

## **Principles of Compensation For the Taking of Gasoline Petroleum Station Operations.**

This article will discuss basic issues of the valuation for gasoline stations taken by governmental agencies as part of an eminent domain proceeding. After speaking about some of the general principles, issues specifically related to gasoline stations, including the effect on a partial taking of an individual station where the effect of the taking of a gasoline station is part of a multi-location gas station operation will be discussed.

The ability of the government to acquire property for public use by condemning it through the power of eminent domain is a Constitutional delegation provided under both the Federal and State Constitutions that allow private property to be taken for a public use upon the payment of just compensation. This article will assume that "public use" exists for the project necessitating the acquisition and will focus on the valuation aspects of an eminent domain acquisition.

The question the judicial system is called upon to determine in eminent domain proceedings usually pertains to the issue of what constitutes just compensation for a taking of an individual parcel of property, including the value of structures, easements, and property rights. The basic principle followed by virtually every jurisdiction is that the owner of property should be placed in the same position as if the condemnation had not occurred.

The valuation process is one premised upon an appraisal. The appraisal is a basic requirement for any acquisition involved in federal funds, and is generally applied even when federal funds are not included. The notion is one that fair market value, or, better stated, the amount of money a willing buyer would pay to a willing seller would buy under compulsion and the timing placed to choose the sale would render. Inherent in this fair market value is that they probably will be paid for its highest and best use, which is generally considered the most profitable use that is legally allowed and economically in demand.

A key point of interest in gas station condemnations is the notion of the standard for payment of just compensation for "partial takings". Partial takings are generally considered to be those takings in which a part of the property is being taken, and the owner is left with the remainder. The common valuation approach is called the "before and after" approach, meaning that the appraiser is to value the property as a whole prior to the taking, then determine the value of the property after the physical taking, with the difference being the amount of just compensation to be paid. As an alternative, some jurisdictions look at what is physically taken and then has the appraiser make a determination of the remainder diminution. The amount taken plus the diminution is then considered just compensation. In effect, the same amount should be arrived at by their approach. However, the methodology

does vary by the jurisdiction.

### **The Comparable Approach**

The fact finder may look to the value of properties similar to the property at issue in determining fair market value. Whether the properties are sufficiently similar to have some bearing on value rests in the sound discretion of the trial court.

The standard has traditionally been broad in allowing evidence to be admitted and relied upon in determining what is a comparable property. For example, similar property of different size and an entirely different locality may be admissible. It is sufficient if the property referred to has a resemblance to the property being acquired.

It is within the discretion of the trial court to determine whether a sale used for comparison took place within a reasonable time of the proposed taking. Any objection to the sale as remote in time must be made at the trial level and not for the first time on appeal.

### **Governmental Activities Which Diminish the Value of the Property**

Almost every jurisdiction premises just compensation upon the theory that an owner should be placed in a position as if the taking had not occurred. As such, almost every jurisdiction requires the fact finder to ignore any refusal to rezone the

property unless one could reasonably believe that the request to rezone would have been denied even in the absence of the contemplated condemnation and planned public improvement. Courts have consistently held that it is improper for one agency of the government to artificially depress the value of the property by unreasonably restrictive zoning so that another agency of the government can obtain it by condemnation at a lower price.

## **II. Partial Taking of Individual Locations**

The effect on the property created by a partial taking at an individual location is frequently missed by the governmental authority. Frequently, the authority will provide a per square foot pricing, sometimes far in excess of the value of the community. [A per square foot pricing in this regard any effect of the taking on the remainder] The agency will completely avoid consideration of any notion the remainder of the property is in any way diminished in value. By example, gas stations are built by competent architects in such a fashion as to maximize the needs of access for both the refueling trucks and customers. Frequently, the design is made to provide for different types of driveways for different types of land and building configurations. Taking a driveway is frequently considered by agencies to have no effect on the overall value of the property, while to the owner of the station, the marketability of the location may have been destroyed.

An additional problem of the partial taking to an individual

location may be the overall affect on the utility of the station. A key factor in the highest and best use notion described above, is that there be a potential to expand or modify the use of the site. The loss of land may make either more difficult, yet is frequently disregarded in appraisals prepared by governmental agencies. Under the ever-changing needs of an advancing society, what is considered a modern gas station has changed drastically over the years and will likely continue to change drastically in the future. By example, the traditional gas station/repair facility has been replaced by gasoline services with accessory uses, such as party stores or food chain suppliers. The loss of land at the station may interfere with the parking or the basic minimum necessary to appropriately construct a facility.

### **III. The Taking of One Parking Lot Out of a Multi-Location Operation**

When a multi-location operation loses one of its stations, the loss of a single location 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 station. The going-concern value of the station operation would be diminished because of the inseparability of one location from the total operation would not be considered under many jurisdictions. However, the prevailing principle of valuation

is one of indemnification. In recent years, courts have concluded that where sites, even where separated by distances or by different types of ownerships, such as maintenance of tenancies rather than ownership of the property is not relevant so long as the multiple locations are being utilized as a single operation.

A multi-location gas station operator who loses one station in a condemnation proceeding may no longer have to endure the paradox of finding himself worse off than if the entire operation had been taken. Thanks to a trend pioneered in the federal court system over the years, determination of just compensation in partial taking cases has been liberalized in many jurisdictions.

The loss of a single location, if proven irreplaceable, can have a substantial effect on the continued profitability of 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 for the taking of the gas station is the availability of compensation under the terms of the Petroleum Marketing Practices Act and the lease between the operator 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 overall business operation. 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 operation 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 desirable 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**

When faced with an involuntary acquisition through the government's eminent domain process, gas station owners should be vigilant in their quest for "just compensation". The best way for a gas station 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.

