

Howard J. BARNES and Barbara BARNES, *v.*
ARKANSAS STATE HIGHWAY COMMISSION

CA 83-107

664 S.W.2d 884

Court of Appeals of Arkansas
Division II

Opinion delivered February 22, 1984

[Rehearing denied March 21, 1984.]

1. **EMINENT DOMAIN — TAKING OF PROPERTY FOR HIGHWAY PURPOSES — MEASURE OF DAMAGES.** — The measure of damages for the taking of private property for highway purposes is the difference in the fair market value of the lands immediately before the taking and immediately after, less any enhancement in value resulting from the taking.
2. **EMINENT DOMAIN — DETERMINING "BEFORE AND AFTER" VALUE OF LANDS TAKEN — ELEMENTS TO CONSIDER.** — In arriving at the "before and after" value of lands taken by eminent domain, a jury may consider every element that can fairly enter into the question of market value and every element which a businessman of ordinary prudence would consider before purchasing the property.
3. **EMINENT DOMAIN — CONDEMNATION OF LANDS FOR HIGHWAY PURPOSES — EVIDENCE OF CITY ORDINANCES REQUIRING LAND-OWNERS TO BUILD ACCESS ROAD ADMISSIBLE.** — Where there were two city ordinances, unchallenged and presumptively valid at the time of the taking of appellants' property, which required appellants to construct an access road to a state highway at their own expense, evidence that these ordinances existed and also evidence that the value of appellants' property would be enhanced by the taking because the State would assume the financial burden of constructing the access road, was admissible for the jury's consideration in determining the fair market value of the lands before and after the taking.

Immediately prior to the commencement of the trial the appellants made oral motions in limine seeking to suppress testimony regarding the city ordinances. These motions were denied and the State's experts were allowed to testify that in arriving at the fair market value of lands immediately before the taking they had given consideration to the existence of these ordinances along with all other factors affecting market value. They testified that any knowledgeable buyer would be aware of the financial burden these ordinances imposed upon the owner to construct service roads and would discount the price they would be willing to pay.

In arriving at the market value of the lands immediately after the taking the experts also took into consideration the fact that the taking had relieved the owner of the lands of that financial burden and in their opinion this factor would enhance the value of the remaining property. The court instructed the jury that they could consider these ordinances in determining fair market values of the land and gave a proper instruction that the Commission had the burden of proving that the highway had enhanced the value of the property remaining after the taking and that the benefits were of a special and peculiar nature not shared by the general public. *Ark. Hwy. Comm'n v. Hambuchen*, 243 Ark. 832, 422 S.W.2d 688 (1968).

The appellants argue that these ordinances were invalid and that during the pendency of this appeal the Supreme Court declared them to be in violation of Ark. Const. art. 2, § 22. *Calabria v. City of Fayetteville*, 277 Ark. 489, 644 S.W.2d 249 (1982). They contend that the court erred in permitting testimony regarding the ordinances and instructing the jury as to enhancement.

It is well settled that the measure of damages for the taking of private property for highway purposes is the difference in the fair market value of the lands immediately before the taking and immediately after less any enhancement in value resulting from the taking. *Young v. Ark. State Hwy. Comm'n*, 242 Ark. 812, 415 S.W.2d 575 (1967).

