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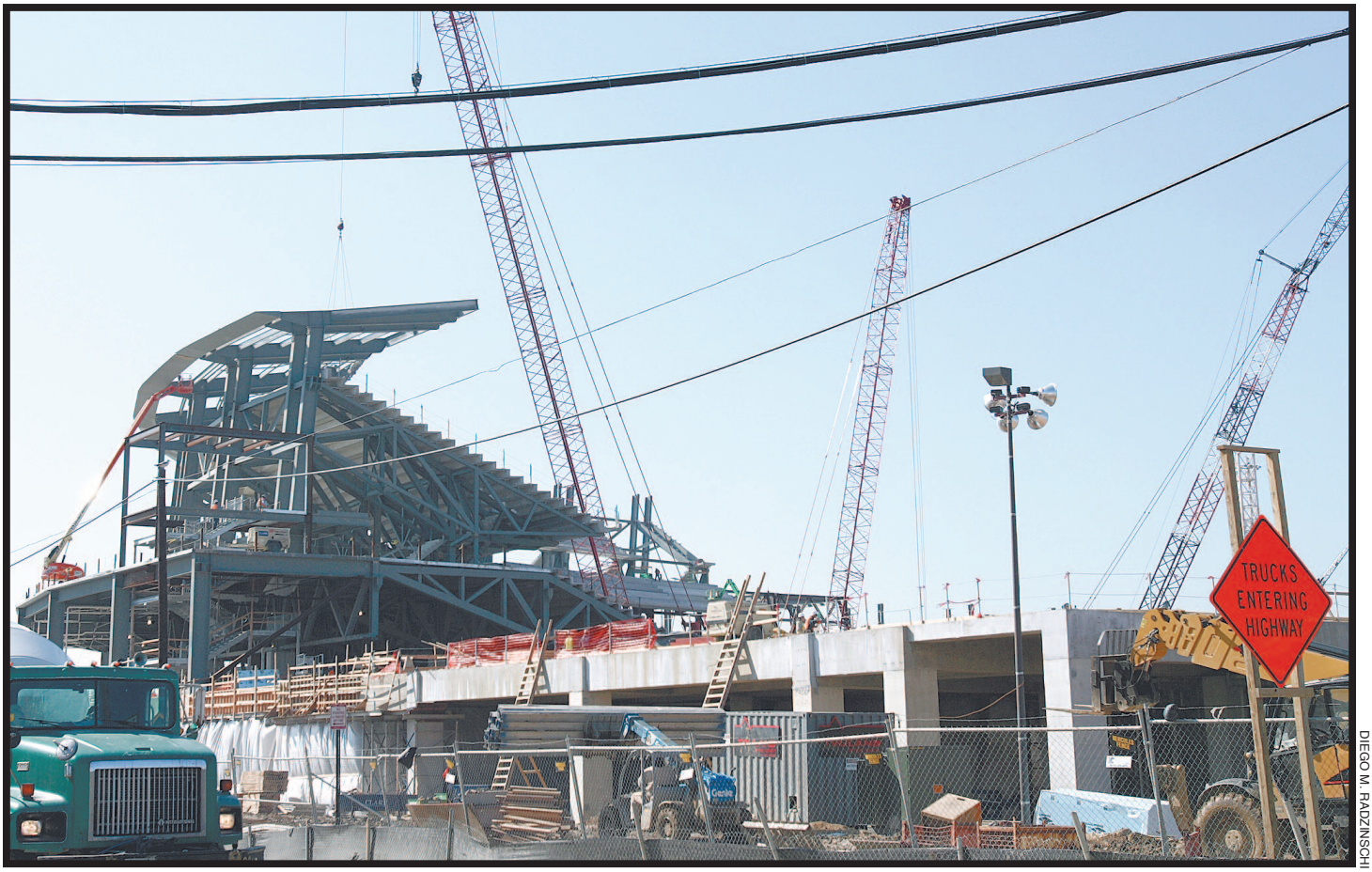

DIEGO M. RADZINSCHI

How Much Is Land Worth In Baseball's Domain?

D.C. and landowners slug it out over fair compensation and business damages.

BY ROY GOLDBERG

The past quarter-century—in which the District of Columbia was relegated to the professional baseball wilderness—also witnessed, perhaps not coincidentally, a dearth of public-works projects in the city. The scandals and deficits that plagued successive District administrations perpetuated this void, and sports-franchise owners pursued private development (the Verizon Center) or shunned the District entirely (FedEx Field).

As a result, while other states continued to grapple with laws governing eminent domain—in other words, taking private prop-

erty for public projects— D.C.'s Superior Court and Court of Appeals had little opportunity to enter this fray.

But that has all changed. On Oct. 25, 2005, the District filed a "taking" lawsuit in Superior Court against nearly two dozen owners of more than 500,000 square feet of land in the footprint of the new Washington Nationals stadium. The landowners claim that the money offered by the District fell far short of the "just compensation" promised by the Fifth Amendment to the Constitution. The Superior Court judge presiding over the case has already been called on to rule on several critical legal issues, and there is still more than six months to go before the first trial opens. These and other rulings, plus likely appeals, will impact the rights of property owners whose land is taken in D.C. for years to come.

Market Value?

Early in the litigation, the Superior Court was asked to resolve, as an issue of first impression in D.C., whether a land owner whose regulated business (such as a nightclub or a waste transfer station), is destroyed as a result of a taking because it cannot relocate may recover for the loss of the business (in addition to the value of the land).

Subject to only a narrow exception, the court said no. The Fifth Amendment says, "private property [shall not] be taken for public use, without just compensation." The Superior Court also ruled that the "measure of compensation that must be paid in an eminent-domain suit is the fair market value of the property being condemned at a time just prior to the taking."

The landowners argued that courts should look beyond "market value" to ensure "just compensation" where necessary to prevent what they called "manifest injustice." They asked the Superior Court to follow decisions in other states that have allowed landowners to recover lost business damages after their regulated businesses were destroyed by a taking.

Last July, however, the Superior Court held that D.C. law does not authorize loss of business as part of just compensation, "even when the business is destroyed by the taking," and refused to follow the other states that have allowed such a recovery. The court reasoned that, unless a statute expressly allows it, the Supreme Court "generally has held that 'injury to a business carried upon lands taken for public use . . . does not constitute an element of just compensation.'" The court pointed to a 1925 Supreme Court case, *Mitchell v. United States,* where landowners deprived of the ability to grow and can corn on the taken property were unable to receive damages for loss of that business.

The Superior Court recognized that lost business damages could be recovered if the government temporarily or permanently took over the business, such as when the Army temporarily commandeered a laundry business during World War II, or where the government took over a public utility and continued to operate it as such. However, the court concluded that neither situation applied to the stadium takings, because the land was not taken to carry on the landowners' businesses.

In refusing to follow the cases from other jurisdictions, the court reasoned that specific language in state constitutions permitted such recoveries there, but not in D.C. The court did recognize that lost business damages might be available where "the parcel may be uniquely suited for such a type of business, or uniquely situated to render such a business unusually profitable." However, in all other circumstances, the landowners would receive nothing for the permanent destruction of their business. The court expressed sympathy with "the harsh realities faced by" the landowners whose businesses were destroyed, but pronounced that the relief they seek "must come from the District Council, the Mayor and Congress rather than the judiciary."

Another Twist

The Superior Court faced another new issue for the District when the D.C. government declared its intention to ask the jury to deduct from the amounts paid to the landowners millions of dollars that the District estimated it would spend to remediate environmental contamination at the taken properties. Last December, the court rejected a blanket exclusion of all evidence of environmental conditions on the properties. But the court confined the relevance of the environmental conditions to their impact, if any, on the sales price that a hypothetical buyer and seller would have agreed to when the property was taken by the District.

In determining fair market value, the judge or jury is to assume, among other things, that both the buyer and the seller knew all the facts about the property, both favorable and unfavorable. The landowners argued that the District should not be permitted to deduct from the "just compensation" to be awarded the actual or estimated costs for the analysis, removal, transportation, or treatment of soil or groundwater at the taken properties.

They maintained that such evidence would overly complicate the case, improperly shift the burden of proof to the landowner to prove it is not responsible for environmental conditions, unfairly prejudice the landowner in the eyes of the jury, deprive the landowner of the ability to pursue third-party claims or cross-claims in connection with the environmental conditions, and subject the landowner to an unfair risk of double liability for the cleanup. The property owners cited non-D.C. cases such as *Aladdin Inc. v. Black Hawk County* (1997), where the Supreme Court of Iowa held that deduction of $135,000 for estimated cleanup costs from the value of condemned land deprived the landowner of "just compensation."

In ruling that evidence of environmental conditions at the property could be relevant to the issue of just compensation, the D.C. court pointed to the lack of a statutory right of action for the District to sue the landowners to hold them liable for environmental contamination on their former properties. The court expressed concern that if the District did not obtain an environmental deduction in the takings case, it might forever lose the opportunity to charge the landowner with the cleanup costs.

However, the court also rejected the District's claim that it was necessarily entitled to "a dollar-for-dollar credit for estimated remediation." Instead, it said, the "effect of environmental contamination evidence, if any, on the fair market value of the property taken by the District" would need to focus on the overriding issue of how the alleged "costs of remediation of contaminated soil from the property . . . would affect the property's fair market value just prior to the taking."

Thus, the jury would need to determine the impact, if any, that the possibility of environmental contamination would have had in the minds of the fictional reasonable buyer and seller as of the date of the taking. The court also refused the request of one of the landowners to exclude all evidence of environmental contamination in the case, but place a certain amount of the award of just compensation in escrow and allow the parties to litigate over personal liability in a second set of proceedings. The court said there was "no basis for this in D.C. law."

Basis for Comparison

The Superior Court also ruled last fall that landowners could use as a "comparable sale" for determining fair market value the District's purchase of homeowner Kenneth Wyban's property. Although Wyban's property had been included in the takings case filed in October 2005, six months later the parties settled on an amount that was $310,000 greater than the District's prior figure. The court ruled that the landowners could use the amount paid by the District as evidence of the value of their property. The District had asserted that the transaction could not be considered because it was clearly impacted by the stadium site. The court rejected this argument, ruling that the District's lawyers could use cross-examination to persuade the jury to give little or no weight to the transaction in their deliberations.

As the stadium litigation proceeds through trials and likely appeals, the District's eminent domain jurisprudence will continue to develop. At the same time, the lack of major public works projects for decades will continue to put the District courts in "catch-up" mode in comparison with their sister state court jurisdictions.

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