

PRINCIPLES OF COMPENSATION

By: Alan T. Ackerman

www.nationaleminentdomain.com

This is the first of a two part series dealing with parking lots and the just compensation process for parking lots acquired through a governmental agency's use of eminent domain. Principles of "just compensation" and basic valuation are discussed in the first of these articles. The second article will include discussions of the concepts of "highest and best use" and the valuation determination for "partial takings".

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.

Many jurisdictions utilize the American Institute of

Appraisers' (AIA) definitions as the foundation for the appraisals, including condemnation appraisals. However, some jurisdictions apply different standards than the American Institute standards, which usually results in a more favorable result for the owner.

The AIA defines just compensation as "the payment of market value of the real estate which was taken."

Most AIA definitions, as applied to condemnation settings, create a conservative approach to the valuation process. This is due to the intent of the AIA standards to protect lending institutions by requiring appraisers to go through the most conservative approach in their appraisal analysis. By example, the AIA definition requires only the "most probable price in terms of money. . ." as opposed to the "highest price estimate in terms of money" utilized for condemnation actions in many states. Nor does the AIA standard discuss possible uses or adaptability to uses other than the existing uses. Almost every State is much more expansive in the application of how a fair market value determination is to be presented in a condemnation proceeding.

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.

Admissibility of Recent Sales

Recent sales of the subject property are nearly always admissible. A sales price is considered competent evidence to show fair market value as long as the sale otherwise fulfills the fair market value standard and is "voluntary, not too remote in time, and not otherwise shown to have no probative value."

The burden is on the party challenging presentation of the recent purchase to show that the sale is too remote in time or that there are other factors that make the transaction something other than arms length. It is within the discretion of the trial court to determine admissibility of recent sales evidence, and a trial court's ruling on such evidence will typically not be disturbed on appeal absent an abuse of discretion by the trial court.

Generally, a sale may not be allowed if the physical and economic conditions are not similar because the price will not be relevant to the fair market value of the property being taken.

Further, where property is completely changed in use or totally remodeled after purchase, the proposed sale price of a comparable may not be comparable and, therefore, will likely be excluded from consideration. Simply by example, if a parking lot was purchased a few years earlier than a taking by the governmental agency, it was not necessarily relevant to value when it is clear that the area has undergone substantial changes in the market demographics which would provide a far different value.

An example of a substantial fluctuation would be a situation in which the condemnor's appraisal recognizes that the fair market value of the property is different than a recent purchase price. Where there has been tremendous movement in value, even over a short period of time, the subject property's purchase price will be inadmissible.

Utilization of Capitalization of Income

Capitalization of income as a method of valuation generally may properly be introduced as evidence and considered competent before the fact finder.

The reality of the parking lot business inhibits utilization of the income approach. The present income for parking lots is often far less than the value of the parcel premised upon a capitalized rate of return because individual owners fully contemplate that the property in its utilization as parking is a transitional (interim) use, awaiting further intensive development. As such, utilization of an income approach should rationally

require a capitalization rate far below the type of rate which would be utilized for properties readily bought and sold premised upon their present income producing ability. Examples of income properties would be apartment or office buildings.

The fair market value allows that the property should be considered as to what it is worth on the market, allowing a reasonable time within which to effect a sale. This means that the government cannot simply condemn a parking lot which may maintain a different purpose simply because it is not ready on the specific date of taking for the alternative purpose.

GOVERNMENTAL ACTIVITIES

There are areas of governmental activities which may be of interest to a National Parking Association member. First, almost every jurisdiction premises just compensation upon a 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.

Probability of Rezoning.

Almost all jurisdictions have maintained that a jury or fact finding court may determine that as part of the highest and best use of the property one of the things that must be considered is whether the zoning classification at the time of the taking was reasonable. If there was a reasonable probability, absent the threat of the condemnation case, that the zoning classification would have been changed, the fact finder should consider this probability in arriving at the value of the property on the date of taking. In order to affect the value of the property, this probability of rezoning must be real enough to have caused a prudent prospective buyer to pay more for the property than he or she would otherwise pay.

Effect of the Proposed Public Improvement.

The process of determining the value on the date of taking may be complicated by the government's actions leading up to the taking, if those actions have had an effect on the market value of the property. If there is such an effect, it must be disregarded.

While the project is not to be considered as part of the valuation process, clearly the announcement of the project should not be considered to insulate the property from normal economic forces. As such, only changes directly traceable to the prospect of the condemnation should be considered so as not to penalize either the owner or the public.

Become Familiar with Valuation Principles in Your Jurisdiction.

In order to properly protect your rights as an owner in a condemnation or eminent domain action, it is vitally important that you become familiar with the principles of compensation available in your jurisdiction. From the market value standard utilized by the jurisdiction to the various nuances associated with the definitions, any number of factors may have a significant impact on the compensation finally realized for the acquisition. The second part of this article will focus on highest and best use and partial taking issues for a parking lot subject to condemnation or eminent domain actions.