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LAND VALUATION

ADJUSTMENT PROCEDURES AND ASSIGNMENTS

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APPRAISAL INSTITUTE

CHAPTER

25

Eminent Domain: Partial Takings

Before discussing partial takings under the power of eminent domain, this chapter will review the legal concept of bundle of rights, which is defined as all the rights of ownership inherent in fee title to real property. This bundle includes the right either to use or not to use a property, the right to lease all or part of the property (rights or physical division), and the right to sell or to convey property interests to other parties via a will, life estate, or other means. The full enjoyment of these property rights is limited by certain public and private constraints, such as the police power of government and the right of eminent domain.

Police power is the sovereign power of government to restrict the use of a property to protect the well-being of its citizens. The police powers of a community are exercised through planning, zoning, building codes, and traffic and subdivision controls. *Eminent domain* allows a government or its agency to acquire all or part of a parcel for the common benefit of its citizens by due process of law. Reasonable compensation to the owner is required but consent is not necessary for the acquisition. *Condemnation* is the process that authorized units of government and public utility companies use to take private property for public benefit upon payment of just compensation to the property owner.

This chapter focuses on partial takings in which there is severance of the property rights. The full acquisition of a property under eminent domain is no different than appraising for other purposes such as for a sale or mortgage loan.

Distinction Between Compensable and Nocompensable Actions

The government exercise of its police powers for the protection of the general health, safety, morals and welfare of citizens is not a compensable action. Generally, when the safety of citizens is protected by installing a traffic control such as a median strip in a street, creating a one-way street, prohibiting left turns, or creating a cul-de-sac by closing a road, compensation is not paid to the property owner. Also, compensation

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seldom is paid to an owner when no property is taken and traffic is diverted to relocate a highway (sometimes referred to as *circuitous travel*). On the other hand, when there is a physical taking of a property or property rights via eminent domain, the affected property owner is entitled to compensation from the condemning agency. This payment is called *just compensation.*

Just compensation is provided for in the Fifth and Fourteenth Amendments to the U.S. Constitution. The logic behind the payment of just compensation is to make the affected property owner financially whole. It would be virtually impossible to replace the property taken with other equivalent property so a monetary award is substituted. The amount awarded the property owner should offset any loss in value to the property resulting from the eminent domain action. This objective of making the condemnee financially whole is also the goal if the appraisal report. The value should be the same whether the appraiser is representing the condemnor or the condemnee.

Basis for Payment of Just Compensation

The two elements of just compensation are payment for that part of a property physically acquired as part of a public project, such as construction of a highway, and payment for any loss in value to the remainder property. The principal causes for loss in value to the remainder are diminished utility and reduction of the highest and best use from the use enjoyed prior to the taking. Some specific causes for loss in value discussed in this chapter are odd-shaped remainders, superadequate remainder improvements, isolated remainders, land-locked remainders, road grade change, and impaired access. This chapter also discusses how to properly appraise the value of trees and landscaping in partial takings and how an appraiser should prepare and present expert testimony.

Valuation Procedure

There are two basic valuation procedures used to estimate the total just compensation due to a landowner in partial takings. The federal rule, used in some states, is known as the *before and after rule.* It holds that the measure of just compensation is the difference between the value of the whole property before the taking and the value of the remainder after the taking. Under this set-off rule, special benefits are allowed to offset both the value of the land acquired by the condemnor and any damages to the residue. Thus, it is possible that the landowner may receive no compensation even though a condemnor has taken property. In some states, however, special benefits may be applied only against damages to the residue. In still other states, the law is unclear as to which value

elements benefits may be applied against. It is essential that an appraiser understand clearly if the federal before and after rule applies or if a modified before and after rule is applicable.

The second valuation procedure described in this section pertains to partial takings of property under the modified before and after premise. The following steps may be used to estimate the total just compensation that a property owner should receive.

1. Estimate the value of the whole property based on market evidence. The whole property, sometimes called the *larger* or *greater parcel*, is a continuous, unbroken tract under the same ownership. This value estimate is not influenced by the effect of the proposed facility on property use.
2. Estimate the value of the part taken. This includes any fee acquisition and permanent and temporary easements. The usual method applied is the equal-unit-value method. This method assigns the same unit value used in the estimated value of the whole property. For example, assume that 0.50 acre is acquired from a property containing 5.0 acre and worth $20,000 per acre. The value of the part taken would be 0.50 acre times $20,000, or $10,000.
3. Deduct the value estimated in Step 2 from the value estimated in Step 1. This amount represents the value of the remainder, without any consideration of enhancement (special benefits) or severance damages resulting from the proposed public improvement.
4. Estimate the value of the remainder parcel, taking into account the value influence of the proposed improvement and the utility of the remainder.
5. Estimate damages to the remainder, if any. This calculation is made by comparing the values estimated in Steps 3 and 4. If the value reported in Step 4 is less than shown in Step 3, severance damages have occurred. If the value in Step 4 exceeds the value in Step 3, there are no damages and the landowner's just compensation is the amount estimated in Step 2.
6. Compute the total just compensation, if there are damages, by adding the value of the part taken (Step 2) to the severance damages suffered by the remainder (Step 5).

These steps are illustrated in the following example, which is based on the commercial property shown in Figure 25.1.

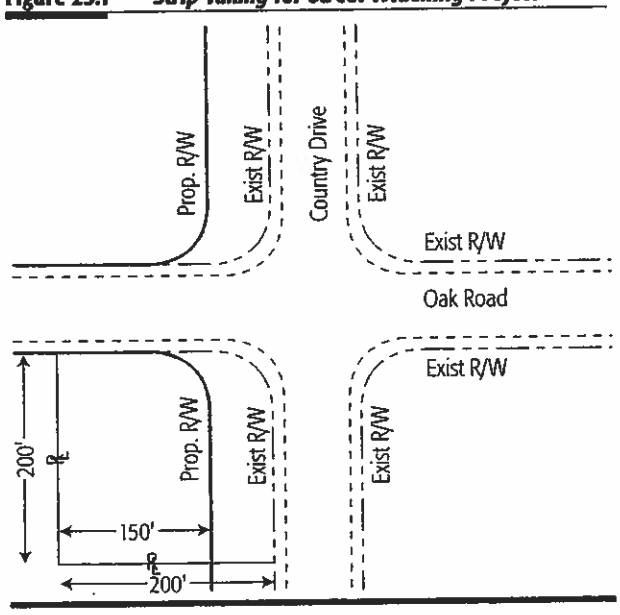
1.	Value of the whole property	$500,000
2.	Less value of the part taken	100,000
3.	Equals value of remainder, unaffected by taking	$400,000
4.	Value of remainder as affected by taking	350,000
5.	Severance damages due to impaired highest and best use	$50,000
6.	Total just compensation (item 2 + item 5)	$150,000

Odd-Shaped Remainders

Frequently, odd-shaped residue parcels are a product of highway construction. A fundamental question that the appraiser must raise is, "What can be done with this remainder?" Imbedded in this question are other related queries such as: What is the highest and best use? Does the parcel fulfill the requisite setback and minimum area requirements for this use? If public utilities are not available, will the site permit installation of a well and septic system with ample distance between the well and drain field, and is there ample area for a reserve drain field, as required by the locality? and How strong is demand for the remainder site? The demand for an irregular-shaped parcel often comes from an adjoining owner who can use the site for additional parking, storage, advertising, maintaining a clear view of the business for travelers, or achieving density requirements for the present or prospective uses. Typically, these parcels suffer a loss in value.

The highest and best use of the remainder will be influenced strongly by its shape and its ability to meet the zoning ordinance requirements. Once highest and best use is determined, it is necessary to consider if the parcel will need to be rezoned to achieve this use and if it is likely that rezoning will be allowed. Whatever the outcome of this analysis, the appraiser must obtain recent land sales that are reasonably similar in shape and highest and best use.

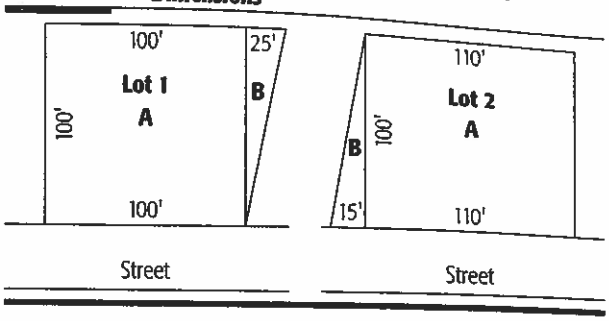
Figure 25.1 *Strip Taking for Street Widening Project*



One prospect available when appraising remainder parcels like the one shown in Figure 25.2 is to locate regular-shaped sales and then make an adjustment to reflect either the additional land at the rear (Lot 1) or proportionately more road frontage (Lot 2). Any

adjustment should be market-derived, but a relatively higher unit value would be assigned to the lot with the triangular base on the street. A proportionately lower value would apply to a site that had its triangular base at the rear of the lot. For example, 65% of the regular-shaped lot's value would apply to the triangular part with its base fronting the street and perhaps 35% of the normal unit price would be assigned to the triangular-shaped part with its base along the rear property line.

Figure 25.2 ***Lots with Different Frontage and Rear Dimensions***



Lot 1		Lot 2	
(A) 100 feet @ $1,000	= $100,000	(A) 110 feet @ $1,000	= $110,000
(B) 25 feet @ $1,000 × .35	= 8,750	(B) 15 feet @ $1,000 × .65	= 9,750
Total value of Lot 1	$108,750	Total value of Lot 2	$119,750

Diminished Size and Road Frontage

Diminished size and road frontage damages occur when the functional balance between the parcel size and the size of prospective improvements on the parcel is disturbed. Although the site is vacant, the nature and amount of the right-of-way taking may leave the remainder parcel too small or narrow to satisfy its former highest and best use. A modern three-bay service station operation can be used to illustrate this situation. A 200-ft. by 200-ft. site has sufficient parking, braking space, and turning radius for prospective customers' vehicles. A street widening project reduces the frontage of this corner site to 150 feet, greatly reducing parking for vehicles being serviced, limiting the turning space for cars, and diminishing the space for underground fuel storage tanks. After the taking, the reduced site is incapable of supporting its former highest and best use. Consequently, its value is reduced sharply. In fact, the site will no longer support an auto service operation and the gasoline trade will also be reduced significantly. Further proof of the after value can be obtained through analysis of similarly zoned, narrow sale sites. Also, study of former service stations that have reverted to lesser uses such as repair shops and small engine repair businesses will further corroborate the diminished value due to loss of road frontage.

Isolated Remainders

Damages to a remainder can also be caused by an isolated remainder, as in the case of a large operating dairy farm. Over the years, a farm owner has increased his herd with a proportionate increase in barns, silos, milking parlors, and implement sheds. A proposed limited-access interstate highway will sever this 600-acre farm. Prior to the right-of-way acquisition, the farm's pastures and cropland supported 200 cows[1]; afterward, there was only enough accessible acreage to support 100 cows. The dairy-related buildings were affected negatively in this same proportion. The apparent damages due to excessive operational capacity totaled $250,000.

In an attempt to minimize the loss to the farmer, the appraiser asked the state highway department to price the cost of building a cattle tunnel under the interstate highway. The $83,000 cost of this facility (a 200-ft. long, 5-ft. by 7-ft. concrete box culvert with concrete wing walls) was much less than the initial value loss to the remainder. If access to the landlocked remainder was needed for farm equipment, then this cost to cure damage estimate would be insufficient to compensate the landowner fully. In this situation, the condemnor may request that the appraiser provide two appraisals—one that shows the total just compensation without the cattle tunnel and another that includes the added costs and lower amount of damages. Then, the condemnor's agents can negotiate with the owner on the basis of the least expensive basis.

Landlocked Remainders

A severe form of severance damage occurs when a parcel is severed in such a way that it becomes landlocked. The only access to and from a landlocked parcel is over the lands of other, adjoining property owners. The acquisition greatly diminishes the utility of the property.

A landlocked remainder's value is diminished because the land is no longer contiguous with the original larger parcel. Who would want to buy a landlocked tract? Without access to the parcel or the possibility of gaining an easement for access purposes, most people would not be interested.

The market for landlocked tracts is limited essentially to one or more adjoining property owners. The degree of motivation must be considered when viewing this limited number of prospective buyers. The value of the remainder parcel declines in inverse relationship to the number of adjoining owners. A landlocked parcel has a certain nuisance value if one

1. Depending on the soil and climatic conditions, 2½ acres of pasture may be required to support a mature dairy cow weighing approximately 1,500 pounds and 1 acre of cropland per cow is needed to produce corn silage, which is stored in silos.

adjoining property owner is fearful about how another owner may use it. However, if there is only one adjoining owner who has no intention of granting access to the landlocked parcel, then there is little incentive for him or her to purchase the land. He or she can continue using it as a buffer. It may be worth more to him or her if it has a beneficial use, permitting timber harvesting or business expansion onto the land.

As estimate of value is best achieved by locating sales of similar landlocked parcels or properties with severe terrain or wetlands which cannot be accessed readily or used for any economic purpose. Insight can be gained by studying highway before and after sales of land affected by right-of-way construction and severance, even if the parcels are of a different type with different zoning. For example, if there is a pattern of landlocked parcels selling for 30%–40% of their former unit price, this price relationship can be used to temper the value indication derived by other means. Similarly, landlocked sales may be compared to nearby unencumbered land sales to derive the percentage of price reduction.

Impaired Access

There are several possible scenarios concerning impaired access for a remainder property. This issue generally relates to limited-access highways such as interstate highways or urban expressways. In one situation a limited access road may traverse the rear of a property. The owner is not deprived of road access because none existed before the construction. A second example is the construction of a limited-access road that severs a parcel, leaving part of it landlocked. A third situation occurs when a property loses frontage on an existing primary road and, after construction of the limited-access highway, is left with access on a service road. Several factors enter into this after-value equation. What is the highest and best use now versus the use before the taking? Has the remainder been enhanced in value due to its proximity to a new interchange and increased traffic flow on the mainline road? How does the traffic flow on the proposed service road compare to traffic on the previous road frontage? In some states, neither circuity of travel caused by dividing a highway or rerouting of traffic are considered legally compensable damages.

The following example is based on an appraisal and demonstrates how impaired access can reduce the value of a remainder parcel. The subject property is on Route 1, a two-lane road. The highest and best use of the property prior to the acquisition was to hold the property until there is ample demand for additional retail activities, public water and sewer are available, and the narrow, two-lane road is upgraded. Zoning was tourist commercial. A new highway, Route 2, is planned. After construction of Route 2, the existing Route 1 will become a service road along the northwestern line of Route 2.

Another service road will be constructed on the opposite side of Route 2. The distance from the subject remainder property to the nearest intersection will be approximately 5,400 feet, or 1.02 mile.

The average daily traffic volume on Route 1 in front of the subject parcel was 8,130 vehicles in the year of the appraisal. A traffic consulting firm survey conducted on behalf of the condemnor projected a daily traffic flow on Route 2 of 12,700, which is expected to increase to 19,000 vehicles a day in 10 years. The projected traffic flow per day on the service road once the road is open to traffic is estimated to be 3,700 vehicles. Thus, the amount of traffic directly in front of the property will decrease 54%, but it will increase 56% on Route 2 over the present Route 1.

The appraiser concluded that the remainder has essentially the same proposed uses as it had previously. It will benefit from the increased traffic flow along the new Route 2. However, it will not be as attractive as it was prior to the road construction because it will not be as accessible. It will take prospective customers longer to reach the remainder site. Thus, the remainder was estimated to have suffered a 35% loss in value.

Grade Change

A change in road grade occurs when a proposed highway is to be built either below or above the existing grade of an appraised property. Whether a change of grade is compensable is a controversial topic. The prevailing judicial view holds that an owner of an affected property can receive payment for damages due to a grade change. However, before an appraiser can estimate the extent of damages experienced, if any, he or she must determine if the grade change has diminished the highest and best use of the remainder property. For some uses, such as agricultural, it is possible that no damages occur as a result of a grade change.

Of course, the extent of the grade change will determine the amount of diminished utility and value experienced by a remainder parcel. The highest and best use and present activities on a site will influence the amount of damages, if any, resulting from a change in grade. Residential uses, which benefit from privacy and minimized traffic noise, would suffer less value loss from abutting a depressed roadbed than an elevated one. Commercial users generally prefer being either at road grade or slightly below it to gain an advertising advantage and visual exposure to vehicular traffic. Any value change should be judged from an analysis of similar sales. In some instances, a cost-to-cure approach may be used. A qualified engineer can estimate the cost to provide access to the site and any additional site preparation costs caused by the grade change.

Because highway construction generally will not have begun when the appraisal is conducted, the appraiser must rely on the right-of-way plans,

especially the profile sheets which will show the extent of the grade change once the road has been constructed. Figures 25.3 and 25.4 illustrate the adverse effects of a change of grade. Assume that the appraised parcel is the land situated between the existing roads (right and left) in Figure 25.3, and the secondary right of way at the top and an existing subdivision at the bottom of the figure. The developer-owner planned to develop the tract as a continuation of the residential subdivision at the lower end of the parcel. As shown in this figure, the parcel is severed by a proposed right of way. Figure 25.4 is the companion profile sheet for this project. The two existing rights of way will remain at grade with the proposed road passing over them. Thus, approximately 24 to 30 feet of fill material will be used to elevate the proposed roadway.

Figure 25.3 ***Proposed Right of Way Bisecting Parcel***

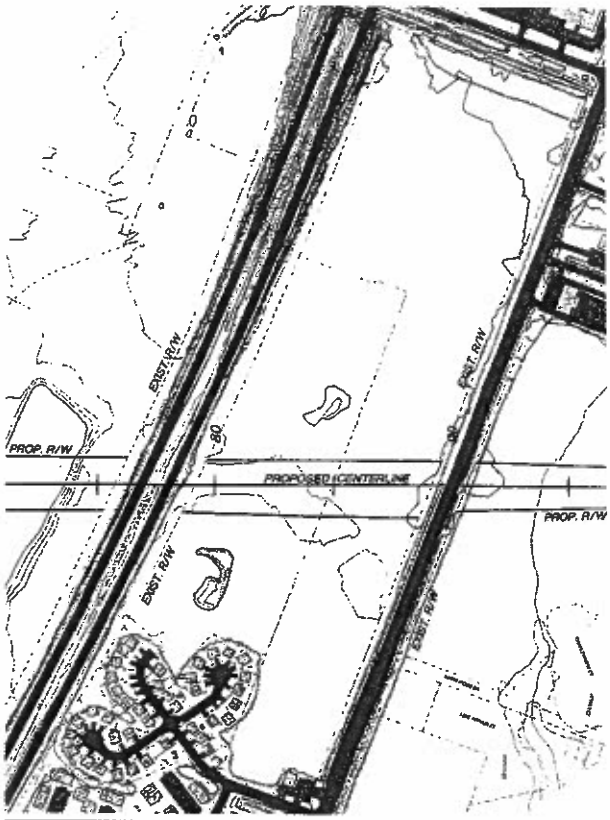
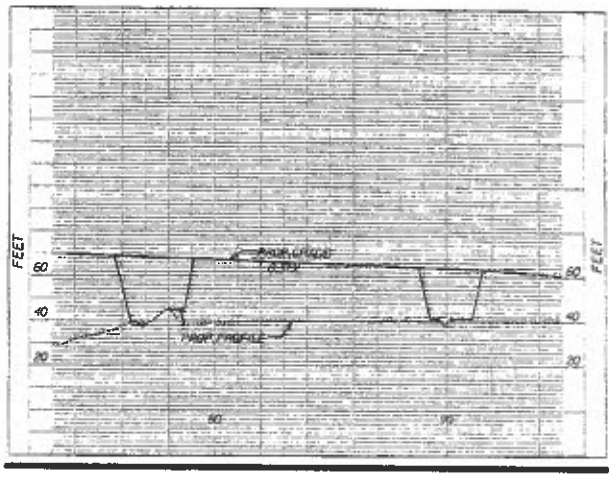


Figure 25.4 ***Profile of Proposed Right of Way***



Trees and Landscaping

In partial takings some landscaping is usually within the proposed right of way. There are two basic schools of thought on how to assign values to landscaping. One approach is to obtain an estimate from a landscaper or tree nursery as to the cost of replacing landscaping elements. The second approach is to determine the contributory value of any trees and landscaping the proposed construction acquires.

The appraiser is advised to use the contributory approach. First, ascertain the value of the entire property then allocate the value of the building(s), other on-site improvements such as fencing,

parking areas, accessory buildings, trees, and landscaping. In one particular road-widening project, several mature trees were to be lost because they were in the proposed right of way. The appraiser contacted a nursery to get an estimate of how much it would cost to replace these trees with similar ones. The total estimate to replace approximately one-third of the trees on the property exceeded the price paid for the parcel just two years earlier, including all of the trees.

Sometimes it is possible to locate similar land sales with and without landscaping and trees. While some adjustments invariably must be made, this approach can provide a basis for estimating how much these elements contribute to the overall value of the subject property. For example, suppose that the total value of a residential property is $500,000; the depreciated cost of the dwelling is $300,000; and the swimming pool, pool house, garden shed, driveway, walks, and fencing are worth $75,000. Now assume that comparable lots with trees and no landscaping in the same development sell for $100,000. Thus, the total value of the improvements and lot is $475,000, indicating a $25,000 value contribution for the landscaping. The contributory value of the trees is not so clear. However, it was discovered that two, open-field lots had sold recently for $90,000, implying that the trees contribute $10,000 to the value of the property.

Now suppose that a strip of the same property was being taken for a street-widening project and approximately 10% of the landscaping and 15% of the trees were within the proposed right of way. Further, the nature and maturity of the landscaping and trees within the proposed right of way were similar to the overall landscaping on the property. In this case, the owner would be entitled to receive a pro rata value of that part of the lot acquired, any damages to the remainder, plus $2,500 (10% × $25,000) for landscaping and $1,500 (15% × $10,000) for the trees lost to the street-widening project.

There will be instances in which an appraiser must retain experts to assist in valuing complex or large-scale landscaping components. Also, professional foresters may be required in appraising timber or ornamental trees.

Temporary Easements

Not all eminent domain acquisitions are fee takings or even permanent easements. Right-of-way construction projects generally require temporary space for storing equipment and access roads to get the heavy construction equipment to the construction site. In effect, the condemning authority is renting the land temporarily. There are several ways to appraise temporary easements. Two methods frequently used are value of rental loss and value of expected return. In applying either methods, the appraiser must be

thoroughly familiar with the characteristics of the defined easement area and determine if the temporary easement disrupts adjacent business operations or causes value losses beyond the easement area. In the examples considered here, the easements have no adverse effect on adjacent operations or property value.

Value of Rental Loss

It is determined that one acre of a parcel will be subject to a temporary easement. A representative of the condemnor's engineering department expects the clearing and construction project will take two years. This temporary easement site is on the edge of cultivated fields that presently rent for $75 an acre per year. Other neighboring farms rent for a similar amount. Thus, the amount due the landowner in this case would be $150 (2 × $75). While it would be mathematically correct to compute the present value of the rental loss, it is judged to be an unnecessary, and even complicating, step with no appreciable effect on the total amount. In this situation, the easement is for a short period and a modest annual rental amount is involved.

Value of Expected Return

In estimating the value of the part the condemnor acquires the appraiser would have estimated the per-acre value of the adjoining land. If the land underlying the temporary easement is similar to the land acquired, the same unit value could be used. In this example, suppose that three-quarters of an acre will be needed for two years. The land is worth $3.00 per square foot and investors expect to earn 12% on similar commercial land. The landowner is due the following amount if the payments are not discounted:

(0.75 ac.)(43,560 sq. ft.)($3.00)(12%)(2 years) = $23,522.

If two equal, annual payments are discounted 12% annually, the amount payable to the landowner on a present value basis is:

For Year 1 paid in arrears	$11,761 × 0.8929 =	$10,501
For Year 2 paid in arrears	$11,761 × 0.7972 =	9,376
Total compensation for temporary easement		$19,877

The appraiser should be familiar with local and state policy concerning discounting. In states such as Utah, compensation to a landowner is not discounted to a present value.

Analysis of Benefits from Public Improvements

As mentioned previously, the justification for a public or quasi-public body taking all or part of an individual property is to benefit the overall community. In appraising an affected property remainder, it must be

determined whether the benefits accrue to the community as a whole (general benefits) or specifically to the appraised property (special benefits) for which severance damages are claimed. In most states, general benefits cannot be considered to offset the value of the part taken or any damages claimed for the remainder parcel. In some states special benefits may be used to offset the estimated value of the part taken and damages to the remainder parcel. In other states special benefits accruing from the public improvements may be used to offset damages to the remainder.

Trial Preparation and Testimony

Eminent domain valuation assignments can be intellectually stimulating and professionally satisfying. Before accepting an assignment, the appraiser must make it abundantly clear to the client that he or she will make an objective analysis and, throughout the assignment, resist pressure from the client or its legal counsel to become an advocate for the client or produce a desired value estimate. The appraiser's fee must be based on the time and expenses incurred; it must not be contingent on the outcome of the case or the amount of the award. In accepting eminent domain appraisal assignments, an appraiser must accept that he or she may have to present expert testimony in a court of law. The late George Schmutz, an early leader in the Appraisal Institute and in the development of appraisal methodology, defined an expert witness as:

> one who is possessed of peculiar knowledge and experience that are not common to persons generally, and who has an opinion based upon such knowledge and experience that is peculiarly fitted for assisting in court, or jury, in determining an issue, such as the amount of damage measured in terms of dollars.[2]

Expert witness testimony should be supported by a detailed appraisal report in which the value conclusions reached are fully documented. The report need not be, and generally is not, submitted as a court exhibit, and the opposing counsel cannot demand it for inspection unless the report is referred to and used as a basis for testifying under direct examination. Comprehensive preparation will allow the client's lawyer to become familiar with the factual details of the appraisal and the technical terminology peculiar to the case. Visual aids should be employed where possible. Subdivision plats, photographs, plot plans, comparable sale tables, depreciated costs, and capitalized income summary sheets should be submitted as court exhibits to facilitate the appraiser's testimony during the trial.

Direct Examination

Where permissible, the expert opinion given may relate directly to the value of the entire property before the taking and the value of the

2. George L. Schmutz, revised by Edwin M. Rams, *Condemnation Appraisal Handbook* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), p. 360.

remainder after the taking. This simplifies the proceedings and indicates the amount of compensation (the difference between the before-and-after values as a result of condemnation) to which the owner is entitled. Compensation should cover both the taking of a part of the property and the severance damages, if any, suffered by the remainder. Of course, the appraiser must be prepared to testify as to the extent and possible effects of potential special benefits caused by the public improvements, provided such questions are raised with the permission of the court (and undoubtedly over the objection of the counsel for the condemnee).

After stating the value opinion, the expert witness generally is called on to give reasons for the conclusions reached, either as to the value of the property as a whole or the allocation of this value to the parts and the severance damages resulting from the taking. The answer is merely a summary of the important conclusions reached as a result of the appraisal investigation and a reemphasis of the sales comparison, depreciated cost, or income capitalization approaches which support the expert opinion.

To ensure a successful performance, the appraiser and trial attorney must agree on the order of data presentation and outline the questions and answers to be asked and given during direct examination. The sequence of questions asked generally falls these categories:

1. Qualifications of the witness
2. Inspection of subject property
3. Methods used in arriving at the estimate of value
4. Opinion of value

Care should be taken to present the qualifications of the expert witness in a simple, but impressive manner. Even when opposing counsel stipulates that, in the interest of time, he or she accepts the witness as qualified to testify as an expert, the client's lawyer should—for the court's benefit—qualify the witness as an expert in his or her field. It is the jury or court that sets the award, and the testimony of the witness has greater weight if his or her extensive experience and knowledge of the field of property appraising backs up the findings.

Expert's Background

Qualifying questions should inform the court as to the expert's background and experience relating to

- Occupation
- Place and geographic extent of business or profession
- Education and degrees earned
- Membership in professional associations and state licensure

- Years of experience as an appraiser
- Types of clients served
- Types of properties appraised
- Appraisal courses completed or taught
- Publication of appraisal articles
- Experience in related fields such as brokerage, property management, and lending

Demonstrated Familiarity with Property

Questions pertaining to the examination of the subject property should establish the appraiser's thorough knowledge of the details of the land and site improvements. Here the direct testimony should answer questions such as:

- Can you describe and clearly identify the subject property?
- When did you last inspect the property?
- Have you examined the building plans and specifications in estimating the reproduction cost of the improvements?
- What is the age of the structure and what methods were used to determine the accrued depreciation?
- Have you compared the subject property with other similar properties that have sold recently?
- Did you verify the income experience of this property? Have expenditures been verified?
- What is the present and foreseeable future highest and best use of the subject property?

The next group of questions under direct examination explores the methods used in deriving an estimate of value. Because any testimony offered at this stage of the court proceedings is subject to rebuttal during cross-examination, the appraiser should be careful not to present unnecessary details that later may be questioned to pinpoint errors of judgment or of fact. Care must be taken not to testify that the value was derived solely by the summation method—i.e., estimating the value of the lot separately and adding the value of the improvements less accrued depreciation. Land and buildings are considered a single operating unit and any division of the whole into arbitrary parts may be challenged in some states as constituting hypothetical appraising, which is contrary to accepted valuation theory and practice.

It is best to generalize and explain in simple, nontechnical words the methods used in estimating value. The appraiser, for instance, may state, "I

have examined the property; considered its location within the neighborhood; inspected the site; checked public records for the legal description and zoning, deed restrictions, and assessment data; studied comparable sales; and analyzed other general and specific factual data essential to the formation of a professional opinion of value."

It is advisable at this point for counsel to request that the witness describe and explain the comparable sales that he or she considered in formulating an estimate of market value. The witness should ask permission to refer to a large subdivision or area map, which should be marked for identification as a court exhibit so jurors may study and refer to it during their deliberations. On this map the subject property should be marked prominently in color and the sale properties should be clearly numbered and marked in different colors. As each sale property is identified, the transaction price should be stated, the seller and buyer named, the date of sale specified, and the terms of sale for the transaction given. The appraiser should make certain that each sale was verified with the purchaser, seller, or real estate broker as to the date of sale, transaction price, and terms of sale.

It is never wise to rely on the state transfer tax, if the state has one, as evidence of the prices paid for comparable sale properties. Even if the tax information posted in the deed book is accurate, the jury or court may be adversely influenced by the lack of sale confirmation and by an admission from the witness that revenue stamps can readily and legally be overstated or understated to mislead those who rely on such evidence as a guide to market value. The witness may be discredited by failing to learn through his or her interviews that there were circumstances that distorted the price paid for the property.

The final category of questions concerns the opinion of value. As a rule counsel asks: "As a result of your investigation, and by reason of your experience, have you formed an opinion of value for the subject. Identify by name the property as of a specified date (date of the taking)." The witness, of course, answers in the affirmative. Counsel then may ask the witness to state his or her professional opinion concerning:

1. Value of the entire property as a whole
2. Value of the part taken when considered as a part of the whole or as a separate parcel (when such testimony is deemed advantageous to the interests of the condemnee)
3. Value of the remainder considered as part of the property as a whole
4. Value of the remainder as a separate parcel after the taking of a part of the whole property

5. Severance damage attributable to the remainder property, if any (Item 3 less Item 4)
6. Total compensation due the landowner (Item 2 plus Item 5)

Cross-Examination

It is during cross-examination that the competence of the appraiser and his or her ability as an expert witness come to light. Many appraisers are thorough, diligent, and accurate in their value findings, but lack experience on the witness stand and the ease that comes from a broad educational background. Such witnesses, through indecision, lack of confidence, and the inability to think quickly on their feet, may undo the work of many days or weeks of preparation. Other witnesses have oversized egos, which cause them to falter or to explode when—directly or by implication—their integrity or competence is questioned. In court, appraisers will have their findings exposed to ruthless analysis and their community reputations jolted by lawyers who will go all out to destroy the effectiveness of a witness's testimony. This adversareal atmosphere keeps many otherwise qualified professional appraisers from accepting assignments that require them to defend their findings in court.

Those who enter the appraisal profession should be trained to take the stand as expert witnesses. As a first step, personal fear must be overcome and confidence must be acquired by undertaking a thorough analysis and seeing the estimate of value as a means of aiding the court in reaching a just decision. The court and jurors usually frown on personal abuse and tricky behavior unbecoming to the legal profession. Witnesses should remind themselves that, while giving testimony, their counsel is a sort of partner and that unfair or misleading questions will be objected to when raised. Further, the court and jurors are intelligent observers seeking truth, not entertainment through a display of legal skill.

The witness should listen to questions earnestly and carefully. When the intent of the question is not clear, clarification should be requested. Answers should be short, simple, polite, and directed to the jury or court. When "yes" or "no" answers are requested, the witness should comply but ask permission to explain an answer when clarification is essential. To illustrate, a series of "yes" or "no" questions may be asked as follows:

1. Are you representing the condemnee?
2. Have you served him or her previously?
3. Are you paid by him or her for your services?
4. You would not be testifying without the promise of pay, would you?
5. Your opinion of value is bought, is it not?

Certainly, Questions 4 and 5 should be explained because bias is implied and that may influence the court's decision. In replying to Question 4, the witness should add that as a member of the appraisal profession he or she is not accustomed to volunteering his or her services, and that as a professional appraiser he or she gladly serves all who seek professional aid. To Question 5, the witness should answer "no" and state that although his or her services are paid for, his or her opinion of value is based on facts gathered and studied during the course of the investigation. The findings and opinions stated would be the same no matter who engaged his or her services.

The cross-examiner can be expected to do all in his or her power to weaken or even discredit the value testimony of the opposing expert witness. The questions asked are generally designed to cast doubt on the appraiser's

1. Experience or education
2. Familiarity with the subject property or subject area and neighborhood
3. Preparation or omission of relevant data
4. Freedom from bias or incompetence
5. Computations or the validity of the valuation premises

In preparing his or her valuation report and in planning the sequence of testimony, the appraiser, with the aid of a lawyer, should anticipate the questions that may be raised during cross-examination and be ready to offer clear and convincing answers. The following 13 guidelines can be invaluable to appraisers giving expert testimony in court:

1. Never lie or be evasive.
2. Never exaggerate the highest and best use.
3. Never testify to a dictated appraisal.
4. Carefully examine and evaluate all comparable sales.
5. Avoid capitalizing the hypothetical income of vacant land.
6. Judiciously exercise your right to explain your answer.
7. Avoid giving the false appearance of infallibility.
8. Always remember that you are an impartial witness, not an advocate.
9. Your testimony should be the same if you were appearing for the opposing party.
10. Think carefully before you respond to questions.

11. If you do not know the answer to a question, say so. In other words, neither guess nor answer questions in areas in which you have no expertise.
12. Always avoid allowing an opposing attorney to put words in your mouth. Restate the attorney's questions so that they accurately describe the issue being examined.
12. Always remember to control your temper on cross-examination and retain a sense of humor. Likewise, do not argue with opposing counsel.[3]

Summary

Eminent domain allows a government or its agency to acquire all or part of a parcel for the common benefit of its citizens by due process of law. Reasonable compensation to the owner is required, but consent is not necessary for the acquisition. Condemnation is the process through which authorized units of government and public utility companies take private property for public benefit and use upon payment of just compensation to the property owner. When there is a physical taking of a property or property rights via eminent domain, the affected property owner is entitled to compensation from the condemning agency; this payment is called just compensation.

There are two basic valuation methods used in estimating total just compensation to a landowner in partial takings. The federal rule, used in some states as well, is known as the before and after rule. It holds that the measure of just compensation is the difference between the value of the whole property before the taking and the value of the remainder after the taking. Under this set-off rule, special benefits are allowed to offset both the value of the land acquired by the condemnor and any damages to the residue. Under the second method, the modified before and after premise, the following steps are used in arriving at the total just compensation that a property owner receives: 1) estimate the value of the whole property; 2) estimate the value of the part taken; 3) deduct the value of the part taken from the value of the whole property; 4) estimate the value of the remainder parcel, taking into effect the value influence of the proposed improvement and the utility of the remainder; 5) estimate damages to the remainder, if any; and 6) compute the total just compensation if there are damages by adding the value of the part taken to the severance damages suffered by the remainder.

Damages to a remainder parcel may result from any of the following circumstances: odd-shaped remainder, superadequate remainder

3. Much of this section is taken from pages 422–427 of James H. Boykin and Alfred A. Ring *The Valuation of Real Estate* (Englewood Cliffs, NJ: Regents/Prentice Hall, 1993).

improvements, isolated remainders, landlocked remainders, impaired access, and grade change. In partial takings, there typically will be landscaping within the proposed right of way. Its value should be estimated by its contributory value to the whole property. Right-of-way construction projects generally require temporary space for storing equipment and access roads to get the heavy equipment to the construction site. In effect, this amounts to the condemnor renting the land temporarily.

In accepting eminent domain appraisal assignments, an appraiser must accept the prospect of having to present expert testimony in a court of law. A detailed report in which the value conclusions reached are documented fully should support the appraiser's testimony. During the first phase of testimony, the appraiser is questioned by his or her client's attorney. The attorney generally will ask the appraiser to inform the court about his or her professional background, to demonstrate familiarity with the appraised property, and then to outline the steps taken to reach a conclusion of just compensation. Following this phase, the opposing attorney will conduct the cross-examination. It is during this phase that the competence of the appraiser and his or her ability as an expert witness is tested rigorously.