

## **HIGHEST AND BEST USE AND PARTIAL TAKINGS ISSUES**

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This is the second part of a two-part series dealing with the valuation of surface parking lots acquired through a governmental agency's power of eminent domain.

Parking lots acquired through eminent domain involve other than a voluntary negotiation and valuation process. All of us expect to be treated fairly, especially if we are not voluntarily selling our property.

Frequently, the use for parking is only an interim use. Parking serves as a profit center until such time as a more intensive utilization of the property occurs. In facing a governmental agency seeking to involuntarily acquire the owner's property, one should remember that the basic requirement remains that common sense must apply. Valuation of the property as part of an eminent domain proceeding should be treated in a manner similar to what would occur in a voluntary transaction.

The basic tenet of market value is that the "highest and best use" of the property be considered in the valuation process. This offers a special problem in parking lots because the government will frequently try to treat the parking lot as an income-producing facility and nothing more than a parking lot, with no consideration given to what may be the highest and best use of the property in

the reasonably near future. The standard for highest and best use frequently is premised upon federal precedent maintaining that the most profitable use which the land can be placed in the reasonably near future, and consideration of this potential is to be provided as part of the valuation.

As noted in the seminal U.S. Supreme Court case of *Olson v. United States*, 292 U.S. 246, 255, "the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect the market value." The highest and best use of the property may be different than the existing use, and the potential for assembly may create an even higher value to property. Under such circumstances, if there is a realistic potential for the different use or an opportunity to assemble to create a higher value, such may be considered in the process so long as it is contemplated that the event of the different use or assemblage will be within the reasonably near future.

## HIGHEST AND BEST USE: DEFINITIONS AND RELEVANCE

In making a determination of fair market value, the fact finder is not limited to placing a value on the land and its existing use, but can also consider other legal potential uses of the property. This is commonly referred to as highest and best use.

The AIA definition of highest and best use is:

*That reasonable and probable use that supports the highest present value, as of the effective date of the appraisal.*

Many jurisdictions also include in the highest and best use definition, "the most profitable and advantageous use an owner may make of the property, even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use."

The notion that the property should not be limited in value to its existing use and that consideration should be given to all possible uses to which it may be adapted, with compensation based upon the most advantageous use, arises out of situations in which courts have applied the "indemnification" standard, requiring payment for what the owner has lost.

Of great importance is the recognition that even in the most liberal states which allow compensation for the most profitable and advantageous use, there is a limitation to a prospective use that has a reasonable basis, but cannot rest upon mere speculation.

Concern regarding "speculation" has been a constant problem for parking lot owners who fully understand that there is always the potential of a substantial incremental value created by demand for the vacant land assembled with surrounding vacant land in order to build an intensive urban project. The best procedure to attack this government "speculation" argument is to show past assemblages that required payment of the incremental amounts far above what a use only for parking lot purposes could be.

Any evidence relating to the question of the highest and best use of property is material and therefore admissible regarding value, and the jury may consider every legitimate use of the property.

**All Uses to Which Property May Reasonably Be Adapted.**

The requirement that the highest and best use is to include those uses to which the property may be reasonably adapted includes two very important considerations:

**Potential to Expand.** Included in the highest and best use of property is the potential to expand on the property. Payments for a diminution in this potential is properly considered in the determination of just compensation.

**Assemblage.** A difficult problem in ascertaining the highest and best use of property occurs when there is a claim that assemblage may be possible. Frequently, the highest and best use of property involves assemblage with other parcels.

So long as the trial court determines that the potential to assemble properties together is not totally speculative, the issue of whether value attributable to a particular use realizable only through an assembly of multiple tracts must be considered in determining the value if the land is enhanced in its value from the probability of its coming to the market for such use.

Generally, the probability of assembly without eminent domain is a question of fact to be determined with the evidence presented. The issue is one of whether there is a probability of assemblage within a reasonable time at a reasonable price. As one court noted, "If such assemblage is found to be practical without exercising eminent domain, the increment in value due to the particular use should be apportioned among the parcels comprising the entire tract."

Where the highest and best use of separate parcels involves their integrated use with the lands of another, such prospective use may be properly considered in determining the value of the property if the potential for assemblage was reasonably sufficient to affect market value.

**Incompatible Uses.**

One of the frequent errors in litigating parking lot valuation cases has been the position of owners that they have a right to the income on the property capitalized into future years while at the same time seeking a substantial value for something other than a

parking lot use. The recognition that the property value should be premised upon its income as presently calculated directly contradicts the potential for an alternative higher and better use.

It is error to consider the value of two incompatible uses together on the same land when determining damages. "It is not a combination of all mutually exclusive uses, but, rather the highest and best use which is the standard to be applied." However, the interim use of a parking lot may add value when compared to interim uses which have no income for the interim period.

**THE TAKING OF ONE PARKING LOT OUT  
OF A MULTI-LOCATION OPERATION**

When a multi-location operation loses one of its lots, the loss of a single lot may have a devastating effect on the viability of the total operation. Traditionally, compensation was limited to the taking of the one lot and the value of that particular lot. On a regular basis, the going-concern value of the lot would be diminished because of its inseparability from the total operation or because of local jurisdictional limitations upon the right to be paid Just Compensation for the property.

A parking lot operator who loses one lot in a condemnation proceeding may no longer have to endure the paradox of finding themselves worse off than if the entire operation had been taken. Thanks to a trend pioneered by the federal court system,

determination of just compensation in partial taking cases has been liberalized in many states.

**Effect on Parking Lot Systems.**

Frequently, specific locational distances between parking lots is a requirement for a chain. The loss of the location, if proven irreplaceable, can have a substantial effect on continued profitability for the remainder of the operation. This effect is a consideration which must be determined as part of the just compensation process.

Underlying the notion that indemnification should be made to the chain is the availability of compensation under the terms of the lease between the chain and its landlord. Even in the most pro-landlord leases, the business damages or losses outside of the difference between the fair rental value and contract rent will be considered part of the indemnification to the chain. The issue, in all likelihood, should be the factual issue on a case-by-case analysis of whether the loss of one of the lots affects the chain as a whole.

The true effect on a specific location can only be determined by the market needs of the location to the overall operation and the potential for obtaining a replacement site. Clearly a multi-location operator can seek a new community or market area to replace what is lost. At the same time, market areas are sought for specifically that reason; i.e. the market area is desirous for

the continued profitability of the organization. The determination of those losses is certainly one which must be determined on a case-by-case process.

**Conclusion**

If faced with an involuntary acquisition through the government's eminent domain process, parking lot owners should be vigilant in their quest for "just compensation". The best way for a parking lot owner to receive full and fair compensation is to be completely aware of all factors to be considered in determining full and fair compensation in the jurisdiction at issue. Competent, knowledgeable representation is required to insure that no element of compensation is lost in the process.

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