which the house and a three-car brick garage were located comprised something more than 12,000 square feet, well landscaped with substantial shrubs, trees and lawn. There were six rental units, all occupied, consisting of a three-room doctor's office and two two-room

apartments on the first floor, three three-room apartments on the second floor, and four unused attics on the third floor.

The petitioner Osias J. L'Etoile testified that the total annual rents, including the garages, amounted to $4,428; that the apartments were equipped with gas stoves and refrigerators; and that the rental charges covered heating and hot water. He also testified that the expenses in connection with the maintenance and operation of the property amounted to $1,332.24, but that this did not include any managerial expenses or repairs. It appears that he personally made all repairs and carried on the management of the property. He further testified that the property was purchased in 1926 and shortly thereafter he made substantial repairs and converted it into an apartment house. He testified in detail as to the nature and extent of these improvements but was not permitted to testify as to their cost.

Charles H. Lawton, Jr., after qualifying as an expert familiar with real estate properties and their values in the city of Pawtucket, testified that the fair market value of petitioners' property at the time of the taking on December 20, 1956 was $50,000. He attempted to testify as to what he considered the fair rentals of petitioners' property should be, but on objection from the state was not permitted to do so. He computed the expenses in connection with operating the property as an apartment house to be $1,925 leaving a return of income to petitioners which, captalized at 6½ per cent on the investment, placed the fair market value at $50,000.

During the examination of the witness Lawton the petitioners attempted to introduce as a full exhibit a photograph of property located diagonally across the street from their property, but on respondent's objection were not permitted to do so. It was offered forthe purpose of showing the nature and type of property in the immediate neighborhood. It is undisputed that petitioners' property was in a residence B zone and that the property shown in the said photograph was not in the same zone to the knowledge of the witness.

William E. Coyle, Jr., after qualifying as an expert familiar with real estate properties and their values in the City of Pawtucket, testified that in his opinion the fair market value of petitioners' property was $25,000. He also testified that for investment purposes it would be necessary to add to the fixed expenses testified to by petitioner Osias J. L'Etoile an allowance for repairs, upkeep and management. In his opinion no prospective purchaser for investment purposes could be expected to provide these services on a personal basis without making allowance for their value, or if performed by an employee engaged for that purpose the compensation therefore would reduce the net annual income, and in either event the realistic net annual income would amount to $2,278 and not approximately $3,300 as estimated by witness Lawton. He further testified that the required rate of return would be 9 per cent rather than 6½ per cent to permit the investor to recoup his original investment over a reasonably foreseeable period of years.

Testifying that in his opinion the property was in excellent condition and for that reason had an investment future of thirty-three years, he computed 3 percent as necessary for recoupment, leaving a net return on the investment of 6 percent per annum. The witness Coyle further testified that he was familiar with the sale of a piece of property on Cottage street in May 1956, which as an investment was comparable to petitioners' property in appraising the fair market value of the latter. The property in question was within 500 feet of petitioners' property and in May of the same year in which petitioners' property was condemned it sold in the open market for $24,000.

In cross-examination as to whether or not he had taken into consideration the excellent landscaping, shrubs, trees and lawn on petitioners' property, the witness Coyle testified that he had given it consideration, but that from an investor's point of view its maintenance constituted another item of expense and that investors gave weight to esthetic values only as they affected income. He added in this connection that all real estate people considered residential properties of more than four dwelling units as investment property which, in his words, "does not carry with it the normal amentities that you find in a one-family home." Queried as to the proximity of Glencairn Manufacturing Company to the property sold in May 1956, which the witness had used for

resident of petitioners' neighborhood in rebuttal of the opinion of the witness for the state that the proximity of the manufacturing concern was not in influence in establishing a fair market value of the property sold for $24,000 in May 1956. It is clear from the transcript that the court did not consider the second phase of the testimony proposed to be offered by Lynch as proper rebuttal.

The petitioner Osias J. L'Etoile then testified in rebuttal that the Glencairn Manufacturing Company was noisy, could be heard at the location of the so-called comparable property, could not be heard at petitioners' property, and that there were no other manufacturing concerns which could be heard from the location of petitioners' apartment house.

The evidence further discloses that a letter dated April 11, 1957 was received by petitioners in which the state made an offer of $28,100 in connection with the condemnation of their property. Counsel for petitioners offered to place this letter in evidence, to which offer respondent objected. The court sustained the objection on the ground that the instant case was subject to the same rules of evidence as prevail in any other case.

The petitioners' bill of exceptions alleges eighty-nine grounds of error, one being to the denial of their motion for a new trial and the others relating to evidentiary rulings. These latter exceptions have been more or less grouped by petitioners into four specific contentions and we shall so consider them.

The first of these contentions is that the trial justice erred in refusing to permit petitioners' expert witness Charles H. Lawton, Jr. to give his opinion from his long experience in real estate as to the fair market value of the property. The petitioners' brief includes the first twenty-nine exceptions as relating to their first contention. These exceptions were taken to the refusal by the trial justice to permit Osias J. L'Etoile to testify to the original cost of the property, the sums expended in making renovations and repairs, plans for future development of the property, and offers for the purchase thereof, which he was prepared to testify were made prior to the condemnation.

The testimony which would have been adduced as to the original cost of the property and the expenses incurred prior to condemnation was properly excluded as immaterial and irrelevant as to the value of the property at the time of condemnation. It is well settled that the measure of damages in eminent domain proceedings is the fair market value of the property at the time of the taking. Hall v. City of Providence, 45 R. I. 167; Hervey v. City of Providence, 47 R. I. 378. The petitioners cite the Hall case to the contrary, but that case is admittedly an exception to the general rule where there is no evidence of the sale of comparable property. Such evidence is not lacking in the case at bar.

The proffered testimony of petitioner Osias J. L'Etoile that he intended to alter the premises by converting an apartment or apartments into additional doctors' offices was likewise properly excluded. It wouldhave been pure speculation if permitted. Estimated cost of

such alterations, increased rentals resulting therefrom only presumed, together with the question of available tenants, would not have furnished the jury with factual information bearing on the question of fair market value.

The witness' testimony that at some time prior to the taking substantial offers for the purchase of his property had been made by responsible persons was likewise properly excluded. Conceding that this is the prevailing view, petitioners nevertheless cite City of Chicago v. Lehmann, 262 Ill. 468, to the contrary and urge the authority of this case on the court. Whether or not such evidence should be taken to have probative value is not before us in the instant case, since Osias J. L'Etoile's testimony regarding such offers would be only hearsay evidence at best.

The petitioners further contend that Charles H. Lawton, Jr. should have been permitted to give his opinion as to the fair market value of their property on the basis of his long experience with the value of real property in the city of Pawtucket, particularly in the area where petitioners' property was located. It is their position that once having qualified as an expert the witness was not required to lay a foundation as a basis for his opinion as an expert. This contention is without merit. To assist him in conducting an intelligent cross-examination, respondent was entitled to know the reasons or factors on which the witness relied to support his opinion. In any event Lawton did testify that in his opinion petitioners' property had a fair market value of $50,000.

The petitioners next contend that the trial justice committed reversible error in excluding as a full exhibit a picture marked "Petitioner's Exhibit 8 for Identification." The photograph offered was a picture of the general area across the park and on the other side of Broadway from the petitioners' property on the corner of Cottage and Underwood streets. It showed a well-kept business area with a new automobile salesroom and car lot together with other buildings. The witness was unable to testify whether the property shown in the photograph was in the same zone as that of petitioners' property. It appears from the record that the photographed property was in fact in an area zoned for business. It was for this reason that the trial justice excluded the photograph as a full exhibit.

The petitioners argue that since the court permitted respondent to introduce as full exhibits photographs of property even further removed from petitioners' property than that shown in the photograph offered by petitioners and excluded by the court, the exclusion of their proposed exhibit was prejudicial. They claim there is no justification for its exclusion because the property it depicts happens to be in a different zone. This contention is without merit. Property within a business zone commonly has greater value for that reason and the admission of the photograph for consideration by the jury would have been prejudicial to respondent. The petitioners' exceptions under their second contention are overruled.

The petitioners state their third contention to be: "The trial justice exhibited partiality and committed error in his rulings and

conduct with reference to the examination and cross-examination of the witness, William E. Coyle, Jr." this contention in some particulars overlaps the arguments made by petitioners in their third and fourth contentions. It is based on certain of their exceptions numbered 43 through 78 in their bill of exceptions and relates entirely to evidentiary rulings by the trial justice. We have examined each of these exceptions and find them to be without merit. A number of them were answered, called for conclusion, were argumentative, were irrelevant and immaterial, or constituted hearsay.

However, several of these exceptions related to the exclusion of a letter received by petitioners in which the state offered the sum of $28,100 in compensation for the taking of their property. The trial justice excluded it in accordance with the general rule that an offer of settlement is made without prejudice. Daniels v. Town of Woonsocket, 11 R. I. 4; Salter v. Rhode Island Co., 27 R. I. 27; Demare v. Rhode Island Co., 42 R. I. 215. Whether or not this was error is immaterial since its exclusion was not prejudicial to petitioners.

The jury's verdict was several thousand dollars in excess of the offer, and the letter if admitted could have gone only to the weight of the testimony given by Coyle the expert witness for the state. The weight would have been slight indeed when it is remembered that the offer made in the letter must have taken into consideration such elements as time, the cost of litigation, and the amount of interest that would run from the time of taking. We are not impressed with petitioners' analogy of relatively higher income from an investment in a race track compared with that of a more desirable piece of property,

in the sense that these may be contrasted with the returns from two comparable parcels of real estate.

The petitioners' fourth contention is that the trial justice erred in refusing to accept in evidence the testimony of William J. Lynch, the second appraiser for respondent. We have related the circumstances on which this contention is based and are of the opinion that the trial justice did not err in refusing to permit questioning of the witness by counsel for petitioners. This witness was called in rebuttal and any testimony that he might have given as a long-term resident of that section of Pawtucket in which petitioners' property is located could just as readily be given by the petitioner Osias J. L'Etoile, who in fact so testified when the testimony of Lynch was excluded.

A different question, however, is presented on the issue of whether or not Lynch could be required to testify as an expert when not engaged but merely subpoenaed by petitioners for that purpose. The petitioners admit that as an expert any testimony given by Lynch would have been based on his examination of their property made during and pursuant to his employment as an appraiser for the state. We are of the opinion that, on petitioners' subpoena, in the circumstances of the instant case the trial justice did not err in sustaining respondent's objection to the giving of testimony by Lynch as an expert. Pennsylvania Co. for Insurances on Lives, Etc. v. Philadelphia, 262 Pa. 439; 2 A.L.R. 1573. See Cooper v. Norfolk Redevelopment & Housing Authority, 197 Va. 653, for a comprehensive discussion of the rule.

The petitioners argue that exclusive of the ruling on Lynch's status as a witness it was error for the trial justice to inquire of the witness and make his decision in the absence of the jury. This argument is clearly without merit. If the ruling of the trial justice was correct, and we are of the opinion that it was, the inquiry by the court if made in the presence of the jury might well have been prejudicial to respondent. If the ruling had been otherwise the jury would have been recalled and the questioning of the witness by counsel for petitioners would have been conducted in their presence. The inquiry was preliminary procedure and the jury was properly excluded.

In this connection and throughout every argument made by petitioners they advance the theory that in condemnation proceedings the state is under obligation to the person whose property is taken to disclose all of the information and every circumstance or factor which may have come to the attention of the state in connection with its efforts to determine the just compensation guaranteed to the property owner by the constitution. We are not in accord with petitioners' conception of the state's constitutional duty in eminent domain proceedings. The property owner is entitled to full and fair judicial proceedings conducted pursuant to sound legal principles and in accordance with the rules of procedure and evidence.

The petitioners' remaining exception is to the denial of their motion for a new trial. We have examined the rescript and find that the trial justice reviewed the evidence, supplied the correct principles

of law, and exercised his independent judgment in passing on the evidence on which the jury assessed the petitioner's damages. We are of the opinion that the jury's verdict did full justice between the parties and that the trial justice did not err in denying the motion for a new trial.

We have considered all of the petitioners' exceptions which they have briefed and argued, although we may not have specifically referred to them, and have found them to be without merit.

All of the petitioners' exceptions are overruled, and the case is remitted to the superior court for entry of judgment on the verdict.