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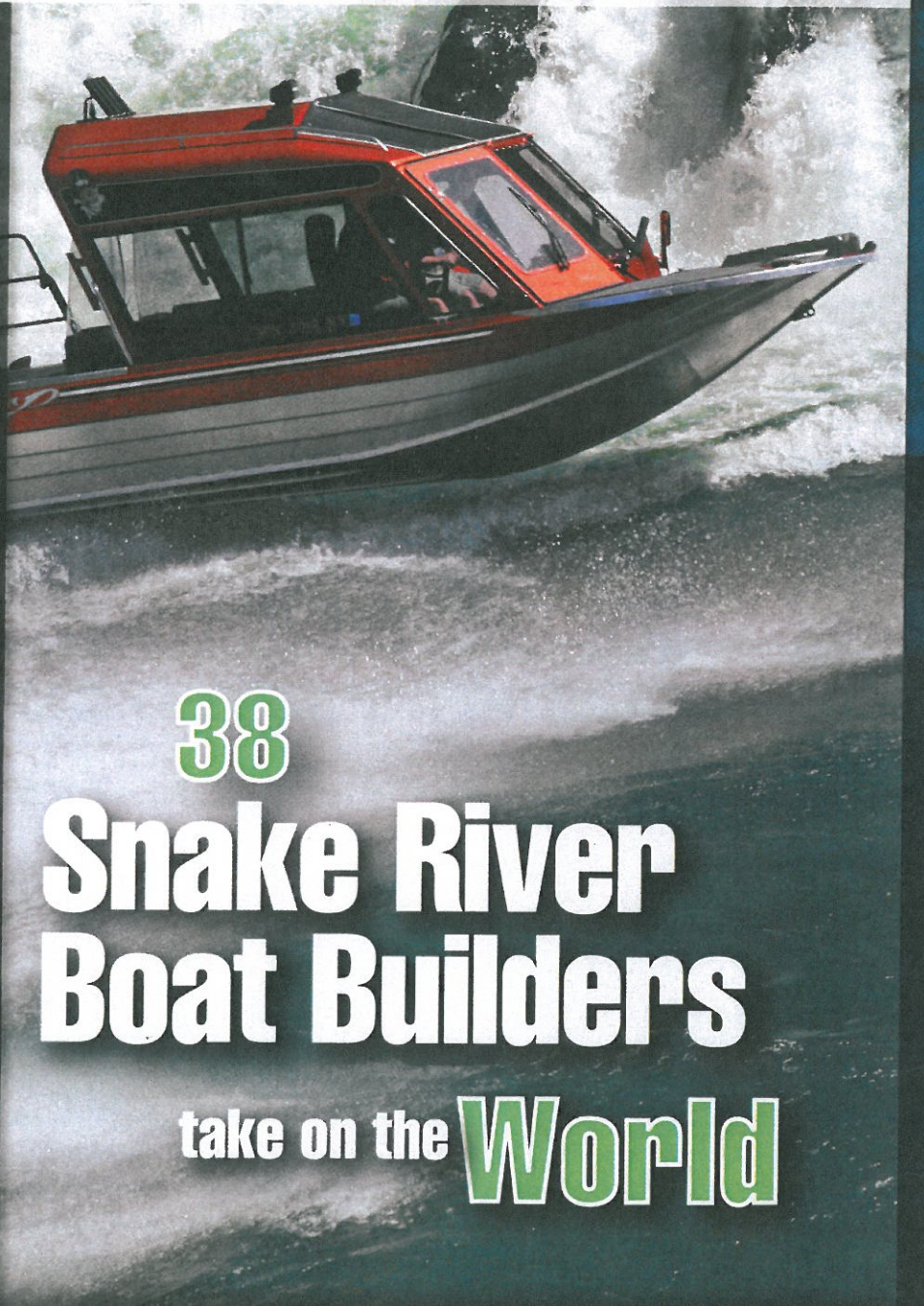
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▶ Working Waterfront Issues

What you need to know about condemnation compensation in partial taking cases



Determining the value of your waterfront property when a government wants it for public use requires a much more detailed analysis than simply measuring square footage. Work within the legal system to protect your rights.

One of the troubling ironies that many commercial waterfront property owners, such as marine terminal and marina owners, are forced to confront is that the seizure of a small piece of their property (partial taking) can have a disproportionately large impact on their operation. Examples of partial taking of commercial waterfront by the government include highway expansion and road widening, public dock facilities, community parks, desalinization facilities and other water-related uses. The cases presented by the eminent domain acquisition of waterfront properties and subsequent valuation can lead to some striking outcomes. In fact, the biggest taking in Michigan in the last 20 years was the Detroit Marine Terminal, in which the government valued the land at \$4 million and, ultimately, the negotiated settlement was \$20 million.

Today, the major cause for condemnation of waterfront parcels is likely to be roadway and transportation infrastructure expansions. While private entities may initiate proceedings, these efforts are almost always backed by the Federal government. Understandably, condemnation can leave marina and marine

terminal owners and operators feeling frustrated and powerless, leading them to settle for far too little.

The good news is that there is legal recourse: legal standards are evolving and owners who lose a portion of their land in condemnation proceedings do not always have to endure the frustrating paradox of finding themselves in a less favorable position than if the entire parcel had been taken. Waterfront landowners have rights.

Defining the legal and geographic boundaries of the portion of the property in question is the first step toward determining how that land, subject to partial taking, can affect the overall value of the property.

Severance damages in partial taking cases have traditionally been premised upon three prerequisites: physical contiguity, unity of title and unity of use. Fortunately, most states by statute or by court decisions are beginning to recognize both the unique value of waterfront property and the operational complexities of some marine terminal and marina operations.

By ALAN ACKERMAN



Physical Contiguity

Many jurisdictions, including the federal courts, have withdrawn any emphasis on the requirements of physical contiguity. The consensus is that physically separate and distinct tracts of property may constitute one larger parcel for the purpose of determining damages and just compensation in condemnations. The case of *Baetjer v U.S.* provides the foundation for the argument in support of a liberal determination of what constitutes a parcel. Baetjer stated that "...tracts physically separated from one another may constitute a 'single tract' if put to an integrated unitary use or even the possibility of their being so combined in use in the reasonably near future." The Baetjer court recognized that distance between the tracts of land was relevant, but established a more realistic standard based on integral use instead of physical proximity.

The increasingly liberal approach to determining what constitutes the parcel in many jurisdictions acknowledges the complexities of land valuation with respect to overall property function. Some jurisdictions will compensate owners for the loss of economies of scale and risk allocation that may take place as the result of a partial taking.

Unity of Title

The second aspect of the traditional approach required the ownership interest to be the same on both parcels, in terms of both quality and quantity, before compensation would be allowed. This requirement has been modified in a number of jurisdictions and, as a matter of policy, is likely to be less rigidly enforced in the future. Some courts have held that a condemnee who had a fee interest in one property and leasehold in another should not be barred from compensation. Strict rules and unity of title standards simply do not make sense in an environment in which marine terminal and marina owners frequently maintain separate real estate entities under different partnerships or ownerships for myriad reasons.

Unity of Use


The Uniform Eminent Domain Code eliminates contiguity and title considerations and distills the traditional three-part approach down to what is essentially a consideration of unity of use. The Code approaches the topic with a welcome degree of real-world practicality: establishing unity of use for a marine terminal or marina operation should be based upon a position that the end purpose is related to the efficient and effective functioning of the marina in question.

The push to upgrade transportation infrastructure, combined with what some see as a legislative mandate to push for more public green space and energy-efficient civic resources has created a set of circumstances where condemnation compensation and partial taking cases will likely remain at the forefront of the national

consciousness. Marine terminal and marina owners who receive a written notice of taking or suspect that they might be subject to condemnation should adhere to some basic precautions to avoid putting themselves at a disadvantage:

- Consult an attorney before discussing any issues pertaining to property value;
- Upon recommendation by a qualified attorney, seek the advice of a competent real estate appraiser to value the property;
- Do not apply for building permits, variances, zone changes, subdivision approvals, curb cuts or any government approvals without consulting counsel;
- Seek legal consultation prior to applying for real estate tax assessment reductions;
- Secure a written agreement to receive copies of all test data and reports before permitting anyone to conduct tests, including borings, explorations for hazardous waste, and water supply studies;
- Do not supply copies of leases, expense records, profit and loss statements, or similar documents to the government or its representatives without first referring such requests to counsel; and
- Continue to maintain your property in an acceptable manner.

Just Compensation Is Possible

Fortunately, the judicial and legislative backdrop has gradually moved in a positive direction. The complexities and large size of many working marine terminals mean that issues involving physical dimensions, ownership structure or operational details often have special applicability to marina operations. Marina operators should be encouraged by the fact that juries and courts generally display the correct understanding—that eminent domain proceedings are intended to place the owner in the same position as if the condemnation had not occurred—and have fulfilled their obligation to fully recompense the owner in the event of a partial taking. Going forward, marina owners and operators who are best able to comprehend their rights will be better positioned to defend themselves and demand just compensation in partial taking cases. 

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