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Eminent Domain Trials: Lessons Learned the Hard Way

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If you attempt to learn and understand all of the eminent domain laws and procedures around the country, prepare yourself for a very complex Venn diagram system. The fifty states vary greatly in statutes, rules and regulations alike.

The one true constant, however, in every single jurisdiction across the fifty states is for the trier of fact to answer is how much just and adequate compensation should be awarded for the property taken or damaged? This is because the Federal Constitution and State Constitutions alike prohibit the taking of property for a public purpose or use without the payment of just and adequate compensation. *See US Const. Amend 5.* The requirement of just compensation provides that the government shall pay for all property interests taken in order to make the property owner whole, or in as good a position as if the property had not been taken. *See Almota Elevator & Warehouse Co. v. United States,* 409 U.S. 470 (1973).

The answer of what is just compensation is comprised of two distinct elements -- the part taken and the damages to the remainder, also known as consequential or severance damages. *See Wright v. MARTA,* 283 S.E.2d 466 (Ga. 1981). What actually makes up each element differs among the states as not all losses suffered by a condemnee are compensable in every jurisdiction. Speculative or sentimental value and pre-condemnation losses are never recoverable. *60 AM. JUR. TRIALS 447 §5 (2008).* Other damages, such as business loss, vary between federal and state jurisdictions with different burdens of proof. *Compare United States v. Powelson,* 319 U.S. 266 (1943) (no business loss in federal actions) *with Bowers v. Fulton County,* 146 S.E.2d 884 (Ga. 1966) (recoverable as separate element). Condemnation cases are unique in that neither side has the burden of proving a value by a preponderance of the evidence, but rather each must prove the value it seeks. *60 AM. JUR. TRIALS 447 §7 (2008).* Instead, there are burdens in proving certain foundational aspects, such as an increased value due to project influence, or the probability of a zoning change to support highest and best use. *See Nichols on Eminent Domain § 8A.01[8], § 12B.12*.

Even with the most skilled litigator, a condemnation case can be won or lost on the evidence itself and how it is presented. Jurors want to hear the story behind the evidence. They also tend to want to do what is fair and equitable. The best evidence

in the world will not save a case if the jury finds the story is too dramatic or not dramatic enough, or the witnesses are overreaching or arrogant, or the evidence is too complex. As a whole, the jury wants the lawyers in the courtroom to: (1) keep it simple; (2) emphasize the facts over opinions; (3) keep the trial moving because they have more important things they could be doing; (4) speak clearly and loudly; (5) use good visuals; (6) be prepared; (7) be professional and polite to everyone, including opposing counsel; (8) open and close with clarity and brevity; (9) show them you care about your client and their claims; and (10) treat them as equals and avoid at all costs talking down to them. *See S. Macpherson, Viewing Your Case Through the Juror's Eyes,* CP006 ALI-ABA (January 2009).

1. Proving Value

To help the jury answer the question of just and adequate compensation, fair market value is the measuring stick that is standard in all jurisdictions: what would a willing buyer pay and what would a willing seller accept in an arm's length transaction with no compulsion to buy or sell? *See United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). For the practitioner, the tricky part is translating this standard into dollars that truly measure what has been taken and what has been damaged by the taking. Is just and adequate compensation always the same as fair market value? What kind of evidence should you consider using to prove fair market value as the condemnor? As the condemnee? What evidence can you present in the jurisdiction?

There are a few basic concepts that frequently arise in most condemnation cases that govern fair market value and will drive the kind of evidence introduced. Of the three approaches to valuation, market, income and cost, the market approach in which the property is compared to sales of other similar properties is generally preferred to prove fair-market value. *See 40 AM. JUR. PROOFS 3D 395, § 11 (2008)*. The price paid by the willing buyer to the willing seller is determined as of a certain valuation date – the date the condemnation is filed, the date of possession or title vesting, or the date of the trial or judgment. *60 AM. JUR. TRIALS 447 §9 (2008).* A property's highest and best use is referred to across the board as the most profitable use that is legally permissible, physically possible, and economically feasible. *See 5 Nichols on Eminent Domain, § 12B.12 (3d ed.).* It is commonly at issue, particularly when the current use and the highest and best use differ. This paper is not broad enough to cover all aspects of proof. Below is a discussion of some of the more disputed sources of proving value.

(a) Evidence of offers to sell/offers to buy the subject property

Pre-take offers on the subject property may be relevant to the question of fair market value of property. However, in most jurisdictions, an offer is not admissible as direct evidence of value primarily because it is not an arm's length completed transaction. Similarly, a mere option to purchase the condemned property is inadmissible because no transaction has occurred. Unaccepted offers can be easily fabricated, cannot be verified, and may be made with no expectation of performance. As a result, most states prohibit evidence of such offers even if made by a bona fide third party. *See 5 Nichols on Eminent Domain, § 21.4 (3d ed.).* Evidence of an offer,

however, may be used to bolster an appraiser's opinion of value, or for impeachment purposes on cross examination of the property owner. If the offer is close enough in time to the date of valuation, it may be admissible against the landowner. *See United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (N.D.Ga. 1942). Such evidence is often the subject of a motion in limine by condemnor and condemnee alike because it poses risks for both sides.

(b) Evidence of the price paid by the property owner for the subject property

Similar to unaccepted offers, the price paid by a condemnee on the subject property may be relevant to the question of fair market value. Whether it is admissible as direct evidence of value depends on how close to the date of valuation the sale occurred. The testifying appraiser may want to rely upon it as a comparable sale. The impact such evidence has also depends on its proximity to the date of valuation. The decision to use evidence of the pre-take price paid for the property is a strategic one. If the price paid by the property owner before the taking supports her value, then she should consider using it.

(c) Admission of offers to settle between condemnor and condemnee

Should pre-take offers to settle ever be used as evidence of value or for impeachment purposes? The short answer is never on any day of the week and twice on Sundays. Pre-take settlement discussions in any type of litigation are generally excluded no matter the circumstances. In the context of a condemnation, pre-take offers to "sell" to the condemnor should be excluded as evidence of market value. *60 AM. JUR. TRIALS 447 § 43 (2008).* They are highly prejudicial because they are offers of compromise that often occur without the benefit of counsel. A property owner who may not understand his or her rights to compensation may feel compelled to accept a lower offer that the value later asserted at trial. The negotiations are by no stretch of the imagination at arm's length and thus, are not reflective of true fair market value. A motion in limine should be made to exclude all evidence of negotiations and offers to settle.

(d) Evidence of the sale of remainder property

If the subject property is sold after the date of taking, the question arises as to whether the sale is relevant to fair market value and should be admitted. If the property owner claims the remainder property is so damaged by the taking as to impact fair market value, then a sale close in time to the valuation date could be admitted as direct evidence or for impeachment purposes. Of course if the property owner sells the remainder property for a higher value, then a claim for consequential or severance damages due to the taking can be severely impacted. It is similar to allowing evidence of a comparable sale that occurs at some point after the date of taking. Some jurisdictions admit this evidence of the sale if the sale was closed soon after the taking

or valuation date, the market remained stable in the interim, and the taking had no impact on the sale price. *60 AM. JUR. TRIALS 447 §42 (2008).*

(e) Zoning changes to prove highest and best use

In proving value, a property owner is not limited to only the subject property's current use. When the proposed use is the property's highest and best use but zoning restrictions limit that use, the condemnee is entitled to show the probability of a zoning change and how it impacts on market value. The burden of proving a reasonable probability of rezoning falls on the condemnee to show that the property can be adapted to the proposed use; the use is reasonably probable within a certain period of time; and proposed use enhances the market value of the property. *See Clark v. Mississippi Transp. Com'n, 767 So. 2d 173 (Miss. 2000).* To be admissible, jurisdictions vary on what constitutes a "reasonability probability" and how to prove it. *See, e.g., Unified Gov't v. Watson, 577 S.E.2d 769 (Ga. 2003) (evidence of rezoning admissible upon showing reasonable probability or possibility).* There are generally two views – evidence of an actual probability that the zoning will be changed in the reasonably foreseeable future versus evidence of any factor that may influence value, including the possibility of a zoning change. *40 AM. JUR. PROOFS 3D 395 §18 (2008).*

The condemnee and his appraiser must be careful not to value the property as if the use were an accomplished fact. Instead, the property is valued at a price that includes the ability to develop the property for the proposed use. *See, e.g., West Jefferson Levee Dist. V. Coast Quality Constr. Corp., La., 93-1718, 640 So.2d 1258 (La. 1994).* Certain factors should be considered and introduced to support a probable zoning change probable:

- Rezoning of surrounding properties
- Institutional support for the zoning change, i.e. school, park, church, bus stop tend to support higher residential density and a walking community
- County or municipal land planning in the area
- Demographics and growth patterns,
- Character of the neighborhood, i.e. older homes being purchased, demolished and replaced with McMansions
- Demand in the area for the proposed use
- Sales of similar properties at prices supporting the new zoning
- Physical characteristics of the subject and of nearby properties and,
- Age and circumstances of the zoning ordinance at issue

- History of rezoning in the jurisdiction

40 AM. JUR. PROOFS 3D 395 §16 (2008). For both condemnor and condemnee, having an expert appraiser with rezoning experience helps the jury understand the likelihood or not of the zoning change. It is important to note that zoning changes often involve a very political process in the particular jurisdiction. No particular witness can testify for certain that the zoning will or will not happen. On cross examination, this fact alone can help steer the jurors towards a conclusion of probability.

(e) Bank appraisals, tax assessments and other sticky evidentiary issues

Tax assessments and other similar assessments should be excluded as direct evidence of fair market value for several reasons. Tax assessors rarely have their hand on the pulse of the market. Valuations by Uncle Sam are done in a vacuum without the input of the property owner, i.e. the seller in the transaction. Assessments in which the value of the property is determined by "someone other than the taxpayer and on which no oath was administered" are not indicative of fair market value. *See Gruber v. Fulton County, 111 Ga. App. 71, 140 S.E.2d 552 (1965).*

Property valuations, such as a bank appraisal, prepared outside the context of the condemnation and on a date other than the date of valuation are inadmissible as substantive evidence when used for purposes of showing a property's value. A bank appraisal prepared before a condemnation does not reflect market value because it only assigns a value to the property in order to determine the level of financing available. The appraisal process for purposes of financing can be much different than the recognized comparable sales approach in a condemnation, primarily because bank appraisers use listings and offers.

Such appraisals also are not admissible for impeachment purposes as a prior inconsistent statement if the appraisal is not connected in time and circumstances to the date of the taking. To be properly admitted, the prior statement must be relevant in time and in circumstances in order to establish the inconsistency. *See Brookhaven Associates v. Dekalb County, 371 S.E.2d 231 (1988).*

In those states that require an initial deposit of funds, evidence of the condemnor's estimate of value and deposit into the court registry upon filing the condemnation is excluded. The jury should never consider such evidence in determining just and adequate compensation. *See 60 AM.JUR.TRIALS 447 § 44 (2008).*

2. Expert vs. Lay Witnesses

Condemnation cases are built around witness testimony and credibility. The use of an expert appraisal witness to put a stamp of approval on a claim for damages is almost universally favored. The appearance of a qualified witness with the proper credentials and experience who explains value on an impartial basis can provide a lasting impression on the jury. If the property at issue involves more complex issues

than a simple strip take, other foundational witnesses may be required to establish the facts the support the appraiser's opinion of value. Engineers, soil experts, surveyors, land planners, and environmental experts can assist with issues such as rezoning, future development, wetlands, and flood zones.

When it comes to appraisal experts, jurisdictions differ as to the specific qualifications of and the evidentiary basis for an expert's opinions. For example, many states require that the buyer and the seller of a comparable property be introduced into evidence for the expert to be able to rely on the comparable sale. At a minimum, an appraiser should be certified in the jurisdiction, provide a written engagement letter that clearly establishes that the appraiser has no interest in the outcome, and have a working knowledge of the applicable law and appraisal standards. For both condemnor and condemnee, an expert must have independence, impartiality and the basic qualifications to assist the trier of fact in understanding the complex field of appraisals. The appraiser advocates for his or her opinions, not the property, not the owner or condemnor, and not the outcome of the case. In general, it is best to hire an appraiser who testifies on both sides of the "v" to bolster his credibility, maintain independent opinions, or just avoid being painted as a gun for hire on cross examination.

At trial, the condemnor is limited to relying on experts to prove value. The expert's testimony at the right time is the crucial step for the condemnor at trial and should be reserved until he or she can give the greatest impact or support for the case. For the condemnee, however, an expert witness is not the only option or even the best option in every case. The property owner should always testify about the property itself not only because she has the most information to offer, but also because she can personalize the property for the jury. In some cases, the owner can and should also testify as to value. Some jurisdictions permit a property to give an opinion of value of the property being taken or damaged without qualifying as an expert. *See 7 Nichols on Eminent Domain § G1.O7[1] (rev. 3d ed. 2007).* The only requirement is that the owner be able to explain the basis for or the process of reaching her conclusion of value, including familiarity with the property, the market area, and values in the market. *See, e.g., City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986).*

The testimony of a property owner can have a greater impact on the jury given the correct circumstances. A lay witness may help break the battle of the experts because he or she may be the most qualified to testify in terms of personal knowledge of the property or the business or the home. The downside of course is the property owner risks appearing sentimental, unrealistic given market demands, or even down right greedy. A condemnor's professional and courteous cross examination of the owner that avoids beating up the witness while attacking his credibility can provide an effective comparison to the other side's highly qualified and impartial expert.

3. Demonstrative Exhibits

Demonstrative exhibits can be critical to winning a case because they can drive home a point or concept better than oral testimony alone. Juries tend to be visual. The best demonstrative exhibit is the property itself. If the judge will allow it, a site

visit can be extremely useful, especially to show changes in access, visibility, grades, etc. Ongoing construction or physical changes to the property between the date of taking and the trial, however, may provide grounds for objection by either side.

If a property visit is not an option either legally or strategically, demonstrative exhibits should be used to fill the gap between seeing and hearing. It is easier for a jury to understand the concept if they can see and even touch a tangible item representation of it during the testimony. For example, if the highest and best use of vacant land is commercial development, an aerial photograph of surrounding developed property or a land development plan showing potential development helps the jury see the possibilities. Use of any one or a combination of demonstrative exhibits should include:

- Photographs of both the subject and the comparable properties;
- Engineering plans of the public project;
- Zoning maps showing current or future zoning;
- County or municipal land planning maps;
- Topographic maps;
- Aerial photographs before and after the project;
- Development overlays showing development potential;
- Comparable sales maps;
- Damage summaries or charts showing conclusions of value;
- Traffic count charts;
- Mitigation plans;
- Site or as-built surveys;
- Market studies showing relocation efforts (if a business is involved);
- Video of the property showing access in/out of and circulation within the property.

To ensure admissibility, exhibits should depict the property, its conditions or the comparable as close to the date of taking as possible. If for example, construction is ongoing during trial, some jurisdictions disallow photographs because it is not the permanent state of the property and can be prejudicial to the condemnor. The rules of evidence in the jurisdiction will govern what can be shown on the property. As a general rule, demonstrative exhibits must be authenticated by a witness. It is not necessary that the witness be the one who prepared the exhibit. Rather, the witness must be able to identify the exhibit, state that it is an accurate representation of what they observed or what they are familiar with, and that it was prepared under his supervision or control. *See Fountain v. MARTA, 249 S.E.2d 296 (Ga. App. 1978).*

4. The Market Factor

Fair market value as of the date of valuation is the baseline measurement by which condemnation cases are governed. To state the obvious, a boom market benefits the property owner. The condemnor must take the property as it was on the date of taking and do its level best to poke holes in that market. Well what happens if the bottom of the market falls out just before the taking? Between the date of taking and the trial date? What if the drop is the worst recession in U.S. history caused by such abnormal factors as fraud? Should the property owner be subjected to conditions in such a market?

The condemnee should argue that the current economy is an anomaly and the conditions giving rise the current market are so unusual that the property owner should not be punished by and the government should not be allowed to benefit from an artificially depressed market. The jury should not be required to take into consideration the current market, but should assess the value as if today's market had not occurred. It is analogous to the project influence rule recognized in some jurisdictions – that any enhancement or depreciation in value caused by the project for which property is condemned must be disregarded in determining fair market value. *See e.g., Williams v. City and County of Denver, 363 P.2d 171, 174 (Colo. 1961).* Thus, fair market value should be determined based upon the price that a willing buyer and willing seller would agree on without compulsion or impacts caused by

The argument of valuing property under more normal circumstances is not new in condemnation law. In a case dating back to 1873, *U.S. v. Inlots, 2 Am. Law Rec. 577 (S.D. Ohio 1873), aff'd 91 U.S. 376,* the court examined the unusual market conditions, finding that it would be unfair to subject the property owner to the depressed values. Thus, the court charged the jury that it should assess the property's value before the market had occurred. In *Howell v. State Highway Department, 167 S.C. 217 (1932),* the Supreme Court of South Caroline upheld the trial court's ruling that fair market value was defined as "a fair sale at normal times," and not the value during the Great Depression. In 1938, the Court of Appeals of New York in *In re Board of Water Supply of New York City, 277 NY 452,* found that the general rule of measuring compensation as of the date of taking must yield to exceptional circumstances. It further found that fair market value does not encompass panic value, auction value, speculative value or artificially depressed or inflated values. *See also D.R. Kornegay v.*

City of Richmond, 41 S.E.2d 45 (Va. 1974) (finding just compensation is not measured by panic, but what is fair, economic, just and equitable value under normal circumstances). More recently, the appellate division of Louisiana held in *Vela v. Plaquemines Parish Gov't, 729 So.2d 178 (La. App. 4th Cir. 1999),* found no error in the trial court's ruling that that depressed economic conditions leading up to the taking were abnormal. The appellate court recognized, however, that such conditions may extend past the point of being abnormal, and that the determination for timing was a fact question.