

**ALI-ABA Course of Study**

**Condemnation 101: Winning the High Ground with Fundamentals of Eminent Domain  
Valuation and Trial Practice**

**January 26-28, 2012  
San Diego, California**

**Strategic Discovery: A Plan and Purpose for Requesting  
Documents and Other Discovery**

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## **How to Dismantle the Expert Appraiser With or Without the Written Report**

In an eminent domain case, the primary issue is what constitutes just and adequate compensation for the taking and damaging of private property. This determination is based in large part upon an expert's appraisal of fair market value of the subject property. As a result, discovery of the opinions of the appraiser plays an integral role in successfully preparing for the trial of an eminent domain case. Expert discovery in an eminent domain case is very similar to other civil cases where expert testimony will be used in terms of how to attack the experience and credibility of the testifying witness. As for the substance of the expert's opinions and conclusions, however, eminent domain cases involve peculiar issues. Appraisal work is one part formula or methodology and three parts personal judgment by the expert. Most jurisdictions have their own specific rules, statutes and substantive case law concerning the disclosure and discovery obligations associated with the opinions of the expert appraiser, including whether written appraisal reports are discoverable. If your jurisdiction protects the written appraisal report from disclosure, how do you dismantle the opposing party's expert? If you have little or no experience reviewing a 200+ page appraisal report, what issues should you focus on? Preparing an effective and eviscerating cross examination of the opposing party's expert should begin on day one of your case with discovery. The following are techniques for gathering relevant information, analyzing the issues, and discovering what you can about the expert appraiser and his or her opinions.

### **I. Gather information from the Client**

The first step of information gathering in an eminent domain case begins with the initial engagement. As with any litigation, it is essential to make sure you understand your client's position and property and have assimilated all the necessary facts and pertinent documents that your client may have. For example, deed records for the property may contain restrictions on the sale or use of the property, which could impact fair market value. The expert appraiser may not be aware of these limitations, which creates an opening to undermine his conclusions at trial. Be sure to review all the documents and correspondence your client has received from the opposing party, including right of way plans or surveys and pre-litigation correspondence and offers from the condemning authority.

### **II. Inspect the Property**

After the initial engagement, a personal inspection of the property is vital to fully understand the taking's impacts. It is best to have in hand a survey of the site and the right of way or construction plans for the project to review during the inspection. If at all possible, try to join the opposing party's expert appraiser on his or her inspection tour to see what the expert is focusing on or what he may be missing, and to provide facts or details relevant to fair market value. Depending upon the complexity of the project or the property, you may need to have additional inspections with other, non-value experts, such as engineers. If traffic patterns, access or circuitry of travel are at issue, drive in and around the property. Familiarize yourself with the surrounding market area. As the practitioner, you should have the most knowledge of the subject property.

### **III. Federal vs. State Rules of Discovery**

In general, the flow and order of discovery is similar to other litigation written discovery and exchange of information and documents followed by depositions. To state the obvious, however, every practitioner should check the applicable local rules, statutes and case law early in the case to determine what is discoverable and what is admissible at trial in an eminent domain case. They can vary from civil litigation. For example, what conversations are privileged? Can you discover what opposing counsel told his expert? Can you discover every document provided to, reviewed by or relied upon by the opposing expert? A smoking gun, such as a post-taking sale or a lender's appraisal, will be of little value if you wait until the eve of trial to determine if the jury will learn of it. Even if the information is inadmissible, it still may be discoverable and useful questioning the expert's opinions.

#### **A. Disclosure of Experts/Appraisal Reports – Federal Rules**

FRCP 26 governs discovery in federal eminent domain cases and requires each party to disclose the identity of its expert witnesses as well as produce an expert report for each identified witness. FRCP 26(a)(2) (A), (B). Under this rule, the parties are required to exchange their expert appraisal reports, and each report must contain:

- a complete statement of all opinions the witness will express and the basis and reasons for them;
- the facts or data considered by the witness in forming them;
- any exhibits that will be used to summarize or support them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case.

#### **B. Scope of Other Discovery – Federal Rules**

FRCP 26(b)(1): Parties may obtain discovery regarding any matter not privileged that is relevant to any party's claim or defense.

FRCP 26(b)(4)(A): A party may depose any person who has been identified as an expert witness whose opinions may be presented at trial.

FRCP 26(b)(4)(D): A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial only upon showing exceptional circumstances under which it is impracticable for the party to obtain the facts or opinions on the same subject matter by other means.

## **C. Sampling of State Discovery Rules**

### **Oregon**

- The government is required to provide a written appraisal report upon which the government relied in establishing the amount of compensation offered when providing the property owner with the initial offer. *ORS 35.346(2)*.
- The property owner must provide the government with a copy of the owner's appraisal not less than 60 days before trial or arbitration. *ORS 35.346(4)*
- Each party to the case is required to provide all parties with a copy of every appraisal obtained by the party as part of the case. *ORS 35.346(5)(b)*
- Failure to provide a copy of an appraisal report prohibits the use of the appraisal in arbitration or at trial. *ORS 35.346(5)(a)*

### **Texas**

- When providing the property owner with the initial offer, the government is required to disclose any and all appraisal reports relating to the property prepared in the 10 years preceding the date of offer. *V.T.C.A. Property Code §21.0111(a)*
- A property owner is required to disclose any and all current and existing appraisal reports relating to the property and used in determining the owner's opinion of value not later than the earlier of the tenth day of receipt of the report or the third business day before the date of the special commissioner's hearing if the report is to be used at the hearing. *V.T.C.A. Property Code §21.0111(b)*

### **Maryland**

- A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert. *MD Rules 2-(402)(g)(1)(A)*

### **Florida**

- The condemning authority must submit to the owner, upon request, the appraisal for their good-faith estimate of value which forms the basis of their initial, pre-litigation offer, as well as right of way maps and construction plans. *§73.015, Fla. Stat. (2006)*.

## Virginia

- Condemning authority in eminent domain proceedings, when it initiates discovery, is required to pay all discovery costs and expenses, including those of experts of the landowners. *Virginia Supreme Court Rule 4:1(b)(4)*
- If the condemning authority obtains one appraisal report, it is required to provide the landowner with that written appraisal report when sending its written offer. If the condemning authority obtained more than one appraisal, then it is required to provide all such appraisals to the landowner. *Va. Code Ann. § 25.1-204(c)*

## Georgia

- Standard rules of discovery under the Civil Practice Act apply. See Black v. Department of Transportation, 262 Ga. 342, FN1 (1992).
- Expert Witnesses Expected to Testify at Trial – *O.C.G.A. § 9-11-(26)(b)(4)(A)*
  - A party may through interrogatories require any other party to:
    - Identify expert witnesses expected to be called at trial;
    - State the subject matter on which the expert is expected to testify;
    - State the substance of the facts and opinions to which the expert is expected to testify; and
    - State the summary of the grounds for each opinion;
  - A party may also obtain discovery from testifying experts by:
    - Depositions;
    - Requests for production of documents;
    - The party obtaining discovery must pay a reasonable fee for the time spent by the expert in responding to the discovery.
- Retained Experts Not Expected to Testify at Trial – *O.C.G.A § 9-11-26(b)(4)(B)*
  - Discovery of facts known and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or for trial and who is not expected to testify is only allowed upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
- Expert appraisal reports are usually not discoverable under the scope and limits of *O.C.G.A § 9-11-26(b)(4)*.

## Nebraska

- Standard Rules of Discovery Apply.

- Only provides for use of interrogatories to discovery the identity of experts witnesses expected to be called at trial, the subject matter of the expected testimony, the substance of the facts and opinions of the expected testimony, and a summary of the grounds for each opinion. Any further discovery may be only sought by court order. *Nebraska Rules of Discovery Section 26(b)(4)(A)*

#### **IV. Interrogatories**

The most important feature of interrogatories in an eminent domain case is the limitation placed on the opposing side at the trial of the case. Interrogatories should be drafted with an eye toward pinning the opposing side down with respect to important issues in the case and the facts that are relevant to those issues, including but not limited to the following:

- Who has knowledge of relevant facts;
- Who has custody of pertinent documents;
- The nature of the interests being acquired in the property;
- The area of the entire property, the property being taken, and the remainder property;
- Identification of expert witnesses expected to testify at trial and their opinions;
- Identification of lay witnesses expected to testify;
- Identification of appraisal reports prepared by or on behalf of the opposing party;
- Identification of comparable sales or rentals considered by the expert appraiser;
- If a business is being appraised, what is the income stream used by the expert appraiser;
- Identification of mitigation plans and/or cost to cure estimates prepared by or on behalf of the opposing parties;
- Identification of business loss appraisals prepared by or on behalf of the opposing party;
- Identification of trade fixture appraisals, sign appraisals, relocation estimates and other expert reports prepared by or on behalf of the opposing party;
- The nature of the property's access before and after the taking;
- The visibility of the property before and after the taking;
- The parking configuration/layout and the total number of parking spaces on the property before and after the taking; ;
- The opposing party's views of the highest and best use and whether or not there are any consequential damages or consequential benefits that have resulted from the taking;
- Identification of any rejected appraisals;
- Have any experts consulted with the owner regarding the appraisal of the property;
- Identification of public or private funding sources utilized for the planning, design, right of way acquisition or construction of the project;
- Have there been any tax assessment protests by the owner;
- Have there been any appraisal of the property in the last five years;
- Has the property been listed for sale in the last five years;
- Have there been any offers to purchase the property in the last five years;
- Are there any restrictive covenants on the property;
- Are there any leases, easements, licenses on the property;
- Are there any security interests, mortgages or liens on the property;

- Is there any evidence of contamination of the property, or other environmental issues, such as asbestos or underground storage tanks;
- Is the property in a flood plain;
- What is the zoning of the property;
- What is the history of the use of the property;
- What are the plans for future use of the property;
- What constitutes total just and adequate compensation for the taking and damaging of the property, provide breakdown of the opinion.

## **V. Requests for Production of Documents**

Requests for production of documents in an eminent domain case should be drafted to obtain documents that are relevant to the valuation of the property and the determination of just and adequate compensation, including but not limited to the following:

- All documents identified in, relied upon or referred to in preparing the responses to interrogatories;
- All plats, surveys, maps, sketches, scaled drawings, site plans, construction plans, deeds, and easements which depict the property;
- All project files, including engineering files, that relate to the condemnation of the property;
- All studies, including but not limited to environmental studies, traffic studies, analysis reports, or drafts that relate to the condemnation of the property;
- All appraisals, review appraisal, estimates or evaluations of the property prepared by or on behalf of the opposing party;
- All trade fixture appraisals, sign appraisals, relocation estimates or any other expert reports prepared by or on behalf of the opposing party;
- Any appraisals, studies, reports or other analysis of the highest and best use of the property;
- All photographs depicting the property that is the subject of the case, including but not limited real property, improvements, trade fixtures, equipment and signage;
- All documents provided to, relied upon, or reviewed by any expert the opposing party expects to call as an expert witness at trial;
- All documents provided to, relied upon, or reviewed by any lay witness the opposing party expects to call at trial;
- A copy of the curriculum vitae of any expert the opposing party expects to call as an expert witness at trial;
- All written communications concerning the eminent domain case;
- All mitigation plans and/or cost to cure estimates prepared by or on behalf of the opposing party;
- All documents that evidence or reflect the nature of the property's access before and after the taking;
- All documents that evidence or reflect the parking configuration/layout and the total number of parking spaces on the property before and after the taking;
- All business loss appraisals prepared by or on behalf of the opposing party;

- All financial statements, tax returns, etc. relied upon by any testifying to evaluate business loss damages caused by the taking in the case;
- All contracts or agreements for appraisal or valuation services performed for the opposing party;
- All project plans that relate or refer to the property, including but not limited to right of way plans, construction plans, road profiles, driveway profiles, cross-sections, mainline plans, utility plans, drainage plans, signing and pavement marking plans, project concept plans, grading plans, topography maps, and erosion and sediment control plans;
- All documents produced in discovery or provided to the opposing party by any other party in the case;
- All documents produced or provided to the opposing party by a nonparty concerning the case;
- All prior appraisals of the property in the possession of the opposing party;
- All documents that evidence or reflect the government's intended use of the permanent easements condemned in the case.

## **VI. Review of the Appraisal Report**

If you have received a copy of your opponent's expert appraisal report, you will need to review and critique it carefully before gathering more information or taking depositions. Appraisal reports often contain pages and pages of boilerplate market and industry research and data. Although the heart of the report will address the subject property, there may be inaccurate information in these pages that were relied upon by the appraiser. The key issues to look for include:

- Credibility of valuation opinion;
- Opinions based on speculation or conjecture;
- Flaws in logic and reasoning;
- Errors or omissions;
- Incomplete valuation analysis;
- Misleading valuation analysis;
- Value or damages given for non-compensable elements;
- Whether opinion is consistent with actual facts;
- Failure to consider relevant facts;
- Extraordinary assumptions;
- Limitations on value conclusions;
- Irrelevant or unnecessary information provided;
- Utilization of improper appraisal methodologies;
- Faulty adjustments;
- Quality of written report;
- Definitions used;
- Thoroughness of underlying investigation;
- Opinions beyond expertise of appraiser;
- Reliance on other experts;
- Verification, confirmation, and reliability of data considered;

- Transparency and understandability of underlying basis for opinion.<sup>1</sup>

In addition, keep an eye out for the expert's reliance on any studies prepared by another witness or professional, such as a parking, traffic or circulation study, which could itself be flawed or contain inaccurate information. Note if any other appraiser signed the report. The designated testifying expert may not have actually conducted the substantive work. The report also may indicate that the appraisal is not complete or may be updated in the future. This can be as blatant as a "preliminary" statement on the value conclusion page, or a more subtle statement of missing information that the appraiser requested but did not receive.

If you cannot obtain a copy of the expert's report, at the very least, you should seek production of a summary of the value conclusions prior to a deposition.

## **VII. Deposition of the Expert Appraiser**

The most important tool of discovery in an eminent domain case is the discovery that occurs during the deposition of the expert witness, and in particular the expert appraiser. It becomes particularly important if your jurisdiction prohibits disclosure of written reports. The expert appraiser's deposition should be used to obtain every piece of relevant information in the possession of the expert witness. It also provides an opportunity to assess his or her credibility as a witness and thoroughness as an expert. An expert should advocate for his opinions, not the property, not the owner or condemnor and not the outcome of the case. A qualified witness with the proper credentials and experience who explains value on an impartial basis can provide a lasting impression on the jury. Do not assume that the expert title equates with expert work. Appraisers make mistakes and can be sloppy in their conclusions, assumptions and even calculations. A deposition also provides another means of pinning down the opposing party in order to avoid being surprised at trial with a new claim or value.

### **A. Preparation**

Preparation is the single most important element of taking an effective deposition of the expert appraiser. By now, you've met with your client and inspected the subject property. To fully prepare for the actual examination of the expert appraiser, you must review thoroughly all the documentation and other information produced in discovery regarding the expert appraiser's opinions and the basis for those opinions. If you have retained an expert appraiser of your own, review your strategy with that expert and ask them to provide additional questions or issues to address with the deponent. A predicate expert deposition may also be needed, if the testifying expert appraiser's valuation is based in large part on the opinions of another expert.

### **B. Subpoena the Expert's Appraiser's File**

As a threshold matter, no expert deposition should be taken without requiring the expert to produce his entire file at the deposition. Production of the expert appraiser's file at the deposition may be accomplished by serving a subpoena duces tecum upon the expert appraiser

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<sup>1</sup> Leslie A. Fields, "Anatomy of an Appraisal: How Lawyers Review and Critique Appraisal Reports," *The Practical Real Estate Lawyer*, January 2011.

within the time required by your particular jurisdiction. If the expert appraiser forgets his or her file, wait for the expert appraiser to get it. Don't assume the expert will be fully prepared. If your deposition questions are thorough, he or she may need the file to refresh memories or recall minute details and calculations. If the discovery rules protect the appraiser's file as work product, request to review the appraiser's market research and information gleaned from other sources, along with any summary or statement of the value conclusions.

### **C. Deposition Checklist for the Examination of the Expert Appraiser**

An outline of the areas and topics you need to cover with the expert appraiser is recommended in lieu of a fully written list of questions or script. As with any expert deposition, you need to listen carefully to the expert's answer and attempt to control the order and flow of the questions. The following techniques are recommended for deposing the expert in order to maximize the amount of information received and discover the weaknesses for use at trial.

#### **1. Basic Techniques for Questioning An Expert**

- The "funnel" approach:
  - Ask open-ended questions aimed at information gathering; then
  - Open/closed questions aimed at adding detail; then
  - The "what else" questions aimed at exhausting information; then
  - The "summary" question aimed at recapitulation for clarity; then
  - The closed question, aimed at test the theory.
  
- Example of the "funnel" approach:
  - What is your opinion of the highest and best use?
  - What are the reasons for your opinion that as of the date of taking the proposed development is legally permissible?
  - Are there any other reasons for your opinion that there was a reasonable probability that the project would have received zoning board approval?
  - So your opinion of legal permissibility relies solely on the vote of the zoning board on October 7 approving the application for zoning relief of the Johnston Development Company on the adjacent property on Main Street?
  - If the application for zoning relief which would have been filed by the owner, but for the taking, was different in the following several respects: \_\_\_\_\_, then your opinion would have to either be revised or is just simply wrong?<sup>2</sup>
  
- Identify all of the expert appraiser's assumptions and judgments;

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• <sup>2</sup>James D. Masterman and David G. Thomas, "Deposition Of The Appraiser In Takings Cases," *The Practical Litigator*, November 2010. For additional deposition techniques, see Charles Lollar, "Discovery Limitations In Eminent Domain Proceedings," *The Practical Real Estate Lawyer*, July 2009.

- Understand the expert appraiser’s methodology;
- Identify the expert appraiser’s normal procedure for appraising property, i.e., document review, data/market research, inspection;
- Attempt to limit the expert appraiser with respect to the opinions and bases for those opinions, and paint the expert into a corner as much as possible, which could set up impeachment on the stand;
- Allow the expert to be the smartest person in the room and “educate” you as the lawyer. Remember that this is a deposition, not a trial and eminent domain cases are rarely won at a deposition. The purpose of the deposition is to discover the information that is necessary for conducting an effective cross examination at trial. Do not attempt to destroy the expert appraiser at the deposition.

## 2. Specific Topics

### **Background/Qualifications of Expert Appraiser**

The expert appraiser will be ready to expound at length on his or her impressive resume and substantial background and experience in appraising property. While your questions will be worded to ascertain this detail, you also want to focus on what is missing. Don’t limit your examination to the expert’s current job as an appraiser. Appraisal experts sometimes wear many hats, including “valuation”, and will be eager to explain the breadth of their expertise in unrelated industries. How much time does the expert truly devote to appraising property? Appraisers also are asked to opine on issues about which they have no specific expertise. For example, if the expert has appraised a c-store gas station site, he may have a great deal of commercial appraisal experience, however, he has no idea what factors are necessary for the remainder property to continue as a viable c-store operation site. A demonstration of all of the hats or the lack of experience specific to the subject property is an effective message to the jury that while the witness may be an “expert” of many things, he is a master of none. This translates into he knows nothing about the true value of the property. Does the expert have experience appraising the particular kind of property involved in your case on an actual market transaction? Fair market value is measured by the willing buyer and the willing seller. If you can demonstrate that the appraiser is a just hired gun for opposing counsel in litigation with no actual market experience, his credibility to a jury will be hurt.

- College Education:
  - Degrees Earned;
  - PHD/Masters;
- Appraisal education:
  - Designations earned; current status;
  - Last appraisal course taken;
- Current license designations (residential, commercial, general):
  - What states;
  - Reprimands, censure, lapse in designation;

- Any professional continuing education requirements and are they current
- MAI Designation;
- Jobs in appraisal position, positions held;
- Other professional memberships or affiliations (ie. Appraisal Institute);
- Real estate brokerage experience;
- Publications authored or contributed to;
- Appraisal courses taught;
- Other cases in which expert appraiser has testified at trial;
- Other cases in which expert appraiser has testified at deposition;
- Reported cases in which expert appraiser's name is mentioned;
- Experience in appraising different types of properties;
- Experience in appraising the specific type of property involved in the case, i.e., a c-store site;
- Current clients: corporate, government, banks, developers, clients with multiple appraisal assignments;
- Percentage of current business that involves eminent domain work;
- Appraisal assignments for condemning authorities;
- Appraisals for the same opposing counsel;
- Appraisal assignments for owners;
- Tax appraisals: taxing authorities versus owners;
- Appraisals of other properties involved in the same project;
- Pending condemnation cases with the client;
- Appraisals in the same city, town or neighborhood as the subject property;
- Prior appraisals of the subject property;
- Previously qualified to give expert testimony: state court, federal district court, agencies, boards, commissions;
- Transcripts of prior testimony, including deposition transcripts;
- Information resources generally obtained for appraisals (ie. tax assessments, land records, GIS maps)
- Ownership of real estate;
- Relatives in trial court jurisdiction;
- Financial terms of engagement;
- Has appraiser been asked to testify in this case;
- Does appraiser feel fully prepared to testify to his or her opinions at the deposition today;
- Did appraiser meet with anyone to prepare for deposition;
- Did expert appraiser exchange emails with anyone regarding today's deposition.

### **Condemnation Project Involved in Case**

- Describe the project involved in case;
- How many other parcels has the expert appraised in the same project;
  - Are any similar to the subject property;
  - Did the appraiser find consequential damages to any other parcels;

- Parcel identification number associated with subject property;
- If any businesses are being impacted on other parcels taken by the project, how many have relocated as a result;

### **Appraisal Assignment and Hiring**

The expert's opinions can be colored before the appraisal even begins. Be thorough in asking the expert questions that delve into when and why he was hired and what he was told to do. This is particularly true if the appraiser is not the first or original expert. If this appraiser was identified during an ongoing case to either supplement or replace another appraiser, there may be a compelling reason that impacts the opposing party's case.

- When was expert appraiser hired in this case?
  - Who contacted expert appraiser;
- What documents did client give expert appraiser to review;
- What documents did expert appraiser review in forming opinion in this case: Petition, tax maps, surveys, plats, land planning, zoning;
- Identity of other experts consulted for opinions and substance of conversations;
- All authorities considered or relied upon in forming opinions;
  - Any legal instructions given to the appraiser by counsel;
  - Any issues the appraiser believes are excluded from the valuation due to applicable laws, i.e., medians
- Date of each visit to property and time spent inspecting;
- Meetings with land owner or representative of owner: who, when, substance of conversations;
- Meetings with other persons concerning appraisal of property: who, when and substance of conversations;
- Exchange emails/correspondence with anyone concerning appraisal of property: who, when and subject matter;
- What is the date of taking in this case;
- Has appraisal been completed, date of completion;
- Has appraisal been reviewed by client; did client request changes to appraisal, were any changes made;
- Any changes or corrections to initial appraisal since first completed;
- Any updated opinion of value since expert appraiser first submitted the appraisal to the client;
- Does expert appraiser have any plans to update appraisal between now and trial;
- Did anyone assist expert with performing appraisal for the case;
- Did expert appraiser talk with any other appraisers or rely upon values from anyone else in determining opinions in this case;
- What predicate expert opinions the appraiser is relying on;
- Did expert appraiser review discovery responses of any party in the case;
- Did expert appraiser review any information concerning the opinions of other party's expert witnesses, i.e., reports, deposition transcripts;
- Were any mitigation plans/cost to cure estimates prepared by the opposing party.

## **The Subject Property**

- Where is subject property located, street address, route number, and intersecting streets
- Tax parcel identification number associated with subject property;
- What was the zoning of the property on the date of taking;
- Identity of owners on the date of taking;
- What was property being used for on date of taking;
- Date of acquisition;
- Did appraiser obtain closing documents and financing documents;
- Did owner list subject property as an asset on tax returns;
- Deeds for subject property;
- Legal descriptions and surveys for subject property;
- Approved permits, applications for permits denied, or lapsed permits;
- Easements that benefit subject property;
- Easements that burden subject property;
- Protests of appeals of tax assessments;
- Prepare or review prior appraisals of subject property;
- Leases, abstracts, and rent rolls for subject property;
- Income and expense statements for subject property;
- Foreclosures, bankruptcy filings, default judgments;
- Total land area of larger parcel, acreage and square feet;
- Total building area;
- Square footage of office, corridors, warehouse, loading docks, basement, etc.;
- Building department records (ie. applications, permits, inspection records, etc.);
- Improvements: age, type, construction quality, renovation history, capital improvements made, cost of repairs;
- Parking: parking spaces, area for parking, parking required by zoning;
- Is subject property a designated Wetland;
- Is property located in flood hazard zone or floodplain, history of flooding, insurance claims, FEMA Flood Insurance Rate Map No. and effective date;
- Shape of property;
- Topographical features: contours, soils, maps, etc.;
- Property's access: road frontage, type of access (ie. Location of driveways), limitations/restrictions of access;
- Property's exposure;
- Traffic counts;
- Utilities available to property on the date of taking;
- Environmental contamination, government action, remediation efforts and costs;
- Geotechnical such as groundwater tests, boring logs.

## **Market Area**

- Type and source of expert appraiser's market information;
- Confirm that expert recognizes these sources as reliable and used by the appraisal industry;
  - If your expert relies on another sources, ask the expert if he recognizes those sources as reliable, etc.;
- How market area was determined;
- Availability of public utilities;
- Proximity to:
  - Schools, police and fire stations;
  - Interstate, state and local highways;
  - Public transportation, rail and airports;
  - Shopping Centers;
  - Noxious uses;
  - Cemeteries;
  - Parks and sports facilities;
  - Waterfront.

## **Property Rights Acquired by the Condemnor**

- Property rights acquired: fee simple, leasehold interests, permanent easements, temporary construction easements, application of undivided fee rule;
- Area of property rights acquired;
- Area of the remainder property after the taking;
- Status of construction on the subject property;
  - Dates of start and completion of construction
  - Date of closure of driveways, and if temporary closure, date of reopening

## **Condition of the Remainder Property**

- If a remainder property exists, how has the property changed?
- How have the improvements been altered?
- Were any buildings demolished?
- Any changes to access, visibility, signage, traffic patterns, driveways, topography, drainage?
- Is the remainder subject to any zoning changes? Are any variances required to re-install signs or other improvements removed during construction?
- If permanent easements were condemned, what can the property do with that part of the property?
- If medians are installed as part of the project, how has that affected the property?
- If a business is being operated on the property, can it continue to operate? Is the remainder property still a viable site for the business?

## **Five Step Process or Summary of Value Conclusions**

Have the expert initially state on the record the final conclusions of value and then work through each one with more detailed questions.

- Fair market value of whole before the taking:
  - Price per acre/price per square foot;
- Fair market value of the taken:
  - Price per acre/price per square foot;
  - Percentage of fee applied to permanent easements;
- Fair market value of remainder before the taking;
- Fair market value of the remainder after the taking;
- Consequential damages or benefits to the remainder:
  - Damages evaluation or lack thereof;
  - What factors went into determining damages?
  - See above, Condition of the Remainder Property
  - If no damages, why not?
- Opinion of just and adequate compensation;
- Does opinion include value for anything other than real estate;
- Is this an appraisal of the land as vacant/or improved;
- What was the highest and best use of the land before the taking;
- What is the highest and best use of the remainder after the taking.

## **Methodologies Used to Appraise Property**

The appraiser may use one or more approaches to determine fair market value of the property as a whole before the condemnation as well as after the condemnation. The following topics should be considered for both the before and the after values. Note any differences in the methodologies before and after and question the appraiser about these differences.

- Market Data or Sales Comparison Approach:
  - Tax Map of Comparables/Photos of comparable sales;
  - Vacant Land Sales considered;
  - Improved Land Sales considered;
  - Details of comparable sales: parties, size, shape, sales price, price per acre/square foot, date of sale, type of property, zoning, location, developed/undeveloped, topography, grading, access, utilities, financing data, traffic counts;
  - Did expert appraiser inspect comparables;
  - Verification of comparable sales data;
  - Did expert appraiser talk to buyer, seller or agents;
  - Adjustments made to comparable sales: qualitative v. quantitative;
  - Did appraiser use other market tools, such as price to revenues or price to EBITDA multiple:
    - How was multiple selected;

- How many transactions were pulled and from what database, i.e. Pratt's Stats;
    - What limitations were used to select the transactions;
    - What transactions were rejected;
    - How did the appraiser select an income stream for the subject property to apply the selected multiple;
  - Total Value..
- Income Approach:
  - Capitalization of cash flow, Discounted Cash Flow, or Weighted Average Cost of Capital;
  - Documents: rent roll; income and expense statement; lease and leased summaries; lease history;
  - Basis for potential gross income:
    - Rental rate under lease agreements with tenants; or
    - Comparable rental properties;
  - Effective gross income (potential gross income – vacancy rate – collection loss + miscellaneous income):
    - Vacancy rate subtracted/basis;
    - Collection loss subtracted/basis;
    - Add back of any miscellaneous income (ie. vending receipts, parking fees)/basis;
  - Net operating income (effective gross income – operating expenses):
    - Operating expenses subtracted (real estate taxes, insurance, utilities, maintenance, repairs, advertising, management expenses, etc)/basis;
  - Capitalization or discount rate (net operating income/purchase price or property value)
    - How did expert appraiser come up with capitalization rate:
      - Market extraction/actual cap rates for buildings sold in market;
      - Build Up Method;
      - Weighted Average Cost of Capital – debt to equity ratio
  - Total Value.
- Cost Approach:
  - Value of vacant property + current cost of building structure – depreciation for subject property;
  - Basis for value of vacant land;
  - Cost to reproduce improvement:
    - Reproduction v. Replacement Cost;
    - Source of values;
    - Improvements and buildings valued;
  - Depreciation subtracted to reflect current condition of building/improvements;
  - Total Value.

- Reconciliation of values and methods
  - If the appraiser uses one or more method to appraise the property, how did he reconcile the various values?
  - Was one method or result weighted more than the others? Why?
  - If the appraiser didn't use all 3, why not?