

Economic Easements

There Ought to Be a Law



- All estates in real property are subject to the four powers of government: taxation, eminent domain, police power and escheat.
- Eminent domain is the right of the sovereign government to take the public property for public use upon the payment of just compensation.
- Many owners have to be reminded that they own their property subject to eminent domain.

It is this appraiser's opinion that when an owner of property is confronted with condemnation, and this condemnation has the effect of temporarily precluding the owner of the normal, peaceful pursuit of his bundle of rights in the property, the owner should be compensated. The condemning agency has, in effect, taken a temporary "economic easement" on the property.

The term "economic easement" is one being advocated by the authors. It is akin to a grading easement. A grading easement is one taken by a utility company, or say a local public agency, for work on privately owned area itself, usually for road grading purposes and/or temporary equipment movement, etc., while working on the publicly owned right-of-way area. This type of easement is usually short-term (one or two years), and the property owner is generally compensated by way of a net rental while the grading easement is in effect.

To illustrate the concept of an economic easement, consider a simple, straightforward, parcel of commercial land partially being taken in fee. The local public agency announces to the general public on February 1, that there will be a certain taking of right of way. We can assume that by June 1, the owner will not be able to go to the local community building department and pull a building permit due to the threat of condemnation. Further assuming that on September 1, the owner is contacted by an appraiser in the employ of the condemning agency to inspect the property pursuant

to his or her assignment as an appraiser. By December 1, the condemning agency makes the owner a good faith offer for the property and by February 1 of the following year, the owner accepts the offer by the condemner.

The illustration is not far from being typical.

Two things have to come into play: First and foremost, it has to be clearly understood that when you own property you do so subject to the four powers of government, of which eminent domain is one.

Second, the time allowed the local public agency to complete the intended purpose and use that created this taking is a "reasonable time." A reasonable time for a project can vary and the condemning agency always has or should have an approved agenda.

Has an owner always been typically fully compensated? There is some merit to the idea that he has not. It is the authors' opinion that after a reasonable time period to complete the project, if the project is not complete, then a "compensable" economic easement exists.

Typically not valued are the owner's rights of normal, full utilization of the property. In a partial taking the remainder property is what is left "after" the taking, assuming a reasonable time to complete the intended improvements.

When right-of-way projects are announced, the future effects on the remainders are weighed by market participants, sales take place and in general, it has been the authors' observation that typically well-informed buyers and sellers realize that there will be a reasonable period of time to complete the objective of the condemnation, and normal market activity returns.

In the normal course of valuing the property in the "after" taking, the appraiser assumes the proposed roadway right of way (the reason for the condemnation) is in an operating condition, and one could get a building permit, if vacant land, and immediately build. If there are improvements in the "after" take, the appraiser assumes that there is no business interruption for a reasonable time period.

As of the date of the appraisal for condemnation, the appraiser usually is asked to make the assumption that the proposed right of way is complete when, in fact, it is not. There typically is a time period to complete the proposed right of way, and during this period there can be lost profits from an ongoing business, lost amenity use to a homeowner, and lost time in getting proposed improvements into normal economic production as examples.

During a reasonable time period to complete the project, it is very questionable that an owner can claim losses, as he or she bought and owns the property subject to the right of eminent domain. Currently, there is no known way to compensate owners for these excessive time-to-complete conditions. That is the thrust of this article.

In condemnation appraisals, where there is a "total take" in a reasonable time, there is no "compensable" economic easement. The appraiser appraises the property in fee simple. Also in condemnation appraisal, there are "before" and "after" takings. It is the "before" and "after" takings, or partial property takings, where the potential "compensable" economic easement occurs.

In a partial taking, generally the property is first valued in fee as though it was going to be taken in total. The appraiser then typically appraises the remainder property in fee that is not being taken. The difference in the "before" and "after" takings is usually referred to as just compensation, which is defined as follows:

"Whenever private property is taken for a public purpose, the Constitution commands that the owner shall be paid just compensation."

Just compensation is the amount of money that will put the person whose property has been taken in as good a position as the person would have been if had the taking not occurred. The owner must not be forced to sacrifice or suffer by receiving less than full and fair value for the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense

of the individual.

The determination of value and just compensation in a condemnation case is not a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all of the evidence you have heard and seen in this case." (SJI2d 90.05)

If the highest and best use is for development and the community refuses to issue a building permit because of the threat of condemnation, or because of the uncompleted construction, it is the appraisers' opinion that the owner could have an "economic easement" taken from him by the condemner. The owner could receive compensation for this taking, just as they would have by a grading easement.

Why then could not an owner be paid a net rental or a normal return, on a monthly basis, on the "after take" market value of the subject property, while the condemning agency precluded this owner from the normal private pursuit of ownership and use of the property in particular after a reasonable time?

Now let's go one step further and say the condemnation is for a roadway widening, and the appraiser does the usual "before" and "after" valuation for the proposed taking as the basis for just compensation. The taking in this example is a partial taking, and there is an economically viable, usable remainder. In all of the "before" take and "after" take appraisals, all applicable appraisal approaches are considered and applied.

In the "after" take, the appraiser assumes the same conditions exist as in "before" the take, which properly excludes any

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"after" take conditions that could accumulate special benefits to the property.

After agreement is reached between the property owner and the condemning authority, and compensation is paid to the owner, however it is most often the fact that the owner cannot physically or economically develop the remainder for a reasonable time period until the construction is complete.

No one can accurately predict how long the construction is generally going to take. This type of use delay and/or interruption is usually of a temporary nature (\pm one year), and the value is easily determined by looking to the remainder value set forth by the agreement between the owner and the condemning authority, and is properly based upon the condemnor's appraisal. The authors suggest that this short-term, temporary taking should be known as a non-compensable "economic easement." It is not a term known to be in use in the marketplace.

In this instance, the "after" take "economic easement" is usually temporary in nature, therefore, the property owner would not be compensated for this easement.

However, when the proposed taking goes beyond a reasonable time, the compensation should be a net type of market rental payable monthly and, in each case, the basis for the net rent is the "after" value of the property. This is a "compensable economic easement."

If the property is improved, the basis for compensation can vary, but should be based on the "after" take value normal market conditions.

If the improved property is a single-family home, the rental value could be affected by abnormal temporary loss of access, inconvenience of, or no, mail delivery, no school bus noise and dust from construction, interruption of school bus locations, etc., during the construction period. Not all of these items would necessarily occur at the same time. There could be periods where there is little or no measurable occupancy impairment, and other times when occupancy would be significantly impaired. A competent, trained appraiser

could measure these losses which might have to be calculated at the end of the construction period, or during the construction period, as needed. The appraisers have done this in the past.

If the property involved in a "before" and "after" taking is an improved commercial property, such as an apartment complex, after a reasonable length of time the adverse effect of the taking, until the owner's normal pursuant of private property is restored, should be compensated by the condemning agency.

If the property involved is a business, such as a tool and die shop or a drug store, these owners also could deserve compensation for their lost profits after the taking of a "economic easement. Sometimes it is best to compute the loss in value (economic easement) after the roadway or proposed improvements (reason for the condemnation) are complete.

Generally what happens when property is under the threat of condemnation is related to the reader as follows:

1. No incentives to totally renovate, modernize, rehabilitate or expand;
2. Relative inability to secure responsible financing and refinancing;
3. Reluctance of the building department to do almost anything enforcement-wise;
4. General relaxation of law enforcement and accelerated vandalism of real property;
5. Notices to area occupants that the area is to be taken in the future, and even offers of relocation at condemnor's expense;
6. General loss in neighborhood pride of ownership;
7. Greatly reduced prospective purchasers for the condemned area, and unfair waiting periods to obtain equities for relocation;
8. A less desirable pool of prospective tenants and increasing vacancies of tenant-occupied properties;
9. Reluctance by the community to issue building permits in the area, regardless of the intended development.

When the appraiser receives an appraisal assignment, he or she must

appraise the property as he or she sees it. Generally, the appraiser must do everything in their power to eliminate any adverse effects on property as a result of the threat of condemnation. Generally, the appraiser judges what the physical and economic condition of the property would be without the threat of condemnation, and values the property accordingly.

In other words, when the appraiser actually goes to inspect the property and value the property for condemnation purposes, and notices any of the preceding outlined problems which exist because of the pending condemnation, the appraiser should not penalize the property value for these conditions if they are found to exist. Some property owners have been successful, when these conditions are found to really adversely affect the property's current value, in going with an earlier date of valuation and compensating the owner, with interest, on the loss in value from the time the adverse condition is determined to have happened, to the actual date of taking.

The general adverse effects on property due to the threat of condemnation are observably not limited to older inner-city property. It happens in all locations. Just look into your local areas where new rights-of-way are being acquired and or road widening is taking place. The improved properties usually temporarily suffer adversely as outlined earlier in this article, and land values become very speculative.

The authors have been involved in the condemnation process for over 50 years. It is the authors' observation that condemning authorities do not deliberately take their time, or delay the condemnation process. Often, it is the system itself that bogs down the timely process of a proposed condemnation project. That is why there are such remedies to a property owner as "advance purchase," "inverse condemnation" and in the state of Michigan, Act 87, which is a "quick take" act whereby compensation for the taking is deposited in a bank where the owner can get at this money quickly, then argue for more money in

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court at a later date, if warranted.

An advance purchase, which is recognized by the Federal Bureau of Roads, is a process whereby the government will step in and acquire the property in advance of the normal time to acquire property when there is a demonstrated hardship. One such hardship could be a

family being moved out of town by virtue of an employee transfer and the threat of condemnation has reduced the number of prospective purchasers who want to buy a house when it is well known the house is to be demolished in the near future for a roadway?

Inverse condemnation is a term used

in condemnation appraising whereby acts by the local public agencies (who have the power of eminent domain) that create a condition of a taking of the property, without the filing of any papers in court. A local public agency can make statements, for instance, that they are going to take certain property for public use, where these statements themselves, in the eyes and perception of the general public, constitute a taking without filing the proper papers. Economic easements can also be caused by this type of action.

Act 87 in Michigan was an attempt to decrease the actual time to process an eminent domain right of way. This process has recently been delayed by property owners who go to court and question the actual necessity of the proposed taking with good or bad intentions, and also by the environmental problems which have arisen in recent years. This action, while not being a direct cause of delay by the condemning authority, has increased in many instances the length of the economic easement.

Here are a couple of examples.

Let's assume that the "after" take value was for a vacant parcel of commercial property with a highest and best use as a gas station. Let's say the site consisted of 30,000 square feet and was appropriately valued at seven dollars per square foot or \$210,000. Because the proposed "after" take right-of-way improvements were not done at the valuation date and, in fact, had not even begun since all of the right of way had not been acquired, the owner had to wait three years until he could rent the site to an oil company as a gas station site. Suppose the net rental rate in the market was 10 percent net of the land value. The landlord lost \$21,000 per year, plus real estate taxes, administration expenses and possibly liability insurance, etc., during the time the landlord could not make normal use of this property. Currently, there is no provision known to compensate property owners for this taking, which, in effect, is an economic easement. Perhaps there is a "compensable" and "non-compens-


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able" economic easement in this case. The normal delay, which is non-compensable, and the abnormal delay, which could be compensable.

Let's look at another example of a small grocery store that only lost part of its parking and in the "after" taking could easily continue to operate. The construction of the proposed roadway over a couple of year's time, which is not unusual, along with construction congestion could easily impair this owner of the grocery store to maximize sales. Profits could, therefore, easily be down during this period of the economic easement, and this owner could be compensated for a longer than typically necessary construction period.

By adopting a policy of paying for a temporary "compensable economic easement," the condemning authority would have an additional motive to avoid inverse condemnation proceedings, provide owners with just compensation they cannot get, and embark on a program to improve their public relations in the community. ■

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