

Overview of A Condemnation Case

Condemnation 101: How to Prepare and Present an Eminent Domain Case

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**By: Christian F. Torgrimson, Esq.
Pursley Friese Torgrimson, LLP
1230 Peachtree Street NE, Suite 1200
Atlanta, Georgia 30309
404-876-4880
ctorgrimson@pftlegal.com**

I. The Power To Condemn – Who, What, When and Why

Broadly speaking, eminent domain is the constitutional power conferred upon federal and state governments to take or acquire private property without consent and devote to a particular public use. This power is limited by the Fifth Amendment in two very important respects: the taking must be for a public use and just compensation must be paid. Eminent domain authority is delegated by constitutional amendments and enacting legislation to specific entities, such as state Departments of Transportation, cities, counties, schools, utilities, railroads, or housing development authorities. The term “condemnation”, often used interchangeably with eminent domain, is the formal exercise of or procedure to carry out the power of eminent domain and transfer title from the private property owner to the government. Because condemnation procedures vary widely between the states, it is important to fully understand the rules and procedures in the particular jurisdiction.

The traditional picture of eminent domain is for direct “public use” projects, such as roads, bridges and utilities that are used by the entire public. Prior to 2006, many states recognized the more indirect “public benefit” in their defined powers for economic or blighted redevelopment purposes. Following the Supreme Court’s 2006 decision in *Kelo v. City of New*

London, which approved the use of condemnation procedures for the public benefit of economic development, many states swiftly adopted legislation limiting or removing entirely the ability to condemn private land for public benefit. For example, in Georgia, the Georgia General Assembly not only redefined the power of eminent domain for public use only, it further stripped development authorities of all eminent domain powers.

There are four general categories of taking that entitle an owner to compensation: full, partial with a remainder, inverse and regulatory. A full taking of real property occurs when title to every interest in property is completely acquired or destroyed. When a landowner is deprived of a portion of property and retains a remainder or remnant, or his rights to use a certain portion are impaired, a partial taking has occurred. An inverse taking occurs when the condemning authority's actions on an adjacent parcel deprive or severely deplete the economic value of the property in question. A regulatory taking arises from the government's exercise of police power, such as a zoning regulation, that exceeds the police power and runs afoul of the constitution. In all instances, a property owner's rights must be permanently damaged in order to recover compensation. The temporary inconvenience or temporary damages caused by construction, such as noise and dust that the entire driving public experiences, cannot be the basis for recovery of compensation in a condemnation.

II. All Property Interests Are Subject to Condemnation

If a property right exists, it can be taken. In fact, all private property rights and interests of every type and nature are subject to being condemned. This includes not only the actual land, but also leasehold values, trade fixtures, buildings and improvements, billboards, access rights, air rights, easements, certain contract rights, operating businesses or income streams and business values that are inherent in the property. A compensable interest in a condemned

property or a claim to just and adequate compensation can be assigned. The assignee is entitled to seek the fair market value of the property and all damages arising out of the taking, and not merely the value paid for the assignment. Along with the fee or title holder, typical compensable interests in a condemnation include:

- A. Lessee:** A lessee is entitled to recover the market value of the lease, including any specified options to renew that could have been exercised but for the taking. Known as a "leasehold", this interest recognizes that the lessee has a value on the subject property that it could not receive on another property. A leasehold interest can be waived or assigned to the landlord and the specific lease language will govern whether the lessee has the right to pursue compensation.
- B. Tenant at Will:** A tenant at will is entitled to recover the value of the actual tenancy, which is a definite term of at least sixty days.
- C. Secured Interest:** The holder of a secured interest or a mortgage on the property must be named as a party and is entitled to the full value of the lien from the proceeds paid into the registry of the court but the holder may not recover a prepayment penalty.
- D. Easement:** The holder of an easement is entitled to compensation for the full taking or damaging of the easement interest.

While all interests can be condemned, most but not all ownership interests are entitled to receive the compensation that must be first paid before the property is taken. For example, the holder of a right of first refusal, owners of franchise rights, and beneficiaries of restrictive covenants have no right to be paid for any loss or damage to such interests.

III. Acquisition/Negotiation with the Condemning Authority

The condemning authority is required to make every reasonable effort to acquire property expeditiously by making an offer in good faith and engaging in direct negotiations with the owner before beginning formal condemnation proceedings. When the condemning authority attempts to acquire fee simple title to real property, the parcel must be appraised prior to the initiation of negotiations. The appraisal establishes the lowest amount the condemning authority may offer as the fair market value for the property. Don't let the term "negotiation" fool you – even when property is acquired without formal condemnation, it is not an arm's length transaction between a willing buy and a willing seller, each possessing equal knowledge, motivation and bargaining power. If the condemning authority and the property owner cannot come to an agreement as to value, the condemnor has the power to initiate condemnation proceedings either by formal hearing or action in superior court.

IV. Formal Condemnation Procedures

There are three general methods by which a condemning authority can seek to formally condemn property, depending on the nature of the rights being taken and the type of public project. With all three methods, all property interests on or in the subject property must be named in order for clear title to the property to be acquired. Not every method is employed or available in all states and a particular state may follow a different rule or element of one of these methods in its jurisdiction.

A. Assessor Method

Although it is rarely used in most jurisdictions, the assessor method is a general condemnation procedure applicable to most public entities and for most public purposes. In a three assessor panel proceeding, the condemnor files a notice of condemnation on

the owner(s) that: (i) includes a description of the property and interests involved; (ii) sets the date of a hearing to be held on the matter; (iii) names the condemnor's assessor; and (iv) requests the condemnee to name an assessor. The assessors chosen by both the condemnor and condemnee mutually select a third assessor. After hearing evidence from both sides, a majority of the assessors must agree on the amount of just compensation. The assessors' authority is limited to issues of compensation. If either party disagrees with the amount of the award, they may request a jury trial *de novo* to determine just and adequate compensation.

B. Special Master Method

The special master method is the preferred alternative to valuation under the assessor method. A petition is filed with the court, setting forth the required property and interests, those facts as may be required for a full understanding of the matter, and a statement setting forth the purpose for the acquisition, i.e. the specific public use. Upon presentation of the petition, a judge sets the hearing and appoints a special master who is responsible for hearing evidence from both sides. The most important difference between the assessor method and the special master method is the authority of the special master to determine both issues of value and legal questions presented. Following the hearing, the special master issues an award of compensation and any party dissatisfied with the amount of the award may file an appeal requesting a jury trial *de novo*. The sole issue for the jury is to determine is valuation with the court responsible for reviewing any legal issues decided by the special master. Title to the property does not pass to the condemnor until the court issues a judgment confirming the award.

C. Declaration of Taking Method

The declaration of taking method is widely used in many jurisdictions by state, county, and municipality entities for public transportation projects. It is the only method where the taking or damaging of private property can occur without an evidentiary hearing to fix the amount of just and adequate compensation. Instead, the condemning authority relies upon the appraisal that likely was completed for the negotiation stage and deposits its estimate of compensation based on that appraisal into the court registry along with filing a detailed petition in court. The petition sets forth the required rights and interests to be condemned and title immediately vests with the condemnor. The petition also may include a request for physical possession of the property. An order issued by the court on the petition is considered conclusive as to the public use of the property and the authority to condemn. A condemnee dissatisfied with just compensation under this method must file an appeal for a jury trial *de novo*.

V. The Jury Trial

Under all three methods of condemnation, any dissatisfied party has the right to seek a determination of compensation by a jury. In general, the same rules of discovery and evidence will apply to a condemnation case with the condemnor in the "plaintiff" position and the property owner(s) in the "defendant" position. Written discovery and exchange of information, depositions and disclosure of lay and expert witnesses are conducted.

At trial, the burden of proof is upon the condemnor as the plaintiff to establish evidence of just and adequate compensation. If the condemnee disagrees with the amount of compensation or contends that other elements of value should be awarded, it has the burden of presenting evidence to establish its claim. Condemnor and condemnee both seek to

demonstrate to the jury their own version of the fair market value of the subject property, its highest and best use, the specific impacts of the project on the subject property, including consequential damages, and the broader scope and the extent of the parent tract, and the scope of the project as a whole. Expert witnesses provide the opinions, testimony and exhibits that form the basis for each side's contentions of value and damages. Typical experts include real estate appraisers, business appraisers, accountants, engineers, land planners and other professionals. To be effective, the expert testimony must be persuasive, it must be accurate, and it must be admissible.

In condemnations involving multiple parties, a jury may award the total just and adequate compensation in one award without allocation unless the parties request separate verdicts. Following completion of the trial, the parties must petition the court for allocation among the various interests if the parties are unable to agree upon the proper allocation.

VI. Core Valuation Concepts for Just and Adequate Compensation

Just and adequate compensation is defined as the amount owed to a property owner for the taking and/or damaging of property with the intent of placing the property owner in as good as position as if the taking had never occurred. The "just" and the "adequate" portions include not just the value of the rights and interests being acquired, but also the damages to the remainder, if any. The primary measurement of just and adequate compensation is "fair market value". The term is readily defined as the price a willing but unpressured buyer would pay a willing but unpressured seller in a voluntary transaction with both parties are aware of the benefits and detriments of the property and accounting for the highest and best use of the property. Although the definition of fair market value is straightforward, the variables involved

in calculating the value can easily complicate an award of just and adequate compensation award.

A. Date of Taking

One of the most fundamental concepts in eminent domain law is that compensation must be determined as of the date of the taking. This is the date on which the legal taking or damaging of the property occurs, and the date on which the condemnee's right to recover compensation is fixed. In most cases, the legal date of taking can be stipulated by the parties, but in no event can the date of taking precede the date on which any condemnation pleading are filed. Evaluating the full extent of damages requires knowing the characteristics of the property on the date of taking, including various property interests and relationships, current fair market value, vacancies, capital improvements, renovation or restoration needs, and environmental conditions.

B. Highest/Best/Use and Zoning

Real estate value is limited by 1) physical factors and 2) governmentally imposed restrictions, such as zoning. While the physical condition of the property may be readily determined, governmental restrictions may be more difficult to ascertain. Compensation in a condemnation proceeding considers both factors in determining the fair market value of property for its highest and best use. When real estate is valued, the highest and best use is not always its present use or even the current zoning of the property, but may be any use that can be anticipated with reasonable certainty that would enhance market value. Reasonable probability of rezoning is the most common application.

C. Cost to Cure or Mitigation

The damage to the value of a remainder property can include a “cost to cure” or mitigation value that reduces the consequential damages. Whether a condemnation involves an actual partial take, or a constructive full take, a “cost to cure” plan often is necessary to minimize damages to the property or for a business to continue operating after the take occurs. The cost to cure is not awarded as a separate item of recoverable damages, but instead, is included in determining the amount of consequential damages or business damages that are recoverable.

D. Access Rights

The loss of access refers to the legal right of ingress to and egress from the property to an adjacent public road and from there to the system of public roads. The property need not actually use the right of access in order to have a compensable interest. To be compensable, the interference with this right must limit or obstruct access within the boundary of the property to the public road. Median dividers or a change in traffic flow in front of the property is not a compensable loss of access.

E. Leaseholds

The measure of compensation is the fair market value of the remaining unexpired lease term, which is appraised by comparing market rent of comparable property with the rent being paid under the existing lease. No claim for leasehold value exists if the landlord terminates the lease before the condemnation, or the lessee abandons the property prior to the date of taking due to the pending condemnation.

F. Business Damages

In a small number of jurisdictions, owners are permitted to recovery business damages or value as a separate element of compensation. Even these jurisdictions vary as to when and how much business damages are recoverable. A condemnor is not required to include business damages in its initial estimate of just and adequate compensation, and a business owner has the burden of proving business damages. Successfully recovering business damages will require a showing of uniqueness between the property and the business.

VII. Appraisal of Property in A Condemnation Proceeding

There are three generally accepted appraisal methods employed in determining fair market value – the Sales Comparison Approach, the Income Approach and the Cost Approach. Each method involves appraising the fair market value of the subject property as a whole as of the date of taking. With a partial taking, appraisals generally include: (i) the value of the “before” condition of the property in the market without any taking; (ii) the value of the rights or interests taken, typically based on a price per square foot or a price per acre; (iii) the remainder property or the actual amount of property after the taking but without any consideration of damages; and (iv) the remainder property in the “after” condition considering all of the impacts caused by the taking or the project. A condemnation appraisal is both science and art with subjective judgment of the appraiser.

Depending on the jurisdiction, each of the appraisal methods may be used alone or in conjunction to arrive at just compensation:

- **Sales Comparison Approach:** Compares and contrasts sales of similar properties in the market area to the subject property, with adjustments made for location, size, time,

zoning, marketing factors, view, and other factors. This is the most commonly utilized method of appraising real property.

- **Income Capitalization Approach:** Determines the present value of real property based on an income stream less the expenses of the property. Two methods are direct capitalization of one year's income or discounted cash flow.
- **Cost Approach:** Determines value based upon the estimated replacement cost or value of the improvements, plus the value of the land as if vacant. The cost approach is rarely used as the sole basis for appraisal and is more typically used as a backup measurement.

Real estate appraisers are heavily relied upon to determine fair market value and damages, using one or all of these methods. An appraisal report is the most compelling foundation in determining just compensation. In addition to qualified expert appraisers, a property owner may be permitted to testify as to the market value of property as long as he or she has a factual basis for forming a correct opinion, including familiarity with the property, knowledge of sales in the area, and knowledge of land sales in the community. A trial judge has discretion to determine the competency of a non-expert witness, which will not be overturned in the absence of manifest abuse.