

Real Estate Consultants and Eminent Domain



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Pulling the Pieces Together

Forty or fifty years ago, condemners usually followed one of two procedures in acquiring needed real estate interests. One of them involved ordering appraisals to value the part taken and any damages in order to make an offer. In this case, it was made clear that there was no room for negotiation. If the offer was rejected, then condemnation action would swiftly follow.

The other acquisition method employed the “land man” approach where a representative of the condemning authority would call on the targeted property owner with a checkbook in hand. This action typically started with smiles and promises of cooperation during construction to preserve trees, keep the surface clean, remove brush, and the like. The owner would be assured that the offer was a fair one and available only for a short time. Once the owner signed the conveyance forms and accepted the check, the representative was not heard from again, and the promises made were seldom honored. On the other hand, if there was reluctance to sign or an expressed need to consult others, the mood would change to one implying dire consequences if the project experienced delays. Condemnation would quickly result, along with much lower compensation and no assurances of cooperation. Typically, compensation offered was not based on an appraised value, but rather on a judgment of how little could be offered.

If a hearing or a jury trial took place, the verdict might go in favor of the local property owner. Jury trials often took place with no discovery, no exchange of appraisals and no holds barred. Condemning authorities were often considered “fair game” for large payouts to local property owners. Other times, however, local juries

were not adequately informed on property values and therefore would award very low amounts. If the jury award seemed unfairly low, the county judge might grant a new trial and give the property owner another chance.

Through the years, a number of reforms have resulted in important changes. Now offers are usually based on an appraisal and reasonable time for consideration is granted. Much more information on the proposed project is presented, and public hearings are common. The rights to be taken are clearly spelled out. In most cases, a copy of the appraisal on which the offer is based is provided to the property owner.

The exchange of appraisals has resulted in requests from attorneys for the appraiser on their side to review and comment on the opposing appraisals in order to aid in depositions or cross-examination. In the past, this practice was widely discouraged by the Appraisal Institute and many appraisers, however it is now more accepted. While this practice does not necessarily compromise the objectivity of the appraiser, it can result in appearance of advocacy.

Rather than rely on appraisers who are directly involved in the case, it is often preferable to involve a completely objective party to review all the appraisals, consider the nature of the case and the parties involved, and assess the experience and reputation of the appraisers. Involving a third party permits a confidential, objective, and completely candid report that isn't subject to discovery in most cases. This is not feasible if an appraiser directly involved in the case is used.



Just what services can a non-testifying expert provide? They can include any number of the following:

- 1) An analysis of the case, assessing public opinion regarding the condemning authority and the project, as well as the property owner. If necessary, they conduct an investigation into offers extended to other owners and the status of those negotiations.
- 2) A careful examination of the appraisal(s) prepared for the client, including mathematical accuracy, appropriateness of the methodology and comparables, reasonableness of adjustments, highest and best use, and overall appearance. Conformity with Uniform Standards of Professional Appraisal Practice (USPAP) and any employment contract would be tested. If more than one appraisal has been prepared, the examination could include a comparison and analysis of any disagreement or inconsistency between them.
- 3) A similar examination of appraisal(s) and other reports prepared for the other side.
- 4) A comparison of the appraisals, outlining strengths and weaknesses, including the experience, credentials, reputation and testifying ability of the appraisers.
- 5) An examination of other evidence, such as land plans, existing leases, purchase offers and previous sales of subject, which resulted in a report of the strengths, weaknesses and effect on the case. Any actual or perceived inconsistency between this evidence and any appraisals is noted.
- 6) Preparation of direct and cross-examination questions, or areas to be explored in depositions. The ability to consult with the attorney handling the case.
- 7) Participation in developing strategy in the case with the attorney handling the case.
- 8) Preparation of witnesses by posing likely questions and assisting in structuring answers to accurately convey the opinions of the witness to a lay audience.
- 9) Preparation of a counseling report that candidly and objectively presents the information developed and the resulting opinions.

Many judges now require mediation prior to trial. This again is an

area where the consultant can be of great assistance in helping assess settlement offers and emphasizing weaknesses in the opposing case. In many instances, a consultant can also help clients understand the weaknesses and risks of their case.

Often property owners have concerns not directly related to compensation. It may be emotional attachment to the property, concern about intrusion on the property by unauthorized people, a misunderstanding of the rights being taken, or one of many other reasons. It may also involve misinformation about payments to other property owners. Discrete inquiry and research by a consultant can uncover these concerns and help prepare the client in overcoming these sometimes unarticulated barriers to successful negotiation. These services may be helpful whether the consultant is working for the property owner or the condemner.

The ideal consultant for this work is one who has significant experience in appraisal, including eminent domain testimony, and has a reputation for independence, integrity, and broad knowledge of real estate, eminent domain appraisal and eminent domain law. Tact is essential in dealing with all individuals involved, including the appraiser, the client and the attorney. The consultant must be able to walk that fine line between being too forceful and too timid, and must be adept at correcting or mitigating unpleasant but necessary aspects of the case. They should also be well versed in eminent domain law.

In some cases, the consultant may be asked to testify, and may do so very effectively. Since this practice runs the risk of introducing discovery problems not otherwise encountered, the attorney must determine what is most effective regarding the case at hand.

While the involvement of a litigation support person is not warranted in every case, it is always highly recommended in complicated and/or high value cases. Often, having an experienced, unbiased expert involved will result in the settlement of a case at greatly reduced cost. Including a consultant in the case can also enhance the role of the real estate appraiser, as it helps eliminate the appearance or implication of bias. If advantageous settlement is not possible, the work of the consultant will be extremely valuable in the hearing or trial.

The most effective consultants can position themselves as counselors who will research alternatives and recommend a solution. Many IRWA members and experienced appraisers are qualified to perform these services and some of them may also be members of the Counselors of Real Estate. Regardless of the consultant's affiliations, this is simply another service that some of us can provide to make the eminent domain process work smoothly and efficiently. ●