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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-95136

DATE: July 12, 1978

MATTER OF: Economy Act Application to
Condemnation Proceedings

DIGEST:

Economy Act, 40 U.S.C. 278a, which prohibits the Government from entering into a lease wherein the annual rental to be paid exceeds 15 percent of the fair market value of the property, precludes the initiation of condemnation proceedings under the Declaration of Taking Act, 40 U.S.C. 258a, when agency believes condemnation award would exceed 15 percent limitation.

The Administrator of General Services requests our opinion on the application of section 322 of the Economy Act of June 30, 1932, 40 U.S.C. 278a (1970), to condemnation proceedings. The Administrator believes that the Act is not applicable. The Department of Justice, which is responsible for instituting and litigating condemnation matters, takes a contrary view.

The question arises out of the need of the General Services Administration (GSA) for continued occupancy of approximately 73,104 square feet in the Ford Building, 555 West 57th Street, New York, New York, for assignment to the Drug Enforcement Administration (DEA). A five-year lease for the space expired on January 31, 1978, and since that date occupancy has continued with agreement of the owner on a month-to-month basis, not to exceed six months under the same terms as included in the expired lease. A dispute has arisen between the contracting officer and the landlord concerning the fair rental value of the space. GSA states that "no viable alternative to continued occupancy exists," and has proposed that a ten-year leasehold interest be acquired by eminent domain pursuant to the Declaration of Taking Act, 40 U.S.C. 258a et seq. (1970).

Under that Act, the Government files a declaration of taking and deposits into the Registry of the court the sum of money estimated to be just compensation for the interest taken. The Government acquires title when the declaration is filed and is irrevocably committed to pay the judicially-fixed compensation eventually awarded. Thus, in practical terms, what is actually being paid, regardless of whether the lease is acquired on a voluntary or involuntary basis, is an amount which represents rent, and as such is subject to the ceiling imposed by the Economy Act.

Section 3 of the Declaration of Taking Act, 40 U.S.C. 258c, provides:

"Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid."

This section clearly prohibits an agency from initiating proceedings under 40 U.S.C. 258a when it anticipates that the condemnation award will exceed any Congressionally imposed limits on the funds available to acquire the interest being condemned. See H.R. Rep. 2086, 71st Cong., 3rd Sess. 2 and 74 Cong. Rec. 778 (1931). Accordingly, condemnation proceedings may not be initiated under the Declaration of Taking Act unless GSA believes that the resultant award will not exceed any applicable statutory limitation.

Section 322 of the Economy Act provides in part:

"Hereafter no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value

of the rented premises at date of the lease under which the premises are to be occupied by the Government * * *."

GSA's estimate of the fair rental value of the space to be leased in the Ford Building exceeds fifteen percent of the fair market value of the leased space, and thus there is no question that a voluntary lease of the premises at the GSA estimated fair rental would be prohibited by the Economy Act.

To our knowledge, the precise question of whether condemnation actions taken pursuant to the Declaration of Taking Act to acquire a leasehold interest are limited by section 322 of the Economy Act has not previously been considered. The statutory language, of course, refers only to "rent" and "rental"; there is no reference to leasehold interests to be acquired by eminent domain. Similarly, we find nothing in the legislative history of the Economy Act which indicates that the drafters specifically considered condemnation awards. See, e.g., S. Rep. No. 756, 72d Cong., 1st Sess. 15 (1932). GSA, however, reads our prior decision holding that section 322 of the Economy Act was not applicable to condemnation proceedings instituted under section 201 of the Second War Powers Act, 1942, 56 Stat. 177, see 22 Comp. Gen. 1112 (1943), as applying to all leasehold condemnation actions, and points out that in any event the powers of the Administrator to acquire property by condemnation action is virtually identical to the powers given the military secretaries under the Second War Powers Act, so that the result here should be consistent with our earlier holding.

We do not find the previous decision to be controlling. Although there is some language in the case which could be construed to mean that the Economy Act only applies where a lease is entered into on a voluntary basis rather than through an involuntary taking, we think it is clear that the decision dealt only with "an involuntary taking as authorized under * * * [the] Second War Powers Act," 22 Comp. Gen. at 1115, and not with all such takings. We stated that we viewed the language of that Act, which authorized the Government to take possession of the premises immediately after filing a condemnation petition and to

occupy, use, and improve the premises "notwithstanding any other law," as "negativ[ing] the idea it was intended to be subject to the restrictions of * * * the Economy Act." (Emphasis added.) The fact that the Administrator of GSA may have nearly identical powers to those granted by the Second War Powers Act is of no consequence here since we see nothing in the language of the Federal Property and Administrative Services Act, from which the Administrator derives his authority, which precludes application of the Economy Act, as we did in connection with the Second War Powers Act.

Moreover, in our earlier decision, we had for consideration the question of whether a condemnation award following a taking could be subject to the restrictions imposed by the Economy Act; in holding that it could not, we merely recognized that the right to compensation is a constitutional right which may not be limited or modified by any statutory restriction, and that while just compensation is based on the fair value of the lease at the time of taking, such compensation may not be restricted to a payment by the United States of 15 percent of the fair market value. 22 Comp. Gen. at 1445. Here of course, the question is not whether a judicially-determined award for a taking of property can be statutorily limited, but whether an agency can resort to condemnation proceedings when it believes that the award will exceed 15 percent of the fair market value of the leased premises.

We believe that the question must be answered in the negative. One of the purposes of the Economy Act is to limit Government expenditures in connection with the rental and repair of buildings. While the Economy Act, as noted above, literally limits only rental payments and not "just compensation" for the taking by eminent domain of a leasehold interest, we note that the measure of compensation for the taking of a leasehold interest is its fair rental value. Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949); John Hancock Mut. Life Ins. Co. v. United States, 155 F. 2d 977, 978 (1st Cir. 1976); United States v. 883.89 Acres of Land, Etc., Sebastian Co., Ark., 314 F. Supp. 238 (W.D. Ark., 1970), aff'd 442 F.2d 262 (8th Cir. 1971).

Our conclusion in this regard is buttressed by section 3 of the Declaration of Taking Act, which, as stated above, precludes initiation of condemnation proceedings when condemnation award is expected to exceed a Congressionally mandated spending ceiling. Obviously, the Congress, by enacting this provision, intended to make applicable to the taking procedure authorized by 40 U.S.C. 258a whatever spending limitations might exist with respect to the acquisition of an interest in real property through more conventional means. This was made clear by Congressman LaGuardia, who, in explaining the purpose of the proposed section 3, stated:

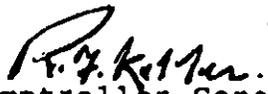
"* * * section 3 * * * states that before you can avail yourself of the benefit of [the Declaration of Taking Act], a responsible agency head must certify that the land in question will not cost, even in condemnation, beyond the amount authorized by Congress." 74 Cong. Rec. 778 (1931).

Accordingly, we must conclude that Congress, in authorizing agencies of the Government to invoke the Declaration of Taking Act, intended to limit the exercise of that authority to situations where resort to the condemnation procedure would not result in the avoidance of any spending limitations imposed by the Congress. It follows that the restrictions of section 322 of the Economy Act cannot be avoided through use of the involuntary taking procedure, and that the restrictions are applicable to the proposed taking.

Although we conclude that condemnation proceedings are subject to the provisions of section 322 of the Economy Act, the facts in this case present a particular problem. While the purpose of the Economy Act is to minimize Government spending, GSA reports that the failure of the Government to acquire the space in the Ford Building by condemnation would result in "increased Government expenditures." According to GSA, the cost of remaining in the Ford Building for the next 3 years is approximately \$3,118,000. However, if relocation is necessary, GSA believes "the cost of newly acquired lease space would far exceed the cost of the space presently being occupied."

GSA estimates the cost for the next three years to be approximately \$6,000,000. Moreover, GSA states that because of high real estate taxes in New York City coupled with the decline in real estate values, it is likely that the fair rental in alternative locations would also exceed the Economy Act limitations.

Thus, we are faced with the anomalous situation where application of a statutory spending limitation will result in appreciably higher costs to the Government than if the limitation is not observed, and where there may be no way to comply with the statutory limitation if DEA is to retain space in the New York City area. We are also advised that this situation is not unusual, and that other similar circumstances exist. It thus appears that application of section 322 of the Economy Act is not always viable, and that amendment of the law to take into account these modern-day circumstances would be appropriate. In this regard, we understand that GSA is seeking remedial legislation to provide for this type of situation. We believe this matter should receive expeditious consideration.


Deputy Comptroller General
of the United States