

Condemnation Laws and Practice Across the Fifty States

***A Recap of the 28th Annual ALI-ABA Eminent Domain and
Land Valuation Litigation Seminar***

By: Christian F. Torgrimson, Esq.
Pursley Lowery Meeks LLP
260 Peachtree Street
Suite 2000
Atlanta, Georgia 30303
www.plmlp.com

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Introduction

I had the privilege of presenting at the ALI-ABA eminent domain seminar two weeks ago in Coral Gables, Florida. There were two different courses, “Eminent Domain and Land Valuation Litigation” for the more practiced lawyers, and “Condemnation 101: Making the Complex Simple in Eminent Domain” for those with less direct experience in this area. Starting with the notion that the grass is always greener on the other side, I approached the seminar with a mission to measure how good we really have it as practitioners in Georgia from both a procedural and a legal standpoint. The answer is an interesting mix and included in this paper are some of the more noteworthy and downright alarming practices and cases revealed at the seminar.

1. How is the practice in Georgia similar to the practice of our brethren in other states?

It became clear early during the first day of the seminar that the Eminent Domain section of the State Bar shares with many other states the same sense of a small community of professionals who know and respect each other in the practice. Unlike New York and California, which were referred to as the “snake pit” and the “den of inequity and arrogance” respectively¹, eminent domain practitioners in Georgia, Colorado, Alabama, Oregon, Florida and many other states enjoy a certain level of camaraderie and cooperation that is not present in other areas of litigation. We seem to like what we do and find the intricacies of condemnation law fascinating - an opinion that non-condemnation lawyers fail to grasp.

¹ Comments of speaker Gideon Kanner, Professor Emeritus, Loyola Law School in his presentation “National Law Update” at the 28th Annual ALI-ABA Course of Study, *Eminent Domain and Land Valuation Litigation*.

As in Georgia, condemnation practice in every other jurisdiction turns on appraisals and the relationship between the attorney and the appraiser is central to the presentation of evidence. All appraisals follow USPAP, and the sales comparison approach is generally recognized as the most reliable and widely used method of determining value.² Beyond that, the differences in both the practice and the law are wide across the fifty States.

2. How does Georgia law surpass other states?

There are two particular areas that distinguish Georgia law from the laws in other jurisdictions – the discovery process and the pursuit of business damages. Whereas Georgia condemnation law has adopted the Civil Practice Act to the extent it does not conflict with condemnation procedures, the rules of discovery in many states are so foreign from typical civil practice, they are nearly unrecognizable.³ For example, New York takes the surprise approach to trials by specifically eliminating discovery procedures from its condemnation statutes. Discovery is limited to the production of the property owner’s financial records and leases to the condemnor. Perhaps New York’s reputation as a “snake pit” stems from the lack of any requirement to negotiate with the property owner prior to filing the condemnation. Likewise, in New Jersey, the judge may permit at its discretion the application of the discovery rules to a condemnation case. Similar to Georgia, South Carolina, Minnesota, Texas, Nebraska and Florida generally recognize the usual rules of discovery in condemnation cases.⁴

² “Anatomy of An Appraisal: How Lawyers and Critique Appraisal Reports,” by Speaker David Jann, ALI-ABA Course of Study, *Condemnation 101: Making the Complex Simple in Eminent Domain*.

³ O.C.G.A. §9-11-81

⁴ *Id.*

By recognizing business damages as a separate compensable interest⁵, Georgia law is very forward thinking. Only a handful of other states permit the recovery of business damages by statute, including Vermont, Florida, Pennsylvania and New York.⁶

States that continue to deny business damages do so for a variety of reasons, such as an inability to quantify the damages because profits depend on the skill or acumen of the owner or operator, not on the physical location or the property.⁷ Courts in other jurisdictions also view business damages as too speculative, too confusing to the jury, or simply irrelevant because the condemnor has taken only the property, not the business itself.⁸ Many states hold the view that a business is not property the “[l]oss of trade or business is not an element of such damages because it is only the value of, and damage to, the property itself, which may be considered. A particular business may be entirely destroyed and yet not diminish the actual value of the property for its highest and best use.”⁹

3. How is Georgia law inferior to other states?

Appraisal reports are not discoverable in Georgia under long-standing practice. In many states, however, appraisal reports are not only discoverable as a matter of course; they are considered a necessary ingredient to full and fair negotiations. For instance, an attorney with the Colorado Attorney General’s Office who spoke at the

⁵ *Bowers v. Fulton County*, 227 Ga. 814, 183 S.E.2d 347 (1971).

⁶ “Rethinking Concepts Chiseled in Stone,” By Speaker Jeremy P. Hopkins, ALI-ABA Course of Study, *Eminent Domain and Land Value Litigation*.

⁷ *Kurth v. Iowa Dept. of Transp.*, 628 N.W.2d 1 (Iowa 2001); *Toledo v. Bernard Ross Family Ltd. Partnership*, 847 N.E.2d 466, 479 (Ohio Ct. App. 2006); *In re Condemnation by Pennsylvania Turnpike Comm’n of 1.169 Acres in Fee Simple*, 745 A.2d 66 (Pa. Commw. Ct. 2000).

⁸ *State by Humphrey v. Strom*, 493 N.W.2d 554 (Minn. 1992); *Kurth*, 628 N.W.2d 1; *Ryan v. Davis*, 109 S.E.2d 409 (Va. 1959).

⁹ *State v. Vella*, 323 P.2d 941, 944 (Or. 1958).

seminar was perplexed to learn that negotiations are actually successful in Georgia condemnation cases without the benefit of an appraisal report. Colorado statutorily limits the number of permitted appraisals to one per side, which in practice prevents lenders from obtaining their own valuation and being actively involved. In Minnesota and Texas, appraisal reports must be exchanged by the parties prior to a commission hearing, which is equivalent to our special master hearing. California, New York and New Jersey require the exchange prior to trial. California goes one step further and requires that the condemnor actually pay the first \$5,000 of the property owner's appraisal.¹⁰

The award of attorneys fees and expenses remains a major issue of discussion among practitioners. State laws run along a wide spectrum of possibilities from no recovery under any circumstances, including abandonment of the project, to awards for reasonable fees and expenses if the condemnee prevails based on a percentage above the initial offer.¹¹ Five states do not allow any recovery under any circumstances, even where the project is abandoned or the condemnor is found to have acted without authority.¹² Although Georgia does not fall into this particularly harsh category, it does share with some thirty odd states the general rule that fees and costs are recoverable if:

¹⁰ "Discovery in Condemnation, A Plan and a Purpose" by Speaker William Blake, ALI-ABA Course of Study, *Condemnation 101: Making the Complex Simple in Eminent Domain*.

¹¹ "Challenges and Issues Facing our Departments of Transportation across the Nation: The Exposure of Departments of Transportation to Attorney's Fees and Costs Impact the Handling of Eminent Domain Litigation," by Speaker Larry Tannenbaum, ALI-ABA Course of Study, *Eminent Domain and Land Valuation Litigation*.

¹² *Id.*

(a) the condemnor abandons the project; (b) proceeds without authority; or (c) acts in bad faith.¹³

Georgia continues to fall behind Florida and Colorado, which have successfully developed statutory formula permitting the recovery of reasonable attorneys fees and expenses as part of just and adequate compensation.¹⁴ Courts and practitioners in those states view such recovery as a means to encourage fair and reasonable offers and negotiations.¹⁵ Awards in Colorado are based on a determination by a jury or judge that fair market value exceeds 130% of the last written offer.¹⁶ Florida has a more complicated structure based on benefits achieved for the owner, measured from the last written offer to the final judgment or settlement.¹⁷

4. How have condemnation laws changed in light of Kelo?

Some states, such as Minnesota and New York, continue to wrangle with redevelopment laws more than five years after the landmark decision in Kelo v. City of New London¹⁸ by the U.S. Supreme Court, which ultimately led to Georgia's elimination of condemnation powers for local, municipal and downtown development authorities.¹⁹ Although there was little direct discussion of that opinion at the seminar, recent case law in two jurisdictions demonstrate that the private versus public benefit dichotomy is still at issue. In Minnesota, a condemning body must have a binding agreement with a redeveloper prior to the taking to avoid property being condemned and left vacant and

¹³ *Id.*

¹⁴ *Town of Telluride v. San Miguel Valley Corp.*, 197 P.3d 261, 263 (Colo. App. 2008).

¹⁵ *City of Colorado Springs v. Andersen Mahon Enterprises*, ____ P.3d ____, W.L. W2853757, p. 3 (Colo. App. July 22, 2010);

¹⁶ *San Miguel Valley Corp.*, 197 P.3d at 263.

¹⁷ *Florida Statutes*, § 73.092(1)(c)-(3), § 72.091(1)(a).

¹⁸ 545 U.S.469 (2005).

¹⁹ O.C.G.A. §36-42-8

unproductive for years on end. A recent appellate decision, however, found this requirement did not apply to an economic redevelopment authority.²⁰

New York courts just completed a six year battle in favor of the Empire State Development Corporation in which land in Manhattan labeled blighted was conveyed to Columbia University, a private institution, for purposes of expanding its campus.²¹ The Court of Appeals of New York reversed the lower court's decision, which had struck down the taking, by giving great deference to the condemnor's blight study and resulting findings.²² Out of the 17 acres conveyed, a majority of the land found to be blighted was under the control and/or ownership of Columbia University at the time of the blight study.²³ The condemning agency argued in favor of community benefits, job creation, and increased tax revenues to justify the condemnation of private property for a private institution. Despite the property owner's argument that Kelo prohibits this very outcome, the appellate court did not agree and did not mention Kelo anywhere in its decision.²⁴

5. How has the practice of eminent domain been impacted by the economic recession?

Practitioners in many states face similar issues that we do in Georgia with lenders becoming more and more involved in condemnation cases, pursuing their own claims and interests, obtaining their own appraisals and seeking some or all of the

²⁰ *Eagan Economic Development Auth. v. U-Haul Co. of Minnesota*, 787 N.W.2d 523 (Minn. 2010).

²¹ *Tuck-it-Away, Inc. v. New York State Urban Redevelopment Corp.*, 2010 N.Y. Slip Op. 5601, 2010 N.Y. LEXIS 1181 (N.Y. June 24, 2010).

²² *Id.*

²³ "Defending Against Private Development: The Lessons of Eminent Domain and Columbia University's Expansion Plan," by Speaker Norman H. Siegel, ALI-ABA Course of Study, *Eminent Domain and Land Value Litigation*.

²⁴ *Id.*

compensation to reduce the principle on the subject property. During one Q&A panel at the seminar, several attorneys told stories of lenders using the condemnation as a basis for re-financing the subject loan at much higher interest rates and using cross-collateralization to draw from other loans and assets to satisfy the loan on the subject property.

The issue of depressed comparable sales was a hot topic of discussion at the seminar. Some practitioners espoused calling not only the property owner to testify at trial, but also alternative witnesses to the stand to explain the reason for the fire sale, or dispute lower comparable sales. The theory is that the actual buyer or the seller involved in the sale can testify that the sale price did not represent true fair market value due to the economy or other factors related to the property. Adjacent property owners also can provide context for a sale and what is happening in the market area.

In addition, abandonment of a condemnation has taken an interesting turn. States generally vary on issues arising from abandonment such as reimbursement of attorneys fees and expenses, payment of damages to property owners, and what happens to the compensation offered or paid when a condemnation is abandoned. For instance, in Oklahoma, a condemnor is generally not liable for attorneys fees unless the owner's possession has been disturbed.²⁵ With budgets being squeezed, there has been a growing trend in several states for condemnors to simply dismiss the case in lieu of

²⁵ *State D.O.T. v. Minor*, 221 P.3d 141 (Okla.App.2009).

abandonment to avoid these costs. Appellate courts, however, have determined that such dismissals are tantamount to abandonments.²⁶

6. “Fair market value” in the world of condemnation does not mean fair market value in the real world

In several states, the standard of fair market value does not include all the same factors a willing buyer and a willing seller would consider in an actual market transaction. Seminar discussions of damages to remainder property almost universally involved the disconnect between reality and what the laws permit. For example, impacts to the remainder property such as noise, dirt, and debris caused by the lawful use of the property, are not permissible factors in several states in determining fair market value.²⁷ Some courts even espouse the view that it would be unfair to compensate the owner for impacts to the remainder caused by the project while surrounding owners whose properties are not taken would not be compensated for any depreciation in value.²⁸

Likewise, some changes in access and traffic flow are often excluded from fair market value, despite that it would make the subject property less desirable on the open market.²⁹ Most jurisdictions, including Georgia, prohibit recovery of damages arising from the installation of a median or the closure of a median break, in the absence of a

²⁶ Id. (affirming award of fees to owner where condemnor dismissed case 3 days prior to trial and refilled with same taking of property but a different project design); *St. Louis County v. Berck*, 322 S.W.3d 610 (Mo. App. 2010) (affirming award to owner for 3 years worth of interest on commissioners award that county failed to deposit into court registry and allowed five year rule to run for redevelopment projects).

²⁷ *Michigan Dept. of Transp. v. Tomkins*, 749 N.W.2d 716 (Mich. 2008); *Sacramento and San Joaquin Drainage Dist. By and through Reclamation Board v. Reed*, 215 Cal. App. 2d 60 (Cal. Ct. App. 1963); *State ex. Rel. Herman v. Wilson*, 438 P.2d 760 (Ariz. 1968).

²⁸ *La Plata Elec. Ass'n, Inc. v. Cummins*, 728 P.2d 696 (Col. 1986); *State Dept of Hwys v. Davis*, 626 P.2d 661 (Colo. 1981); *Galax v. Waugh*, 129 S.E. 504 (Va. 1925).

²⁹ “Rethinking Concepts ‘Chiseled in Stone,’” by Speaker Jeremy Hopkins, ALI-ABA Course of Study, *Eminent Domain and Land Valuation Litigation*.

direct taking or damaging of access on the subject property.³⁰ The fact that a commercial owner or business operator may actually suffer financial losses due to the change in traffic flow continues to fall on deaf ears in the courts. The condemnor, however, may be able to show that the removal of a median as part of the project improved the value of the subject property.³¹

Indirect damage to access is another area of contention. In some states, an owner's permissive right or use of access across another property does not establish a compensable right or give rise to damages the right or use is taken.³² The loss of access to a major intersection through the adjacent property, however, is a factor that could impact an actual sale in the market.

7. Other strange wrinkles

In Nevada, lawyers for property owners are permitted to invoke the “most injurious instruction” rule by which the court legally instructs the jury to assume the absolute worst damages to property if the project has not yet begun before trial. In addition, the date of taking and the amount of compensation is not set until the jury issues its verdict. The condemnor is not required to produce its plans for the subject

³⁰ *State v. Capital Plaza, Inc.*, 397 So.2d 682 (Fla. 1981); *State v. Bastian*, 546 P.2d 399 (Idaho 1976); *Department of Public Works and Bldgs. v. Wilson and Co., Inc.*, 340 N.E.2d 12 (Ill. 1975); *Hendrickson v. State*, 127 N.W.2d 165 (Minn. 1964); *State v. Monmouth Hills, Inc.*, 266 A.2d 133 (N.J. Super. Ct. App. Div. 1970); *Barnes v. North Carolina State Highway Comm'n*, 126 S.E.2d 732 (N.C. 1962); *South Carolina State Hwy Dept. v. Wilson*, 175 S.E.2d 391 (S.C. 1970); *City of Memphis v. Hood*, 345 S.W.2d 887 (Tenn. 1961).

³¹ “Rethinking Concepts “Chiseled in Stone,” by Speaker Jeremy Hopkins, ALI-ABA Course of Study, *Eminent Domain and Land Valuation Litigation*.

³² *State v. 0.622 Acres*, 254 A.2d 57 (Del. Super Ct. 1969); *Louisiana Seafood Mgmt. Council v. Louisiana Wildlife and Fisheries Comm'n*, 715 So.2d 387 (La. 1998); *Cylburn Arboretum Ass'n, Inc. v. Mayor and City Council of Baltimore*, 664 A.2d 382 (Md. Ct. Spec. App. 1995); *Northwest Natural Gas Co. v. City of Portland*, 711 P.2d 119 (Or. 1985); *State v. Clackamas Water Dist.* 428 P.2d 395 (Or 1967); *GAR Assocs. III, L.P. v. State*, 224 S.W.3d 395 (Tex. Ct. App. Houston 2006).

property. The court can inform the jury if the condemnor refuses to do so, drawing all reasonable inferences from the refusal.³³

In Indiana, possession of the subject property can occur prior to the passage of title. In that state, title does not legally pass until the court's final judgment is recorded as a deed. A landlord's contractual rights to the leased income stream can be taken upon possession by the condemnor before title passes and compensation is paid for the taking.³⁴

A split exists at the federal appellate level between the 7th, 9th and 4th circuits as to courts bestowing the "quick take" power of eminent domain to certain agencies that are not given such power by statute.³⁵ This method of condemnation is similar to Georgia's declaration of taking method except that condemnors take immediate possession of the subject property upon filing of the case and deposit of the funds into the court registry. The quick take method has been recognized and upheld for gas companies by the 4th Circuit on the grounds of the judiciary's inherent power to grant the legislative power under the preliminary injunction remedy in the Federal Rules of Civil Procedure.³⁶

Several jurisdictions do not establish the date of taking until well after the condemnation proceeding is filed, and even after possession of the subject property occurs by the condemnor and its construction contractor.³⁷ Practitioners in these states

³³ Comments of speaker Kermitt Waters in his presentation "Giving the Judge and Jury the Big Picture in a Condemnation Case, ALI-ABA Course of Study, *Condemnation 101: Making the Complex Simple in Eminent Domain*.

³⁴ *Truck City of Gary, Inc. v. Calumet Realty Corp.*, 918 N.E.2d 10 (Ind. App. 2009).

³⁵ Rethinking Concepts Chiseled in Stone," By Speaker Jeremy P. Hopkins, ALI-ABA Course of Study, *Eminent Domain and Land Value Litigation*.

³⁶ *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004).

³⁷ "Strategic Motion Practice: Wining the High Ground in Eminent Domain," by Speakers Stephanie Autry and Kevin Walsh, ALI-ABA Course of Study, *Condemnation 101: Making the Complex Simple in Eminent Domain*.

rely upon motions to establish the date of taking in order to value the property and the taking of rights.³⁸

³⁸ *Id.*