

# Perspectives in Eminent Domain:

## Research Findings

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**A**NYONE INVOLVED WITH eminent domain, be that person an attorney, appraiser, government employee, judge, contractor, condemnee, condemnor, or the like, knows that there are many and strong differences in opinions and practice relative to the eminent domain process. All one need do is review some of the eminent domain case proceedings or sit through several cases in the courtroom to quickly realize that the issues and perspectives which exist are both abundant and rich with hypotheses and intentions. Possibly even better yet, just talk to a few individuals who have been involved with eminent domain proceedings, and you will soon feel the strength of the varying convictions relative to the procedure, its fairness, and how the outcome may have affected a person's business as well as his or her life.

Practitioners in the field recognize that the area of eminent domain can be characterized much like an uncharted course with minimal guidelines provided by law, court precedence, data compilations, or the brilliant (or ignorant) creativity of participants in the process itself. Consequently, research was undertaken to uncover the perspectives of the individuals who are regularly involved with the process. This paper reports the findings of a survey of the participants who attended a recent regional conference devoted to issues on eminent domain. The survey consisted of a series of both multiple choice and open-end questions concerning the eminent domain process, the under-

lying theory pertinent to eminent domain, practicality in administration of eminent domain law, and demographic questions by which to classify the respondents.

In the paper presented here, demographic review of the respondents who comprised the survey will be presented along with a discussion of two key respondent perspectives on eminent domain. These are: (1) the perceived fairness of the eminent domain process; and (2) the ways in which respondents believe the costs of the eminent domain process might be reduced.

### *The Survey Respondents*

Forty-six individuals provided sufficient completed questionnaires to be included in the findings. Approximately three fourth's (34 individuals) were from the private sector; they primarily represented attorneys and appraisers. The remainder of the respondents (12 individuals) were from government organizations such as municipalities, cities, redevelopment agencies and the like; the latter represented appraisers and administrators.

The largest number of individuals identified themselves as being primarily concerned with legal, business valuation and real estate matters. Thirty percent (14 individuals) were concerned with the legal issues relating to eminent domain; many of these individuals were attorneys themselves or individuals who worked closely with a legal staff. A similar number (14) or 30 percent were concerned with real estate issues. Twenty-four percent (11 individuals) indicated that they were pri-

marily concerned with the business valuation issues related to eminent domain. The remainder of the respondents indicated that their primary area of specialization within the field of eminent domain was related to redevelopment, utility, machinery and equipment or other areas.

Most of the respondents, two out of every five, indicated that they had worked in these areas of specialization for more than 10 years. Approximately one in six respondents indicated that they had worked in their current areas of specialization for six to 10 years. Approximately a quarter of the respondents indicated that they had been in their areas of specialization between three and five years. And the remainder, or approximately another 20 percent, indicated that they had been in their areas of specialization only one or two years.

Most of the respondents were practicing in their areas of specialization for more than five years. Assuming respondents who indicated they were in their areas of specialization for more than 10 years were practicing for 14 years (a reasonable period in light of the time periods depicted), the average length of time respondents were in their areas of specialization was 9.25 years. Consequently, the perspectives reflect well-seasoned, knowledgeable individuals who might be assumed to be familiar with the topics of concern, as well as the problems existing in the practice of eminent domain.

### *Is the Eminent Domain Process Fair?*

One of the questions posed related to how fair the respondent believed

the condemnation process treated the condemnee. Specifically, respondents were asked to indicate if they thought the condemnation process treated the condemnee fairly.

All the individuals (12 out of 12) working with government organizations responded that they did feel that the condemnation process treated the condemnee fairly. In sharp contrast, however, less than half of the respondents (47 percent) who were associated with the private sector indicated that the condemnation process treated the condemnee fairly.

Equal numbers of respondents from the private sector, indicated that in their opinion the condemnation process did not treat the condemnee fairly or that they could not decide whether or not the condemnation process treated the condemnee fairly. Twenty-seven percent of the respondents fell into each of the aforementioned categories. Consequently, slightly more than half of the subsample from the private sector indicated that they either did not believe the condemnation process treated the condemnee fairly, or did not know if the condemnation process treated the condemnee fairly. This difference between the private sector and the public sector is too large to have occurred by chance and indicates strong differences in perspectives of the private sector respondents and those from the public sector.

This difference in perspective between the private and public sectors relative to eminent domain issues is reflected in a number of areas (whether to use market rent or contract rent when measuring goodwill). Part of the difference in perspective expressed obviously reflects a natural bias by individuals who are working with government to provide compensation for what has been mandated and must be addressed. To the extent the difficulties of carrying out this mission because of the absence of easily measurable facts, less than crystal clear concepts, reliance upon individuals with limited knowledge and abilities, or personally motivated advi-

sors who serve to confuse, complicate and frustrate the efficient handling of the process, the attitudes of public respondents are somewhat understandable. On the other hand, it is believed that the varying responses of participants in the private sector also demonstrate the true objectivity of some of these participants.

One could hypothesize that the private sector is partially characterized by individuals more concerned with the benefits they can derive personally or for their clients than in the fairness of the process to condemnee—or for that matter the people at large since what happens to the condemnee is paid for by society as a whole. Therefore, any obstruction to attaining a satisfactory result, as defined by the private sector participant, whether in terms of dollars or efficiency, could be a reason to consider the process unfair. However, as seen from the responses, even these individuals in the private sector who indi-

cated the process was unfair to the condemnee also indicated that they believed the process may be unfair to the condemnor as well. This has been interpreted to indicate a degree of sometimes unexpected objectivity and level-handed on the part of practitioners in the private sector. It also indicates that the problems experienced by those individuals who must participate in the process are diverse.

### *Reducing the Cost of the Condemnation Process*

It is recognized that the costs of condemnation are sometimes enormous, so great that when over and done with, the costs incurred are sometimes considered far in excess of any economic value of a project. To the extent that the condemnation activity and the resulting development contributed to the benefit of society in general (as with a freeway that was sorely needed to provide efficient access to an airport), or to specific seg-

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ments of the population at large for whom the project has improved the existing quality of life, there may be reason to at least partially overlook the economics of the project. However, in many ways, the costs of condemnation are far more excessive than are reasonable in light of the objectives established and in light of alternative paths that might have been pursued.

Participants at the conference were asked how the costs of the condemnation process could be reduced. Here again, a disparity of opinion between the private and public sector was blatantly obvious. From the public sector's perspective, almost half (46 percent) of the respondents indicated that the way to reduce the costs of the condemnation process was to have the differences between the parties arbitrated. Another 8 percent of the respondents from the public sector indicated that the costs could be reduced if disputes were avoided.

In sharp contrast, only 6 percent of the participants from the private sector indicated that they believed the costs of the condemnation process could be reduced with the aid of arbitration. Arbitration is not viewed as a viable procedure for reducing the costs of the condemnation process by individuals practicing in the private sector.

Most of the methods suggested for reducing costs by participants from the public sector were related to the process of bringing the two different sides (condemnee and condemnor) together. Participants from the government sector believed that some method of communication between the parties, be it arbitration, meetings or improved training for the judges responsible for the communication process itself, was the overwhelming key to any hoped-for economies. (Approximately a quarter of the respondents indicated that they did not know how they could reduce the costs of condemnation.)

On the other hand, responses of participants in the private sector indicated the existence of a more eclectic perspective. Private sector respondents were more prone to suggest creative, non-traditional techniques to help reduce the costs of the condemnation process.

For example, offering incentives for the condemnees to settle and setting penalties if the two parties went to trial and the results were found in favor of the government agency, were suggested. So, too, was the elimination of the use of attorneys and experts in the process. (This, of course, assumes that both parties enter into agreements with the rights and benefits of both clearly identified in advance and the process fairly approached.) Other suggestions by individuals in the private sector included: shorter time to trial to reduce the costs of legal activities as well as those required of government agencies, condemnees and other participants; disclosure of financial data earlier in the condemnation process; utilization of a panel of appraisers to decide on value or values; and better education in the area of goodwill for government personnel.

Although approximately a quarter of the individuals in the private sector responded with statements that could also be classified as "communication" related, almost two out of every five individuals indicated that they did not know how to reduce the costs of the process. This was slightly greater than for individuals in the public sector who were more convinced that improvement in the communication process would be effective in reducing costs.

Another more subtle difference also appears to exist between the public and private sectors. That is, respondents from the public sector tended to suggest communication that was more passive or indirect, such as through arbitration. On the other hand, individuals from the private sector tended to suggest communication methods that were more direct and possibly highly confrontational, such as through direct negotiation with a government counterpart.

When asked how the costs of goodwill cases (as opposed to the process in total) could be reduced, the value of communication was again noted by both groups. However, as in the former case, individuals from the public sector tended to think more in terms of an indirect path such as arbitration or avoidance of disputes altogether. In contrast,

individuals from the private sector were more prone to suggest direct techniques such as negotiation between the two sides or use of the appraisers to negotiate between the two sides. Approximately one in every six respondents in the private sector indicated negotiation or relegating the decision process to appraisers.

Also of interest is the fact that at least some of the public sector respondents suggested other non-confrontational methods such as up-front payments to help business owners or a series of payments for goodwill loss as it occurred. There was strong evidence from survey data that many respondents in the public sector recognized the responsibility of government to treat the condemnee fairly, efficiently and in a manner helpful to the business. On the other hand, respondents from the private sector were more prone to focus on the process itself and suggest changes that would affect the costs through process modification. For example, bringing the case to trial earlier, getting documents earlier, and determining what is compensable earlier in the condemnation process were suggested by respondents in the private sector. (Even so, it should also be recalled that while some respondents in the private sector indicated this, almost half (45 percent) the respondents from the private sector indicated that they had no idea as to how to reduce the costs of goodwill cases.)

Based on the above, it would appear that most respondents in both the public and private sectors believe a promising method by which the costs of condemnation can be reduced is via improved communication. But while individuals from the government sector tend to think of a communication process that would be described as more indirect, such as through arbitration, individuals from the private sector tend to think of a communication process that is more direct, such as through face-to-face negotiation. Although early monetary payments were suggested by individuals in the public sector and are interpreted to clearly indicate recognition by government-related employees of the difficulties faced by businesspeople because of the

process as it exists, some individuals in the private sector also visualized the use of early monetary payment as both an incentive to settle as well as a penalty for not accepting a fair offer when their position was later judged to be inadequate and unfair, or to have delayed settlement and increased costs to the public.

Obviously, the costs of condemnation are recognized as substantial by both sides. These costs are in terms of profitability and business viability for the entrepreneur; they are in terms of social and economic costs for the public sector. Consequently, both sides would like to adopt techniques that would reduce costs and hasten the process. Arbitration, negotiation, selection of a panel of final appraisers and education are some of the suggestions offered.

### Summary

Eminent domain is a vibrant area in which to practice. It offers the practitioner diversity of subject matter dealing with companies, industries and issues; opportunities to be creative in his or her work through interpretation of the facts and law, methodologies for support of theories and data, and area in which to perform new research; and possibly most important, the ability to contribute to the good of both the private and public sectors.

As indicated by the research performed, practitioners both in the private and public sectors aim to provide service that supports the law and the intent of the law. As here discussed, to fairly compensate the business entity for a loss incurred from eminent domain activities that are compensable.

The research findings focused upon were those that indicated a difference in perspective, which appeared to reflect they were associated with the private or public sector. For example, while all the respondents in the public sector indicated that they believed the condemnation process treated the condemnee fairly, slightly less than half of those in the private sector felt similarly. And while half the respondents from the public sector indicated the way to reduce the costs of the condemnation process was through arbitration, few respondents in the private sector believed similarly. However, in spite of the differences in perspective that can be found to exist between the private and public sectors, the overall goals of both are similar—to fairly treat the entity affected by eminent domain.

Recognizing the differences and pursuing alternatives as suggested should be rewarding. Future papers will discuss other issues uncovered in the research. □

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