VALUATION OF PARTIAL TAKINGS

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INTRODUCTION

One of the more complicated issues in eminent domain cases is the valuation of easements in partial taking cases. Partial takings, which are routinely used in construction, utility, and flood mitigation projects, can come in various forms: (i) an easement over part of the whole property; (ii) an easement over the whole property; or (iii) a fee taking of part of the whole property. As government entities attempt to improve the electric grid to support the transportation of new renewable energies, they will necessarily have to condemn millions of miles of easements throughout the country.[1] This article will establish the fundamentals of easement valuation and discuss some common issues we have encountered during our advocacy on behalf of property owners, focusing primarily on utility easement takings.

Federal Versus State Rules

There are two primary ways appraisers and courts assess damages for partial takings. The preferred method typically varies by jurisdiction.

Under the federal rule, also known as the before-and-after method, just compensation for a partial taking is calculated as "'the difference between the value of the property before and after the Government's easement was imposed.'"[2]

By contrast, under the state rule, also known as "value of take plus damages," just compensation is calculated as the value of the taken property plus the damages to the remainder. "In a partial taking, a property owner is entitled to compensation for the property taken and 'damages' for injury to the property which remains after the taking, i.e., the residue."[3]

In theory, both methods should achieve the same result. In practice, that is not always the case. According to several right-of-way agents, the state rule results in excess compensation.[4]

Enhancement

In applying the state rule (property taken plus damages), most jurisdictions allow condemnors to use the enhancement[5] to offset damages to the

remainder but not the value of the taken property. As a result of different offsets, the state and federal rules can achieve two different results.

Here is a simple illustration: A 10-acre parcel is worth $1 per acre before the condemnation of an easement across five of the acres. The taking is part of a grand public project that dramatically increases the remainder's value. Following the taking, the five acres that are not encumbered by the easement are worth $2 per acre. The easement diminishes the value of the affected acreage by $0.50 per acre.

If, in applying the federal (before-and-after) rule, the jurisdiction offsets the enhancement, then the owner is not entitled to just compensation, because the property is worth more after the taking ($15) than it was before ($10).

By contrast, in applying the state rule, the enhancement offsets only the damages to the remainder. Even though the property is worth more after the taking, the property owner is still entitled to damages based on the value of the taken property. More specifically, the property taken would be calculated as 50 percent ($0.50 / $1) of the encumbered five acres, which were worth $1 per acre, for a total of $2.50 in compensation.

Impact of Partial Takings

In appraising the value of the remainder following a partial taking under either approach, you should consider many ways the taking impacts the value of the property. Michigan's jury instructions, for example, list several non-exclusive considerations, including:

- The reduced size of the residue;
- The altered shape of the residue;
- Reduced access to the residue;
- Any change in utility or desirability of the residue;
- The effect of the applicable zoning ordinances on the residue; and
- The assumption that the condemnor will use its newly acquired property rights to the fullest extent allowed by the law.[6]

Please note that these are just a few of many possible ways the taking affects the property's value. In the context of the increasing utility takings, for example, property owners are concerned about health risks or hazardous conditions associated with living in close proximity to high-voltage transmission lines. In most states, property owners are entitled to introduce evidence that the fear of health concerns or hazardous conditions will affect the market value even if that fear is baseless.[7]

COMPENSATION BASED ON THE MAXIMUM POSSIBLE USE OF THE EASEMENT

Although a condemnor may intend to perform a specific project, it is later constrained not by its initial intentions but by the easement language. Owner advocates should carefully review and seek compensation based on the specific rights an easement grants to the condemnor and "presume[] that the condemnor will … use the property taken to the fullest extent of the right acquired."[8]

The Holder of the Dominant Estate is Constrained by the Terms of the Easement

In many cases, utility companies have, after decades of consistent use (or even non-use) of easements, expanded their use to the detriment of property owners. When that happens, the utility companies are constrained not by their initial intended use of the easement but by the terms of the easement itself.

As an example, consider *Rolland v. Int'l Transmission Co.*[9] *Rolland* centered around easements originating from the 1940s and 1950s, when the Detroit Edison Company "acquired easement rights to 'construct, operate and maintain' electrical power lines, 'including the necessary H-frames, towers, fixtures, wires and equipment'" over the owners' properties.[10] Detroit Edison installed many wooden H-frame poles, which remained in place for many years.

In 2000, Detroit Edison assigned its easement rights to the International Transmission Company (ITC), which sought to replace the wooden H-frame poles with steel monopoles and install new monopoles where they did not previously exist as part of a major project.

When ITC notified the landowners that it intended to enter their properties to install the monopoles, the owners objected and sought a declaratory judgment and injunction prohibiting any power line or pole upgrade work on their land.

The court ruled against the property owners, holding that ITC could install the colossal monopoles under the terms of the existing easements—specifically, the easement language granting the predecessor-in-title Detroit Edison Company "the right to construct, operate and maintain its lines for the transmission and distribution of electricity"—even though steel monopoles did not even exist when Detroit Edison obtained the easements.[11]

Unfortunately, this is not a unique example.[12] The lesson from these cases is straightforward: Utility companies are constrained by the terms of the easement, not their initial intended use.

Property Owners Have Only One Opportunity to Obtain Compensation

In *Rolland*, the property owners were not entitled to additional compensation when the utility company replaced the H-frames with monopoles. The reasoning is straightforward: The utility company already owned the right to install the monopoles under the existing easement.

That shows how important it is for property owners to seek compensation based on the maximum use of the easement. Because the landowner "is forever barred from claiming additional compensation," the condemnor must compensate the landowner as if it will "make use of every one of the quantum of rights it had arguably taken."[13] Accordingly, the factfinder must consider "all foreseeable damages" including "not only specific direct damages but also indirect factors that affect the property's market value."[14]

Unconstitutional Contemplation of the Anticipated Use of the Easement

In determining just compensation awards for partial takings, some courts permit consideration of the expected use of the easement. In *2,953.15 Acres of Land v. United States*, the Fifth Circuit held that just compensation for plaintiffs whose property was taken by a flooding easement included consequential damages to the undersoil as a result of the rising water. "Damages reasonably to be anticipated from the use of the property for the purpose for which the condemnation is made are relevant in determining the compensation to be awarded for the taking."[15] Michigan's model jury instructions state that "[i]n valuing the property that is left after the taking, you should take into account various factors, which may include ... the use which the [*name of condemning authority*] intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property."[16]

We want to caution that it would be unconstitutional for a condemnor to use this type of instruction to avoid paying just compensation based on the maximum possible use of the easement.[17] The condemnor's "promises of intention not to use a right or a privilege specified or reasonably implied" are nonbinding and insufficient "to exclude the consideration thereof in the assessment of damages."[18] And, as explained above, the property owner will not be able to recover more compensation if the condemnor alters or expands its use under the existing easement. Holding that a landowner's compensation could not be reduced by a permissive right of way granted by the condemnor, the court in *Baucum v. Ark. Power & Light Co.* noted that the condemnor "acquired by the condemnation proceedings the power to make such use of the right of way as its future needs required" and the property owner would not be entitled to "future damages" if the condemnor subsequently prohibited the permissive use.[19]

The Constitution mandates that condemnors pay property owners "the full and perfect equivalent in money of the property taken," not the property the condemnor expects to use.[20]

Policy Considerations

Policy considerations also favor compensating property owners based on the maximum possible use of the easement. In direct takings cases, the condemnor typically specifies the property it seeks to condemn in the complaint. Although property owners may challenge whether the taking is necessary for a public use, they are typically bound by the condemnor's chosen easement language. Compensation based on the maximum use of the easement incentivizes utility companies not to condemn more rights than necessary for their anticipated project.

In sum, in cases involving partial takings of easements, just compensation must be based on the condemnor's maximum possible use of the easement, even if that use appears theoretical or unlikely.

EXCESSIVELY BROAD EASEMENTS

We have recently had several takings cases in which utility companies have sought easements that are broader than necessary for their anticipated project. We thought it would be worth explaining one recent experience with this phenomenon and two potential ways to combat it.

About a year ago, we represented the owners of an office building dealing with a utility company's partial taking of a permanent easement for a pipeline. The utility company caused minor damage and disrupted the use of the office building when it installed a pipeline on a grassy area between the building and a busy road. However, once the project was completed, the pipeline was underground and invisible to the naked eye. On the surface (pun intended), the damages appeared relatively minimal.

There were a few complications though. In addition to reducing the property's building area, the permanent easement granted the utility company the right to do far more than install the pipeline it had put in place. Instead, the easement granted the utility company the right to modify and upgrade the line, including by replacing the mostly innocuous existing pipeline with one far greater in size and above ground. The easement also granted the utility company the right to use the rest of the owner's property whenever it found it useful for working on the pipeline.

After unsuccessfully challenging the necessity, we decided the best course of action was to make the utility company pay for it. So, we sought compensation based on the maximum possible use of the easement.

At the mandatory mediation, we explained that the utility company acquired the right to replace the mostly innocuous existing pipeline with an aboveground one that is far more monstrous in size. We also explained that the utility company had the right to repeatedly disrupt the office building's standard use. The mediation panel awarded our clients huge damages.

The damages award made the utility company reconsider whether it really needed the broad easement. In the end, we settled for slightly less in damages but dramatically reduced the scope of the easement.

APPRAISING EASEMENT DAMAGES IN THE ABSENCE OF MATCHED PAIRS

One common complication in easement valuation is identifying matched pairs for a specific—and often unique—type of damage. In many cases, there are no possible matched pairs because it is the first time a particular type of project is constructed in the subject marketplace or because the subject property is unique. We observe the former every time a new technology requires condemnation.

The absence of paired sales does not mean that the easement does not damage the value of the remainder or that the owner is not entitled to compensation. Despite the lack of matched pairs, the appraiser must use common sense, experience, and expertise to make a reasoned adjustment based on the relevant information, such as the changed conditions, the location of the easement, and the rights taken.[21]

Matched pairs—if truly "matched" pairs exist—are not the end-all-be-all. Nor are they necessary for appraisers to make adjustments to comparable sales. Appraisers frequently make adjustments to sales without matched pairs. For example, appraisers almost always make adjustments without paired sales for time, market conditions, and other factors. The appraisers, who are qualified experts, use their expertise and experience to make these adjustments. It is standard and approved appraisal methodology to do so.[22]

The result should be no different when appraisers make adjustments related to factors impacted by the taking or the changed conditions caused by the taking. Appraisers must make adjustments—before and after the taking—whether matched pairs exist or not. Such adjustments go to the weight of the evidence, not the admissibility.

To the extent an opposing party disagrees with an appraiser's adjustment, the answer lies in stringent cross-examination. Such cross-examination easily exposes any errant adjustments or flawed analysis.[23] In *Rover Pipeline, LLC v. 1.23 Acres of Land*, the court affirmed the admission of an appraisal report that did not include comparable sales noting, in part, that it is well-settled that "'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"[24]

Several courts have confronted challenges to the admission of appraisal reports based on the lack of matched pairs for damages. The majority have ruled that the reports were admissible.[25] In *Vector Pipeline, L.P. v. 68.55 Acres of Land*, Vector objected to the valuation report prepared by a judicially appointed commission because it "failed to offer paired sales analyses or sales of parcels with comparable numbers of pre-existing easements in all cases."[26] The court rejected this contention reiterating that "no particular methodology is required and … [o]ther methods may be used 'where no comparable sales exist.'"[27]

It is commonly noted that an appraisal is merely an educated guess. Every appraisal is subjective, which is precisely why courts have recognized that appraisals are an art, not a science. To treat them as a science would be to exclude them entirely.

Notes

1 See, e.g., Nadja Popovich and Brad Plumer, Why the U.S. Electric Grid Isn't Ready for the Energy Transition, N.Y. Times, Jun. 12, 2023, available at https://www.nytimes.com/interactive/2023/06/12/climate/us-electric-grid-energy-transition.html.

2 Otay Mesa Prop., L.P. v. United States, 670 F.3d 1358, 1364 (Fed. Cir. 2012) (quoting United States v. Va. Elec. & Power Co., 365 U.S. 624, 632 (1961)). See also Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land, 195 F. Supp. 2d 314, 320 (D. Mass. 2002) ("The measure of damages is generally the fair market value of the land immediately before the taking minus its fair market value immediately after the taking.").

3 Hilliard v. First Indus., L.P., 158 Ohio App. 3d 792, 794 (2004) (quotation marks omitted). See also White v. Dep't of Transp., 227 Ga. App. 488, 489 (1997) ("There are only two elements of damages to be considered in a condemnation proceeding: first, the market value of the property actually taken; second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part that is taken and the devoting of it to the purposes for which it is condemned.") (internal quotations and citations omitted).

4 See, e.g., Wayne C. Lusvardi, The Appraisal of Easements Under the State Rule: Separating Fact from Fiction, Right of Way, July/August 1995, at 15, 18 (criticizing the "value of take plus damages" approach based on the author's opinion that the "value of take" part of the approach is based on a "subjective" and often overvalued "percentage of diminution applied to unencumbered land sales").

5 In some cases, the government takes land in a partial taking that is used as part of a public project that increases the value of the remainder of the property. Depending on the jurisdiction, the "enhancement" to the value of the remainder may be considered in determining the just compensation.

6 Mich. Civ Jury Instruction 90.12 (Partial Taking).

7 See, e.g., Florida Power & Light Co. v. Jennings, 518 So. 2d 895, 894, 898-99 (Fla. 1987) ("We join the majority of jurisdictions who have considered this issue and hold that the impact of public fear on the market value of the property is admissible without independent proof of the

reasonableness of the fear.... [A]ny factor, including public fear, which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert's valuation opinion. Whether this fear is objectively reasonable is irrelevant to the issue of full compensation in an eminent domain proceeding.")

8 State v. Ware, 86 S.W.3d 817, 826 (Tex. App. 2002). See also Kenai Landing, Inc. v. Cook Inlet Nat. Gas Storage Alaska, LLC, 441 P.3d 954, 963 n.28 (Ala. 2019) ("The landowner is entitled to assume ... that the taking authority will make the full use 'physically possible of any easement or land described in the taking certificate.'" (quoting 4 Julius L. Sackman, Nichols on Eminent Domain § 12A.07[2] (3d ed. 2018)).

9 No. 274411, 2008 WL 2038025 (Mich. Ct. App. May 13, 2008).

10 Id. at *1.

11 Id. at *2.

12 See, e.g., Consumers Energy Co. v. Acey, No. 277039, 2008 WL 2779896 (Mich. Ct. App. July 17, 2008) (holding that a utility company could construct a second pipeline on an owner's property based on a 1951 easement), rev'd in part on other grounds, 483 Mich. 985 (2009).

13 Highway Comm'n v. Great Lakes Express Co., 50 Mich. App. 170, 175 (1973). See also State Dep't v. Kaylor, 137 S.E.2d 664, 666 (Ga. Ct. App. 1964) (explaining that "the assessment of compensation for land taken covers all damages whether foreseen or not which results from a proper construction [and operation of the project]").

14 Metro. Water Dist. v. Campus Crusade for Christ, Inc., 37 Cal. Rptr. 3d 598, 622 (Ct. App. 2005) (citations omitted).

15 2,953.15 Acres of Land v. United States, 350 F.2d 356, 360 (5th Cir. 1965).

16 Mich. Civ. Jury Instructions 90.12 (Partial Taking).

17 City of Mission Hills v. Sexton, 160 P.3d 812, 825 (Kan. 2007) ("[L]andowners are entitled to full compensation for the actual rights acquired by the condemnor, not the rights actually used.").

18 Union Elec. Co. v. Levin, 304 S.W.2d 478, 481 (Mo. Ct. App. 1957) (citation omitted); See also Loveridge v. United States, No. 16-912, 2023 WL 4926217 (Fed. Cl. Aug. 2, 2023) ("[M]ere informal privileges to use property in a certain manner cannot be used to reduce damages unless the owner is given a legally binding right to use the property in the manner contemplated." (quotation marks omitted)); "A condemnor's non-binding promises to restrict its uses of the rights it takes will not reduce the damages to the property and should not be considered." Id. (quoting Joseph T. Waldo & Jeremy P. Hopkins, Eminent Domain and Land Valuation Litigation: The Claim of Severance Damages in Easement Takings (2004)).

19 15 S.W.2d 399, 402 (Ark. 1929).

20 United States v. Miller, 317 U.S. 369, 373 (1943).

21 See, e.g., J.D. Eaton, Real Estate Valuation in Litigation 309 (2d ed. 1995) ("The appraiser must also use common sense ... [If] after the taking, the dwelling is located three feet from the fenced right-of-way and its roof overhangs the taking line[,] the appraiser cannot conclude that the dwelling suffers no proximity damage simply because no comparable sales of dwellings three feet from an interstate highway right-of-way can be found in the market. The appraiser must exercise sound judgment in such matters, whether or not strong market evidence exists.").

22 See, e.g., Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 486 F. Supp. 2d 741, 757 (N.D. Ill. 2007), aff'd, 525 F.3d 554 (7th Cir. 2008) ("[E]xact comparables [a]re not required by even the strictest appraisal standards because such exactness is impossible and because appraisers can make adjustments to account for differences.").

23 See, e.g., Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 580 (1993) ("Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising 'general acceptance' standard, is the appropriate means by which evidence based on valid principles may be challenged.").

24 No. 17-CV-10365, 2018 WL 3322995, at *5 (E.D. Mich. July 6, 2018) (quoting Clay v. Ford Motor Co., 215 F.3d 663, 669 (6th Cir. 2000)).

25 See, e.g., Wash. Metro. Area Transit Auth. v. One Parcel of Land, 549 F. Supp. 584, 588 (D. Md. 1982), aff'd, 720 F.2d 673 (4th Cir. 1983) (holding that the appraiser's testimony of severance damages, without comparable damage sales, was not insufficient or inadmissible);

26 157 F. Supp. 2d 949, 956 (N.D. Ill. 2001).

27 Id. The court also noted that Vector's own appraiser was unable to find a transaction that the judicial commission thought was comparable. "However, because, as the Commissioners respond, 'land is unique,' this is neither surprising nor fatal to an appraisal." Id. (quoting United States v. 99.66 Acres of Land, 970 F.2d 651, 655 (9th Cir.1992)); Rover Pipeline, LLC, 2018 WL 3322995, at *5; Guardian Pipeline, L.L.C., 486 F. Supp. 2d at 757.