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SJC to MassDOT: owner must be compensated for taking

Test track project exceeded scope of prior easement

■ **Eric T. Berkman**

An easement that the Massachusetts Department of Transportation took to use property in South Boston to test Red Line cars exceeded the scope of an easement taken years earlier by its predecessor in interest, the Supreme Judicial Court has ruled.

Accordingly, MassDOT must compensate the landowner, plaintiff Smiley First, LLC, for such use.

The Massachusetts Bay Transportation Authority announced plans in 2017 to build a test track and a 6,000-square-foot building for newly purchased subway cars on a stretch of Smiley's land burdened by an easement that the Department of Public Works took in 1991 to relocate Conrail tracks and facilities displaced by the Big Dig.

MassDOT recorded a confirmatory order of taking in 2018 but refused to compensate Smiley.

When Smiley sued, a Superior Court judge interpreted the 1991 easement as a grant to use the entire area of the easement for "any 'railroad purpose,'" including the Red Line test track project, and ruled that Smiley was owed no compensation for the 2018 taking.

The SJC reversed.

"[W]e conclude that the 1991 easement was more limited in scope than the 2018 easement and, in particular, did not encompass a use such as the Red Line test track project," Justice Serge Georges Jr. wrote for the court. "Therefore, the summary judgment in favor of MassDOT must be reversed, and the matter remanded to the Superior Court for a determination of the appropriate compensation due Smiley."

Feldman

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– PAUL L. FELDMAN, BOSTON

The 24-page decision is *Smiley First, LLC v. Department of Transportation*, Lawyers Weekly No. 10-058-23.

RULES OF INTERPRETATION

Smiley's attorney, Paul L. Feldman of Boston, said the decision makes clear that rules of interpretation for negotiated easements between private parties apply equally to easements taken by eminent domain, other than looking at the intent of the parties, which is not a relevant consideration when property is taken against a landowner's will.

Feldman added that MassDOT's position in the case, that the 1991 easement could be interpreted broadly to encompass the use in question, amounted to a fee taking.

"But that's not what [MassDOT] did – it took an easement," he said. "If the easement was as broad as MassDOT was arguing, why not just take the fee in the first place? Because they didn't want to pay for it. They wanted to pay for an easement interest."

MassDOT spokesperson Jacquelyn Goddard said the agency was reviewing the decision and weighing its options.

Meanwhile, New England Legal Foundation senior staff attorney Benjamin G. Robbins, co-author of NELF's amicus brief in the case, applauded the SJC.

"It reinforces the constitutional right of a private property owner to receive just compensation whenever the government intends to exercise its power of eminent domain and effect a new taking of private property for public use," Robbins said. "The continuing validity of … older cases [relied on by the SJC] is very heartening and provides a welcome sense of stability and permanence concerning the rights of a property owner in the commonwealth."

George A. McLaughlin III, an eminent domain attorney in Boston, noted the language of the 2018 easement, which explicitly declared that "[f]or the further avoidance of doubt," the type of railroad use set out in the 1991 easement included the Red Line test track project. That suggests that MassDOT knew it was on shaky ground, he said.

"Whenever I see language like that, it's an acknowledgement to me that the taking authority does have doubt and that's why they're putting it in there," McLaughlin said. "Really what we had is a totally different use. … In my opinion, it was MassDOT trying to get a piece of land for nothing, and the SJC said 'no.'"

Mark S. Bourbeau of Hingham, who has represented both landowners and taking authorities in eminent domain cases, said the adoption of MassDOT's position would have seriously undermined the principle of just compensation for an owner.

"You could have pretty much expanded any easement across property to encompass any use even if it wasn't initially contemplated within the scope of whatever it was assigned for, as long as the general purpose was the same," Bourbeau said.

Boston attorney James D. Masterman said the case confirms bedrock principles that limit the state's otherwise limitless power of eminent domain.

First, he said, the decision confirms that the scope and extent of an easement taken by eminent domain will be limited to that which accomplishes the purpose stated in the order of taking.

Additionally, Masterman said, the Fifth Amendment, contrary to common misunderstanding, does not create the power of eminent domain.

"Rather, it is an express limit on the power by guaranteeing that no private property, even of a partial interest, may be made without the payment of just compensation," Masterman said.

EASEMENT BY TAKING

In 1991, the DPW laid out the South Boston Haul Road, a limited access state highway, to support construction of an I-95 extension that was part of the Central Artery/Tunnel Project.

The project displaced Conrail's rail operations. Accordingly, the DPW took easements on neighboring parcels, including 12,510 square feet of the parcel at issue, which Smiley acquired in 2015.

Smiley First, LLC v. Department of Transportation

THE ISSUE: Did an easement in South Boston taken by eminent domain by the Massachusetts Department of Transportation to test Red Line cars exceed the scope of an easement taken years earlier by MassDOT's predecessor in interest, the Department of Public Works?
DECISION: Yes (Supreme Judicial Court)
LAWYERS: Paul L. Feldman and Shawn M. McCormick, of Davis, Malm & D'Agostine, Boston (plaintiff)
Kendra Kinscherf of the Attorney General's Office, Boston (defense)

The taking order provided that the easement would be used "for railroad purposes only."

Conrail subsequently relocated its main line to a single track that crossed land burdened by the easement.

MassDOT later acquired the 1991 easement through a series of transactions.

In 2017, the MBTA announced plans to build a test track for Red Line cars and a 6,000-square-foot building for newly purchased subway cars on the portion of Smiley's land burdened by the 1991 easement.

Subsequently, in 2018, MassDOT recorded a confirmatory order of taking that stated that its purpose was to confirm and, "to the extent necessary to establish such rights, acquire" an easement "for railroad purposes" that included the Red Line test track project.

In 2020, Smiley sued MassDOT in Superior Court, where Judge Paul D. Wilson granted MassDOT's motion for summary judgment, finding that the 1991 easement, by its terms, could be used for any "railroad purposes," including the construction of a test track and building to test new subway cars.

Smiley appealed, and the SJC transferred the case from the Appeals Court on its own motion.

EXCEEDING THE SCOPE

Addressing Smiley's appeal, the SJC stated that an easement taken by eminent domain is subject to the same rules of interpretation as negotiated easements, other than consideration of the parties' intent, which is irrelevant when an easement is taken against the owner's will.

That means that, as with privately granted easements, doubts over the extent of an easement should be resolved in the landowner's favor.

With such principles in mind, Georges noted that the 1991 easement clearly stated that its purpose was to facilitate the laying out of the state highway for the Central Artery/Tunnel Project by moving Conrail's operations out of the way.

"By its plain language, the scope of the easement is limited to the extent reasonably necessary to relocate Conrail's facilities," Georges said.

The Red Line test track project, however, is a "new and different project" from the original Conrail relocation, he continued.

"It involves an additional 6,000 square foot building, a different type of railroad car, and a considerably larger portion of the burdened land than did the single track originally constructed by Conrail pursuant to the 1991 easement," Georges observed. "Indeed, the 2018 taking permits the easement holder to use the 'Remainder Railroad Easement Area'

— i.e., the entirety of the burdened land, not just the right of way taken up by the relocated Conrail track — for 'all lawful railroad purposes within the Commonwealth.' Thus, the easement holder now may engage in any 'railroad purposes,' anytime and anywhere on the burdened land."

That makes it virtually impossible for the landowner to build anywhere on the burdened land because the owner cannot predict whether or when the easement holder might seek to exercise its rights on that part of the property, Georges emphasized.

Accordingly, the SJC concluded, Smiley is owed just compensation.