

Litigating Environmental Issues in Eminent Domain Matters: Issues To Consider and Pitfalls To Avoid



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THIS ARTICLE will address the practical aspects of litigating an eminent domain matter that includes issues of environmental contamination. This article is not intended to be a compendium of legal cases, as issues related to the admissibility of environmental contamination in an eminent domain valuation matter vary widely throughout the jurisdictions. As such, a practitioner should consult and thoroughly investigate the laws in her jurisdiction prior to preparing a trial strategy in eminent domain valuation matters where legal contamination issues are raised.

WHEN ARE EMINENT DOMAIN MATTERS MORE THAN EMINENT DOMAIN MATTERS?

- To the general practitioner, eminent domain matters seem relatively straightforward. The determination of just compensation owing and the market value of the subject property, whether in a total taking or a partial taking, is the main, and often the only issue to consider. However, practitioners who deal regularly with litigating eminent domain matters either on behalf of condemning agencies or land/business owners quickly recognize that other, often tangential, valuation issues can become the main tipping point in an eminent domain trial. More often than not, practitioners who deal regularly with eminent domain matters and consider themselves experts in the field also need to be “minor experts” or “quasi-experts” in a number of different land issues. Issues regarding zoning, planning, other land use issues, engineering, wetlands, fixtures and business valuations often interject themselves inextricably in the valuation process. While many of these issues are considered normal or logical transitions to eminent

domain, certain issues require greater expertise and understanding, particularly for the lawyer involved in prosecuting or defending such an action. These issues almost invariably bring themselves to light in a highest and best use analysis conducted during the valuation process. Under certain circumstances, a well-rounded general real estate expert appraiser can address many of these issues in their appraisal reports, but some of the issues require far more expertise than general real estate appraisers likely possess.

As real estate professionals, many of the land use and highest and best use issues are familiar to the practicing attorney and appraiser. Professionals dealing with real estate feel confident in tackling the zoning issues, planning issues or even minor engineering issues. However, practitioners often find it necessary to retain land planners, zoning experts, registered engineers or other land use expert to support or defend a real estate valuation position. One of the most intimidating scenarios to face is when the property suffers from environmental contamination issues. Oftentimes, the stigma associated with such a title far outweighs the practicality of the situation. In many instances, the environmental contamination issues, while on their face, are shocking due to the unrecognizable and unpronounceable chemicals and compounds, actually bear little on the valuation process. Under certain circumstances, it would be acceptable for the attorney to proceed with the appraiser without environmental expertise involved. In some circumstances, the addition of an environmental contamination expert clouds the issues, pulls at the sensibilities of the jury or finder of fact, and results in confusing testimony comprised of terms and concepts not understood by the general population.

Notwithstanding this, when faced with an environmental contamination expert on behalf of the opposing party, the only possible route to protect

your client's interest in a condemnation action is to retain your own competing environmental contamination expert. Because of the technical aspects of the testimony involved, admissibility becomes a significant concern. Even the ability to refute opposing expert testimony will likely be successfully challenged without an expert opinion. Condemning agencies often retain environmental contamination engineers for the project itself. As part of the project engineering, borings have been completed, reports have been submitted and conclusions have been derived. In such an instance, it is far more beneficial for the landowner to retain their own environmental contamination engineer to refute the claims of the opposing engineer or to explain the results in a manner which relates to the valuation of the property at issue, rather than how those results pertain to the construction process of the project itself. Moreover, the retention of an expert environmental contamination engineer provides the necessary supporting background information for the appraiser, provides the appraiser with an explanation for why they appraised the property in a certain manner, and helps explain to the jury the practical impact of the contamination on the valuation of the property.

PITFALLS TO AVOID • Although a practitioner would assume that an appraiser would consider any potential environmental contingency on the property, at a minimum, a red flag should be raised under certain circumstances. As is common in most of the Country, areas along waterfronts previously used for heavy industrial purposes are being converted to commercial and residential uses. Before assuming that a property is worth far more as a residential site than in its dilapidated industrial state, consideration should be given to the environmental condition of the property with respect to any contamination that may be on the property. Residential and commercial properties require higher standards for contamination cleanup than contin-

ued use as industrial property. While, on its face, the value of residential and commercial property may far exceed that of the industrially-zoned land, a significant environmental cleanup can oftentimes make the conversion of use impractical and infeasible. Under such circumstances, even when in doubt, the services of an environmental contamination expert should be consulted prior to alleging a different highest and best use.

Even under certain scenarios, the continued use of a property as industrial may require remediation or cleanup to a lesser degree than residential, yet is still cost prohibitive. Simply assuming that conversion of one industrial use to another will be permitted without some remediation should not be taken for granted.

Further, if it is determined that minimal cleanup or simple land use regulation can be employed to avoid any cleanup, expert testimony could greatly assist in this regard. For example, in many instances a continued industrial use will only require either a baseline environmental assessment or restrictive use covenants such as residential use restrictions and subsurface disturbance restrictions. On occasion, a simple capping of the existing site is all that is necessary for a continued use and, in some instances, a non-industrial use.

In some instances, seemingly unexplainable environmental conditions may be successfully explained without the need for an expert. In one instance, during the expansion of an airport runway, the adjacent property was being acquired. During the appraisal process, it was alleged that the property suffered from environmental contamination. The issue was perplexing in that the property had historically been used for agricultural and non-industrial uses. Upon review of the environmental report, and an internet search regarding the findings, it was determined that the environmental

components found on the site were the main components of jet fuel. Under such a circumstance, further investigation was not necessary, nor was the use of an expert.

WHEN TO RETAIN AN ENVIRONMENTAL EXPERT • Typically, the costs of environmental experts are a major consideration in that in jurisdictions without reimbursement of expert costs in eminent domain proceedings, the cost of the environmental expert may result in a significant decrease of just compensation received. However, care must be taken to avoid a situation of “penny wise, pound foolish.” If a successful challenge to the environmental condition of the property is brought by the opposing party, the results oftentimes could reduce just compensation far more than the cost of an expert could protect.

A standard litigation strategy often requires that the parties “fight fire with fire.” If the opposing party has retained an environmental expert, it will be difficult, if not impossible, to challenge the findings of that expert without expert testimony. As previously stated, environmental contamination is often perceived as a negative topic by juries. While the litigators often live in fear of that phrase, juries typically find it far more intimidating than the attorneys or appraisers when there is no testimony to refute, minimize or explain the environmental condition and its impact on value. Reliance on a real estate appraiser, solely, usually does not carry the same weight, credibility or even admissibility when considering the technical requirements necessary for environmental issues. While many appraisers will downplay the environmental condition of a property, oftentimes justifiably, testimony in this regard may likely be excluded in the litigation arena. Certainly, real estate appraisers can discuss the minimal impact of certain contamination on industrial properties. However, real estate appraisers, without expertise in environmental contamination,

will likely be unable to testify regarding the condition. In fact, USPAP requires appraisers to include a statement indicating that they do not possess the requisite expertise with regard to environmental contamination. (Uniform Standards of Professional Appraisal Practice, Advisory Opinion 9, 2014-2015). Without the factual support necessary for an appraiser, a party may be barred from discussing the environmental condition of a property while the opposing side, with its environmental engineer, is free to provide critical testimony.

Considerations regarding cost often play a role in the retention of experts. As a litigator, it is important to identify the scope of the assignment the expert will be completing. Many choices are available in this regard. As previously stated, environmental reports based on borings and analyses are oftentimes completed by condemning agencies as part of the engineering for the public project itself. Therefore, borings have been completed, analysis has been prepared, and compounds have been identified. Likewise, phase one, phase two and baseline environmental assessments have oftentimes been completed on industrial properties, particularly those that have sold within recent times. If the litigants and the parties are confident in the borings and identification of conditions on a property, those documents can be utilized by the expert, which will reduce cost.

Once an expert is retained and it has been determined whether the existing borings, if any, will be useful, the next step will be to concisely and specifically define the scope of the assignment to the expert. This may require some consultation and coordination with the real estate expert and any other experts who may be involved. In order to properly define the scope of the assignment, the highest and best use of the property will need to be determined and, in the event of a partial taking, the highest and best use of the property after the taking will need

to be determined as well. Unless you have a client who has nothing better to do with their money than spend it unnecessarily, the worst thing a litigator can do is give the environmental expert unlimited discretion in analyzing the site. For example, if the appraiser has determined that the highest and best use of the property is heavy industrial both before and after the taking, the scope of the expert's assignment should be limited to the condition of the site pursuant to baseline environmental reports, existing phase one and phase two reports and a determination of the extent of remediation, if any, necessary for the heavy industrial use. In many instances, the highest and best use will require minimal clean up, capping or a restrictive covenant type of program.

If however, the current use of the site is or was an industrial use or has historically been associated with a use of environmental concern, i.e., service station, fueling station, etc. and the appraiser determines the highest and best use to be a commercial, residential or other non-industrial use, the environmental expert's assignment will be far more complicated and involved. In such a case, the true purpose of the environmental expert is not to provide testimony as to the condition of the property, but rather, to determine whether the proposed highest and best use is economically feasible after consideration is given to the extent of cleanup necessary. Certainly, you do not want to be in a position where the cost of cleanup exceeds the property's value in your appraiser's highest and best use.

Many times, all that is necessary is for an environmental expert to review any existing reports on the subject property as well as any public reports of comparable sales utilized by the appraiser. As the appraiser is seeking to determine market value, it will be important for the appraiser and the finder of fact to understand the similarities in contamination levels between the subject property and any comparables relied on. Likewise, if the subject prop-

erty is free of contamination while the comparable sales are contaminated, appropriate adjustments should be made, or, different comparables sought. On the converse, if the comparables are clean and the subject property is contaminated, the appraiser must also take this into consideration. However, full cleanup costs analyses are likely not required if both the comparables and the subject property are similarly impacted.

WHEN TO RETAIN THE ENVIRONMENTAL CONTAMINATION EXPERT • Certainly, the environmental expert, if necessary, must be consulted simultaneously with the appraiser's retention on any property in which the environmental condition of the property may be at issue.

In certain jurisdictions, a condemning agency is permitted to withhold its estimate of contamination cleanup from a landowner's estimate of just compensation at the outset of the proceeding. In some circumstances, an agency's remediation estimate may not be rationally related to the property at issue. For example, in many instances, the

condemning agency will seek to have a "pristine" or residential type cleanup completed. No doubt, this type of cleanup would likely work best for the condemning agency's project. However, under most circumstances, such a cleanup would not be required on the site for any reason. An industrial use property would continue to be used without the requirement of a residential cleanup. If you are in one of these jurisdictions, it is important to involve an environmental expert at the earliest possible time. Many times, the landowner will simply accept the estimates, forgoing compensation which should otherwise be recovered.

CONCLUSION • When in doubt, a litigator should consult and/or retain an environmental contamination expert. Although consultation with the real estate expert will be helpful, it is really to the litigator to determine a comfort level in proceeding when the litigator does not regularly practice in the area of environmental contamination. Although the cost may initially seem daunting, the possibility of not realizing full and fair compensation may far outweigh the initial expert cost involved.

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