VALUATION OF LEASEHOLDS IN CONDEMNATION ACTIONS

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INTRODUCTION

The valuation of leasehold interests in condemnation actions presents some unique issues that will be addressed in this article. It is the settled law in Michigan that a:

> leasehold interest constitutes 'property' and just compensation must be made therefor upon a taking. City of Detroit v Whalings, Inc, 43 Mich App 1, 8; 202 NW2d 816 (1972)(citing Lookholder v State Highway Commissioner, 354 Mich 28 (1958).

In Pierson v H.R. Leonard Furniture Co, 268 Mich 507; 256 NW 529 (1934) the court set forth the basic rule for determining the value of a leasehold:

> The measure of a lessee's damages for the condemnation of his leasehold interest is said to be the market value of the leasehold condemned, that is, the difference between the rental value of the remainder of the term and the rent reserved in the lease, or the actual value of the leasehold, where there is no market value. Id at 522 (citations omitted)

In Nichols On Eminent Domain, the leading treatise on condemnation law, the basic approaches to leasehold valuation in total and partial takings were explained as follows:

> In the event of a complete taking, the lessee is entitled to the value of the leasehold such value exists only if there is a ``bonus" value (economic rent exceeding contract rent) to the lease. The lessor is entitled to the unencumbered fee value minus the leasehold value.
>
> In the event of a partial taking, in the absence of a lease provision governing, the lessee is not relieved of the obligation to pay rent for the portion of the premises which remains subsequent to the taking. The lessee, however, is entitled to an abatement of the rent 'provided he pleads and demands an abatement in an action brought against him by the landlord for the entire rent reserved.'
>
> To determine the damages to a leasehold interest resulting from a partial taking, the court should first determine the bonus value of the lease, if any, prior to the taking, and subtract therefrom the bonus value of the lease after the taking. The bonus value after a partial taking is computed by subtracting the contract rent, after appropriate abatement, from the fair rental value of the remainder of the fee. The lessor, of course, is entitled to the balance of the total fee-taking award. Nichols, §12.05[4][l]

In the same manner as a lease may have a "bonus value" from the lessee's point of view, alternatively, the lease might a "negative value" when the contract rent exceeds the fair market value of the lease. In such cases, just compensation to the owner/lessor can exceed the fair market value of the unencumbered fee. Unlike Michigan, many jurisdictions have adopted the "undivided fee rule" which essentially states that the total amount of just compensation should not exceed the fair market value of the unencumbered fee. As Nichols points out, the undivided fee rule is essentially a rule of expedience and the application of this rule can result in a deprivation of just compensation:

> The use of the ``undivided fee rule" is widely accepted because of its convenience, particularly to condemnors who are thus spared the need to become involved in controversies between landlords and tenants. Under this rule, once the property has been valued by a lump-sum award, the condemnor has no further interest in the proceedings. However, there are occasional cases where the undivided fee rule breaks down. For example, where the rent reserved in the lease is substantially above the market, the use of the capitalization method will yield a much higher value than that indicated by a market data approach using comparable leases. Under these circumstances, a number of courts have concluded that to invoke the ``undivided fee" rule would deprive the landlord of just compensation by paying him less than what he could have obtained in the market for his ownership interest.. Nichols at §11.01

In State Highway Cmm'n v L & L Concession Co, 31 Mich App 222, 232 n12; 187 NW2d 465 (1971), the Michigan Court of Appeals made it clear that the undivided fee rule does not apply in Michigan:

> Although it is sometimes said that the sum of the parts cannot be greater than the whole, that mathematical concept cannot supersede the constitutional requirements of "just compensation". Thus, if a landlord has a favorable lease this is to be reflected in arriving at the fair market value of his property, although there may be a tendency to avoid the resulting problems by capitalizing the rent payable under the lease as if it were the current rental value. The excess of the actual rent over the current rental value is a separate segment of value to be capitalized and paid for above and beyond a fair market value based on the capitalization of current rental value. See Polasky, The Condemnation of Leasehold Interests, 48 Va L Rev 477, 490 (1962); 1 Orgel on Valuation Under Eminent Domain (2d ed), §123.

EXCEEDING THE TERMS OF THE LEASE

In Almota Farmers Elevator and Warehouse Co v US, 409 US 470 (1973), the Supreme Court ruled that valuation of a leasehold may take into consideration that the lease might be extended past its term. In Almota, the appellants made substantial and permanent improvements that had a useful life in excess of the remaining lease term. When the property was condemned, seven and a half years remained on the lease. The Government argued that compensation was due only for the loss of the use and occupancy of the buildings over the remaining term of the lease.

The Supreme Court agreed with the appellant's contention that:

> this limitation upon compensation for the use of the structures would fail to award what a willing buyer would have paid for the lease with the improvements, since such a buyer would expect to have the lease renewed and to continue to use the improvements in place. The value of the buildings, machinery, and equipment in place would be substantially greater than their salvage value at the end of the lease term, and a purchaser in an open market would pay for the anticipated use of the buildings and for the savings he would realize from not having to construct new improvements himself. Id at 471-72.

The Court based its decision on the fact that a willing buyer would have taken "into account the possibility that the lease might be renewed as well as that it might not." Id at 472. Michigan law comports with the holding in Almota. SJI2d 90.20, which deals with compensation for business property, provides in relevant part that "[i]mprovements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease."

In McCullagh v Leonard Refineries,Inc, 372 Mich 104, 125 NW2d 482(1963), where the lessors claimed that a lease providing for perpetual renewals at the lessee's option had terminated, the court stated that:

> The general rule is that a provision in a lease for a number of renewals will be given effect and enforced. Indeed, the general rule is that a provision for perpetual renewals will, in the absence of prohibitory statute, be given effect and enforced. * * *
>
> Although there is some contrary authority, the generally accepted view is that a provision clearly giving the lessee and his assigns the right to perpetual renewals is valid in the absence of some statutory prohibition, and will he enforced by the courts, although such a provision in a lease is not favored by the courts and a lease will be construed as not making such a

provision unless it does so clearly." Id at 108-09 (citation omitted)

However, as noted in Nichols,

> Generally, however, the courts will not consider the possibility of renewal unless there is an express covenant making a renewal obligatory upon the landlord, since it is not a judicial function to revise the language of a lease agreement by relying upon the custom of the parties to renew leases.
> * * *
> Although there are cases to the contrary, the weight of authority is that tenants at will or tenants by sufferance are not entitled to share in a condemnation award. As a practical matter, a tenant from month-to-month generally suffers only nominal damage upon a taking for the public use and compensation has been rightfully denied in such a case, since a month-to- month tenant has no unexpired term.(footnotes omitted) Nichols, §12.05[4][l]

REDUNDANCY OF VALUATION

Redundancy of valuation may also present a problem. This situation can occur when the valuation of the leasehold also includes the value of the business. In such cases, it is inappropriate to separately value these interests. As the court stated in L & L Concession Co, supra at 235-36:

> in many cases, as in the case of the Belle Isle Coliseum, where the value of the leasehold as an estate in land and the value of the business there conducted cannot readily be separated, the valuation ascribed to the leasehold may reflect the value of the business there operated. In such a case it is entirely sound to refuse to award as a separate element of damages anything for loss of going-concern value or goodwill; to do so would be redundant. But where the valuations of the estates of the lessor and of the lessee in land do not reflect the going-concern value of the lessee's business there operated, then . . . the going-concern value can, without making the total damages awarded redundant, and, if full compensation is to be paid, must be determined and awarded to a businessman whose business has been destroyed by the taking.

GOING CONCERN DAMAGES

The general rule provides that unless a business is taken for use as a going concern, the owner of the business located on a condemned parcel of realty will not be compensated for the good will or going concern value of the business. In re Jeffries Homes Housing Project, 306 Mich 638,

651; 11 NW2d 272 (1943); In re Lansing Urban Renewal (Lansing v Wery), 68 Mich App 158, 163; 242 NW2d 51 (1976), lv den 397 Mich 828 (1976). The underlying rationale for this rule lies in the fact that most businesses can be transferred to another location after the condemnation.

However, an exception to this general rule was enunciated in Grand Rapids & Indiana R Co v Weiden, 70 Mich 390; 38 NW 294 (1888). In Weiden, the court found that:

> A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses." Id at 395.

The rationale underlying this exception is one of the cornerstones of eminent domain law. Just compensation should place the owner of the property in as good a position as was occupied before the taking. In re Widening of Bagley Avenue, 248 Mich 1, 5; 226 NW 688 (1929); In re Grand Haven Highway, 357 Mich 20, 28; 97 NW2d 748 (1959); State Highway Comm'r v Eilender, 362 Mich 697, 699; 108 NW2d 755 (1961). As noted supra, leasehold interests are property interests. If the going concern value of a leasehold has been destroyed as a result of the condemnation and the business cannot be transferred to another location, it follows that compensation must be paid.

In City of Detroit v Michael's Prescriptions, 143 Mich App 808; 373 NW2d 219 (1975), a forty year old pharmaceutical business was condemned to make way for the Poletown project. In Michael's Prescriptions the court reviewed prior case law dealing with the issue of recovery for loss of going concern:

> . . . [I]it is clear that recovery of the going concern value of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. Whether a business is transferable will be decided on a case by case basis inasmuch as a specific factual analysis is required. Generally, however, recovery will be

> allowed where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the entire condemnation project. Id at 819.

In Michael's Prescriptions, the court found that the award of going concern damages was appropriate because of the unique location of the pharmacy, the monopolization of the prescription business generated by a nearby hospital and the fact that relocation "was realistically foreclosed by the scattering of established customers throughout the metropolitan area and by the elimination of other 'business-generating businesses.'" Id at 821.

BUSINESS INTERRUPTION DAMAGES

It has long been held that damages resulting from business interruption are compensable in condemnation cases provided the damages can be proven with a reasonable degree of certainty. Grand Rapids & I R Co v Weiden, 70 Mich 390, 395; 38 NW 294 (1888); In re Park Site, 247 Mich 1, 3; 225 NW 498 (1929). In State Highway Comm'r v Dake Corp, 357 Mich 20; 97 NW2d 748 (1959), some of the items considered compensable under business interruption included additional direct labor costs, additional indirect labor costs, efficiency losses of direct productive labor and estimated additional costs of operating dual facilities during relocation.

However, due to their speculative nature, damages for lost profits are not recoverable in a business interruption case. In re Slum Clearance (Appeal of United Platers, Inc.), 332 Mich 485, 496; 52 NW2d 195 (1952). Although lost profits are properly utilized as a component in determining the going concern value, a business interruption claim based upon lost profits is inadmissible. In City of Detroit v Larned Associates, 199 Mich App 36; 501 NW2d 189 (1993), the court noted that recharacterization of lost profits would not circumvent this rule:

> On appeal, plaintiff contends that these damages were completely speculative and should never have been submitted to the jury. We agree with plaintiff, at least in part. Defendant correctly points out that the weight to be accorded Thomas Czubiak's testimony was a matter for the jury to determine. On the other hand, we agree with plaintiff that the bulk of Czubiak's testimony concerning damages related to lost profits. Whether couched in terms of a decline in sales, loss of income, or loss of earnings, we think it clear that defendant's claim for

damages was premised on its alleged inability to achieve its former level of profitability as a result of being forced to relocate. Id at 41-42 (citation omitted).

The court added, however, that:

We hold only that to the extent this case is retried on a business interruption theory, damages for lost profits will not be allowed. Id. n1 With respect to the remainder of Thomas Czubiak's testimony (e.g. that concerning rental expenses, advertising expenses, and the like), the jury below was free either to accept it or reject it. Id at 42.

MUTUAL EXCLUSIVITY OF BUSINESS INTERRUPTION AND GOING CONCERN DAMAGES

One recurring issue in the valuation of leaseholds involves the mutually exclusive concepts of "going-concern" and "business interruption" damages. This principle is a result of the obvious fact that if a business is transferable, going concern damages are not appropriate. On the other hand, if a business is not transferable and the business has been destroyed, it is inconsistent to maintain that the business is being "interrupted," for there is nothing left to interrupt. However, there are instances where a business owner optimistically does not contend that the business has been destroyed and attempts to relocate. After a short period, the owner finds that a once thriving business has failed. The law does not address this state of affairs, and in some situations a business owner is forced to take a risk that would otherwise not exist, but for the condemnation.

In City of Detroit v. Larned Associates, supra, the court reiterated the principle of mutual exclusivity of going concern and business interruption damages:

Furthermore, on remand, defendant shall not be allowed to recover both business interruption damages and going concern value since the two theories are mutually exclusive. Id at 42.

However, the fact the Larned Court ruled that business interruption damages and going concern value could not both be recovered does not preclude a condemnee from presenting alternative theories to the jury.

MCR 2.111(A)(2)(a) provides that:

Inconsistent claims or defenses are not objectionable. A party may:

(a)allege two or more statements of fact in the alternative when in doubt about which of the statements is true;

(b)state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both.

It is well established in Michigan law that a party may allege more than one claim with regard to the same set of facts. Bonner v Chicago Title Insurance Co, 194 Mich App 462, 487 NW2d 807 (1992). In addition, a party can plead inconsistent claims. Allen v Garden Orchards, 437 Mich 417, 471 NW2d 352 (1991).

Furthermore, in Walraven v Martin, 123 Mich App 342, 333 NW2d 569 (1983), the court considered the question: "Must a plaintiff make an election between inconsistent theories of recovery before proceeding to trial?" Id at 344. In finding that a party did not have to elect between inconsistent theories prior to trial, the Walraven Court stated:

Plaintiff herein, by seeking inconsistent remedies simultaneously, has not "elected" a remedy. Nevertheless, several cases from other jurisdictions support defendants' claim that the trial court may compel an election between inconsistent remedies at any stage of the proceedings. However, no Michigan case is cited therein for such proposition . . . we have found no Michigan case prohibiting the simultaneous pursuit of inconsistent remedies. . . . Our rejection of election prior to trial is consistent with Michigan's rules of civil procedure. Under GCR 1963, 111, every pleading is a simple, concise statement of the facts on which relief can be granted on any sustainable legal theory regardless of consistency and whether based on legal or equitable grounds or both. Walraven, 123 Mich. App. at 347-50. (See also, Jim-Bob, Inc v. Mehling, 178 Mich App 71, 92-93, 443 NW2d 451 (1989)).

TRADE FIXTURE VALUATION

The valuation of trade fixtures constitutes another compensable item in the valuation of leasehold interests in condemnation actions. In In re John C. Lodge Hwy, 340 Mich 254; 65 NW2d 820 (1954), the court stated that:

'Our review of the record is convincing that the 'fixtures' herein involved were not stocks of goods nor, in the usual acceptance of the term, purely personal property; but that they

were what is properly denominated 'trade fixtures' and which although as between landlord and tenant might be personal property, as to third parties they may be properly considered as a part of the realty. Id at 263

In Wayne County v Britton, 211 Mich App 688; 536 NW2d 598 (1995), the Court of Appeals explicitly stated that the property owner may elect whether he/she will receive value-in-place or detach/reattach costs for fixture.

[F]ixtures, even when movable, should be compensated for according to their market value in place, unless the owner chooses to remove them to a new location, under which circumstance they should be valued according to the cost of detachment/reattachment. . . . . [T]he owner is not obligated to continue to operate its business in a new location, nor is the owner obligated to use all of its movable fixtures in a new location." Britton, 211 Mich App at 697.

Under Michigan law, the definition of fixtures is quite broad in condemnation proceedings. SJI2d 90.20 defines compensable business property as follows:

The owner is entitled to be compensated for [his/her/their/its] fixtures, equipment, machinery and personal property.

The definition of fixtures or equipment or machinery for which compensation may be allowed is very broad. Fixtures are not limited to things actually attached to a building. Fixtures may include small machinery, even hand tools. The test is whether or not it was the intent of the owner to permanently use the item in the operation of [his/her/their/its] business. If the answer is yes, then the item is considered to be constructively annexed to the freehold, and a part of the owner's equipment and fixtures for which compensation shall be allowed.

Further, SJI2d 9021 provides that a condemnee must be compensated for the value-in-place of the fixtures. SJI2d 90.21 provides in relevant part that:

With regard to fixtures, equipment, machinery and personal property, you are to award the owner the present value-in-place of those items unless the owner has elected to remove some or all of them.

In State Highway Commissioner v Miller, 5 Mich App 591; 147 NW2d 424 (1967), the appellate court considered whether the court erred in the diminution in value of stock and merchandise (not affixed to the real estate) attributed to the condemnation was compensable. In

Miller, the highway commission took the defendant's house, gasoline station and auto repair shop, and several utility and storage buildings. In reaching its decision, the appellate court approved of the lower court's instruction which stated that:

'The definition of fixtures or equipment or machinery for which compensation may be allowed is very broad. Fixtures are not limited to things actually attached to a building. Fixtures may include small machinery, even hand tools. The test is whether or not it was the intent of the owner to permanently use the item in the operation of his garage business. If the answer is 'yes,' then the item is considered to be constructively annexed to the freehold, and a part of the owner's equipment and fixtures for which moving costs may be allowed. Id at 594 (emphasis supplied)

Of particular note is the appellate court's comment that:

The merchandise in the instant case was not sold over the counter, but consisted of parts used to repair automobiles and sold in the course of repairs. These items were an intrinsic part of the business. The parts were used to obtain an end result -- a repaired automobile. Id at 594-95.

In City of Algonac v Robbins, 69 Mich App 409; 245 NW2d 68 (1976), and City of Fenton v Lutz, 73 Mich App 117; 250 NW2d 579 (1977), both decided after Miller, Michigan courts expanded on the liberal definition of compensable business property. In Robbins, the condemnee business owners contended that "evidence should have been allowed on loss of value of the items over and above the detachment and reattachment costs." Id. at 410. Specifically, the court has to determine "whether particular items are trade fixtures or personal property, and exactly what costs are allowed for either kind of property." Id. at 411.

After a comprehensive analysis of Michigan law regarding compensability of business property, and particular attention the Miller decision, supra, the court stated that:

The question yet remains, however, for what kinds of movable property should damages be allowed. We believe that the above quoted instruction enunciates the proper test: whether it was the intent of the owner to permanently use the item in the operation of his business. Id. at 415.

In City of Fenton v Lutz, supra, the appellate court considered whether 200 used

television sets abandoned by defendant when he moved were compensable in a condemnation action. In affirming the lower court's inclusion of these items in the condemnation award, the court stated that:

> This Court has determined that condemnation awards can provide for the loss of personal property. Algonac v Robbins, supra, State Highway Commissioner v Miller, supra. The evidence adduced at trial was rather thin as to the necessity of abandonment of these television sets and as to the failure of defendant to sell, salvage, store or move these sets. We can see the practical difficulty which defendant may have had in doing so. We suggest in the future that trial courts look to such efforts in deciding whether compensation for personal property is allowable. Lutz, 73 Mich App at 125.

CONDEMNATION CLAUSES

> It has become customary in drawing leases of valuable city property to insert a so-called 'condemnation clause'--a provision that, upon the taking by eminent domain of the whole or a part of the premises leased, the term shall come to an end. Under such a lease the tenant has no estate or interest in the property remaining after the taking to sustain a claim for compensation, although under some circumstances he may be entitled to recover for removal expenses, fixtures or other improvements. It has been held that the law does not look with favor on clauses causing forfeiture of the lessee's interest on condemnation, hence, a lease covenant will be construed not to have that effect if its language and the circumstances possibly permit. It has been held also that inquiry may be had as to the question of conscionability of the clause. Nichols, §5.06[2]

Lessors and lessees frequently include specific provisions within the lease to deal with various contingencies that might arise out of a condemnation action. As stated in Nichols, condemnation clauses are strictly construed. City of Muskegon v Lipman Investment Corp, 66 Mich App 378; 239 NW2d 375 (1976), provides an example of a condemnation clause that totally divested the lessee from any rights to the condemnation award. In finding that a condemnation provision in the lease precluded the lessee from enjoying any of the condemnation award, the Lipman Court stated that:

> There is no ambiguity in the provisions dealing with condemnation. The lease between [lessor] and [lessee] provides for its termination by condemnation. The use of such clauses to deny a lessee the right that he would otherwise have to share in a condemnation award is commonplace. See 2 Nichols, Eminent Domain, § 5.23(2). In

> Zeckendorf v Cott, 259 Mich 561; 244 NW 163 (1932), the Court considered a lease that provided for its termination upon commencement of condemnation proceedings. The Court recognized that the provision was to prevent the tenants from participating in the condemnation award.

> The lease here not only provides for its termination upon condemnation, but goes on to explicitly state that [the lessee] is not to share in the award. The leading treatise on eminent domain suggests that a lessor with a strong bargaining position include such a provision. 7 Nichols, Eminent Domain, § 11.06. We do not think it is our function to rewrite contractual provisions that indicate, by giving one party an advantage over the other, their relative strengths. Lipman Investment Corp, 66 Mich App at 381-82

Although Nichols states that a lessor with a strong bargaining position insist on a condemnation clause, it has been held that condemnation clauses which is construed as a contract of adhesion will not be upheld. In City and County of Honolulu v Midkiff, 616 P2d 213 (1980), the Supreme Court of Hawaii found that the lower court erred in granting summary disposition disposing of the lessee's claim that a condemnation clause was unconscionable. The lessee contended that because its lessor owned a substantial portion of the scarce available property in Hawaii that he "was placed in a take-it-or-leave-it position." Id at 218. In reaching its decision, the court stated that "whether a meaningful choice is present in a particular case an only be determined by consideration of all the circumstances surrounding the transaction. Id. The Midkiff decision, however, was largely dependant on the unique historical circumstances surrounding ownership of private property in Hawaii. Although the possibility exists in Michigan that a condemnation clause could be found to be unconscionable, the chances of success would appear to be slight in a commercial setting where all parties will be presumed to have bargained at arms's length..

In In re John C. Lodge Hwy, supra although the court found that the lessee's interest in its trade fixtures was compensable, a "condemnation clause" between the lessee and lessor was also at issue. The condemnor contended that the lessee had lost its right to receive compensation for trade fixtures due to a condemnation clause in the lease. The court rejected this contention for the reason that the clause only established rights between the lessee and lessor. In reaching its decision, the

court examined the basic principles of such clauses in a lease:

> Each lease containing a condemnation clause must be construed according to the language of the particular lease in question. The lessor and lessee by inserting a condemnation clause are merely looking toward the future and agreeing in advance as to their respective rights in the event condemnation proceedings are instituted during the period the lease is in operation. They are not establishing the rights and duties of the condemning authority as those rights and duties are established by the Constitution and the laws of this State. If a lessee is foreclosed and prevented from seeking and obtaining just compensation for trade fixture removal damages it will be because the lease discloses that it was the intent of the lessor and lessee that the lessee should forego and abandon the rights to damages allowed to him by the Constitution and the laws of this State. Id at 263-64.

The court reiterated the rule that leases are strictly construed, and stated that it could not:

> adopt appellee's contention that the lessees could not relinquish their rights to leasehold and reversion damage and retain their rights to trade fixture removal damage. Id at 264.

In Pierson v H.R. Leonard Furniture Co, supra, the lease contained the following clause:

> If at any time during the existence of this lease the State or municipality under any legal power of eminent domain shall condemn and acquire title to any portion of the premises herein demised, then and in that case the rent herein stipulated and payable at that time shall be decreased in proportion to the amount or portion of said premises as shall be taken under such proceedings.

The lessor contended that the reduction of rent was the sole compensation due to the lessee. The court disagreed, citing the New York and Massachusetts statutory law that specifically provided for a proportionate reduction of rent in condemnation actions. In reaching its decision, the Pierson Court stated that:

> It seems to me that the statute intends merely to fix a ratio of rent between the property as it stood and the untaken part, * * * and that in the fixing of damages as between landlord and tenant, or as between reversioner and owner of the term, the damages sustained by the tenant, and not entering into the apportionment of rent are to be allowed upon some equitable basis. Both the landlord and the tenant may suffer by reason of the taking of the land; the former, by the destruction pro tanto of the term; the latter, by the extinguishment of the fee and loss of rent of the part taken. Id at 520 (citation omitted).

SHOPPING CENTER LEASES

Condemnation clauses that are included in leases to "anchor tenants" in large shopping centers pose unique problems. Leases involving anchor tenants often contain clauses which provide that the lessee may move upon the taking of possession on a portion of the property due to a partial taking for a public use. To an inexperienced eye, such clauses may seem like nothing more than a responsible variation of the right of a tenant to move when he or she has suffered an interference with the leasehold. However, this perception does not take into account the reality that not all partial takings destroy the utility of the leasehold to the extent that the highest and best use of the parcel is lost. Yet, a clause could allow a minuscule partial take to trigger the extreme remedy of a lease termination.

Almost every jurisdiction maintains that when the highest and best use of a property is changed as a result of a partial taking, substantial damages will ensue. However, this does not necessarily require that a total taking of the property will be the result of the infringement upon the leasehold. Given this circumstance, the prospective landlord biting, at the bit to obtain a major anchor tenant, necessarily takes a risk in providing that the tenant may move upon any taking of the property. If, as set forth above, this is the contracted arrangement, the landlord may very well find that the tenant indeed does move not necessarily because of a small partial taking, but because of the favorable "put" type language contained in the condemnation clause of the lease.

The risks generated by such clauses might be effectively dealt with by arranging a pool whereby landlords insure themselves against the risk that a tenant will move because the contract rent is greater than the economic rental value of a property at some future date when the partial taking occurs.

SUMMARY

The Lessor/Lessee relationship generates interesting issues concerning valuation and the apportionment of the condemnation award. The practitioner is well-advised to consider the issues

unique to this relationship in order to properly advocate the interests of the client. This article is intended to present a general summary of issues pertinent to the valuation of leasehold interests in condemnation proceedings and does not obviate the need to thoroughly research the relevant case law.

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