

THE EXPERT WITNESS IN CONDEMNATION LAW

Who will the jury vote off the island?

By Gary David Strauss, Esq.

Recently, I had the good fortune to be made privy to NBC's proposed 2015 fall line-up. To my surprise, I discovered that Survivor XXV was devoted to condemnation law. Although I am well aware of the tenuous nature of television scheduling, given the fact a reasonable possibility existed that the show might air, I considered it to be my duty as an IRWA member to develop a short list of guidelines that might benefit IRWA appraisers in the event that any survive the casting call. This article is intended to explore some common pitfalls that might result in an expert appraiser being voted off the island.

THE EXPERT WHO IS UNFAMILIAR WITH THE RULES OF THE GAME

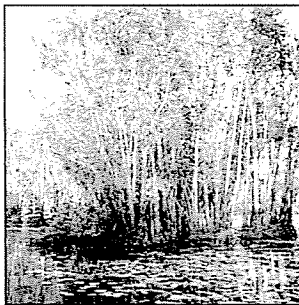
Although a land acquisition effort formally becomes a legal matter after the complaint is filed, the appraisal process involves legal issues from the beginning. Statutes and case law often dictate essential considerations. In order to determine the particular legal issues that may impact the appraisal process, the appraiser should consult with knowledgeable legal counsel prior to initiating and/or completing the appraisal. Failure to adhere to legal guidelines and requirements may result in the appraisal being stricken and/or cross-examination that substantially diminish the credibility of the expert witness.

For example, in many jurisdictions, an appraiser is not permitted to consider the general effects of the project in the determination of just compensation. Increased noise and dirt generated by a new road might fall into this category. The general public policy consideration behind such restrictions lies in the decision that those who have had property taken should not be treated differently (with regard to general effects) from those who have not been condemned, but who still have to put up with the same effects of necessary public projects.

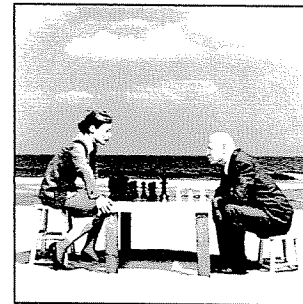
"Circuity of travel" and "diversion of traffic" generally are considered to be non-compensable elements of damage. Nichols, Eminent Domain, §16.03[2], pp. 16-20, the leading treatise on condemnation law, explains the concept as follows:

- Courts uniformly agree that a reduction in value resulting from diversion of traffic is noncompensable, as is mere circuity of travel. While used interchangeably, these catch phrases refer to separate and distinct legal concepts.
- Diversion of traffic implies a reduction in the volume of traffic adjacent to a property, and concomitant loss of patronage.
- Circuity of travel implies an indirect and more inconvenient means of reaching the property.

The rationale behind this rule is that private citizens have no property right in the flow of traffic on public streets, unless of course, you have an entrepreneurial stake in drag racing or actually are working the streets.



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"Highway by User" statutes also might be applicable. In these types of statutes, under certain circumstances, a private road that has been used and maintained by the public for a certain number of years is viewed as a legally dedicated road. In the event that a proposed taking involves a portion of what appears to be a private road, the situation should carefully be examined.

Some jurisdictions permit an appraiser to consider offsetting beneficial effects of a project. While the landowner might describe a new road as AC-DC's "Highway to Hell," market participants may view it as Led Zeppelin's "Stairway to Heaven," notwithstanding the inconsistent metaphor. Discussions with brokers that make a living selling property very close to a project might provide great insight into how market participants actually view the project.

Whatever the particular laws in a given jurisdiction might be, it is important that the appraiser is provided with the appropriate legal framework before the appraisal is completed. Nothing can compromise the chances of remaining on the island more than not knowing the fundamental rules of the game.

THE EXPERT WHO IS UNFAMILIAR WITH THE ENVIRONMENT

It is extremely important that an expert is familiar with the relevant market and also has experience with the specific type of appraisal problem at issue. Experts who have longstanding relationships in the community where the subject property is located may be familiar with market activities that are not apparent to others. Similarly, knowledge of the community's historical posture regarding development or physical capacity of sewer and water systems may be relevant to the market's perception of value. In instances where an appraiser from outside the immediate market is retained, pertinent information can be obtained from local brokers and government officials.

In matters where relatively unusual issues are involved, such as valuation of highly specialized businesses, actual experience with the particular type of appraisal problem is an important consideration. For example, using the cost approach for an older factory might involve the interplay of current environmental statutes and local building ordinances, as they existed at the time of construction, as well as on the date of taking. Oversights in calculating costs may result in an unsupportable opinion that differs substantially with the other party.

It is not uncommon for a highly credentialed expert to lack fundamental knowledge of the particular issues at play in the case. I recall a case where infrastructure costs associated with a subdivision played a key role. The condemning agency retained an expert from a respected firm with a national reputation. Unfortunately, the expert had not been involved in determining subdivision costs for over five years. The property owner's expert dealt with these issues every day. It soon became apparent that the opposing party's cost estimates bore little relationship to reality. After depositions, the case settled pretty quickly.

THE EXPERT WHO IS GIVEN THE WRONG ASSIGNMENT

Occasionally, a condemning agency contracts with an appraiser to perform a limited appraisal, often in an attempt to reduce costs. This situation is not uncommon when mass appraisals are completed for utility easements. In such cases, an appraiser may be instructed to value only the property physically taken for the easement. This method may be appropriate in some situations, such as where the taking is relatively small and does not have an effect on the value of the remainder of the property. However, the appraiser should make this determination only after all the relevant physical and legal factors have been identified and considered.

On some occasions, an appraiser is instructed not to use a certain approach to value, such as the development approach. Whether or not this is appropriate depends on the application of the law to the particular facts. A decision of this nature should only be made after careful consideration by the agency, attorney and appraiser, as it likely will have a substantial effect on the final estimate of value. Regardless of the decision, it should be fully supported by a complete analysis of all relevant factors, rather than as the result of a general administrative posture.

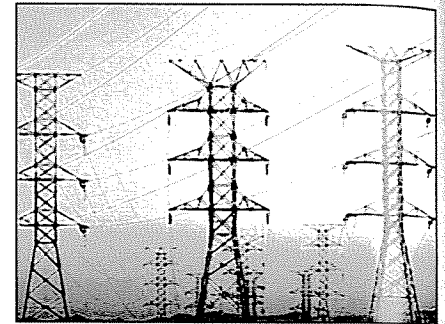
On a related note, sometimes a preliminary review of the project and the proposed taking might reveal that a lesser property interest (i.e. easement) or amount of property might be sufficient. If damages potentially can be avoided in this manner, it certainly is a factor worth consideration. I recall a case where the condemnor eventually realized that it did not need a 27-foot fee taking in order to bury electric lines under the street. After the court permitted the agency to revise the taking to a 10-foot easement, substantial damage claims vanished.

THE EXPERT WHO DOES NOT HAVE PROPER SUPPLIES

Appraisers must obtain all the information necessary to value the property. Situations arise where lack of key information makes it practically impossible for an appraiser to determine the value of the property and/or the effect of the taking. Problems should be identified early so that a clear and sufficiently detailed request for information can be made. Walking the property with the owner and possibly the owner's attorney often does not result in the production of all relevant information. It may be appropriate to have a second interview or to send follow-up questions.

Where questions are not voluntarily answered or documents not supplied, there may be legal processes available to address these problems. There also may be legal means of securing a court order to enter the property for preliminary inspection if the appraiser is not voluntarily welcomed with open arms on the property.

Whatever legal remedies might be relied upon, it is important that a good faith effort is made to identify and request the desired information. A court may be reluctant to come to the aid of a party that complains about not receiving information that it apparently never requested. What might seem obvious to the appraiser at the time the information is requested, might not be obvious to the judge that has just sat through 30 motions and only hears one or two condemnation cases a year.



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THE EXPERT WHO DOES NOT FORM NECESSARY ALLIANCES

The real estate expert and/or the condemning agency's counsel should be given reasonable latitude to acquire the assistance of other experts, where there are issues involved beyond the scope of the real estate appraiser's expertise. Generally it is preferable to retain supporting experts that have frequent real world exposure to the problem at hand. If warranted by the size and scope of the project, before the initial appraisal is begun it may be appropriate for the condemning agency to confer with appraisers, an attorney and/or acquisition experts capable of ascertaining the issues and suggesting experts that might be appropriate for the assignment.

Often the retention of additional experts is necessary to rebut the opposing party's damage theories. Although this proposition is somewhat obvious, it is not uncommon for condemning authorities to proceed without competent rebuttal, or in some cases, without rebuttal at all. In many cases, experts are necessary to educate counsel so that the opposing experts can be properly cross-examined. If the case is tried, effective rebuttal testimony usually is a necessary supplement to cross-examination.

THE EXPERT WHO IS NOT PREPARED FOR THE SHOW

Preparation for deposition and trial cannot be overestimated. The efforts of counsel, experts and knowledgeable representatives of the condemning agency should be coordinated so that every aspect related to the appraisal problem is scrutinized. Rejection of a valuation or damage theory should be the result of relatively exhaustive analysis. An appraiser who testifies that he or she did not really consider an issue may have a substantial negative effect on a case, regardless of the actual merit of the rejected position.

Checklists are available on the Internet and in various publications, which provide exhaustive lists of items that may be appropriate to review. Prior to deposition and to trial, counsel should be aware of areas in his or her appraiser's report that are open to attack. If a particular effect has not been included in the report that was considered by the other side, there should be a reasonable explanation for the rejection. Generally it is helpful if the reasoned rejection was formulated before the appraisal was completed.

All information related to both parties' comparable properties should be obtained. Plat maps, dimensions, acreage, topography, and sales information should be exhaustively examined. If errors are discovered, their effect on the conclusion should be discussed. In any event, errors should be admitted and an appropriate explanation given. Attempts to explain away mistakes seldom work and often destroy credibility.

It also should be understood that the perception that something is wrong might be as detrimental to credibility as a bona fide substantive flaw. Rigorous mock cross-examination should be the rule. Mock trials and focus groups should be considered, if warranted by the case.

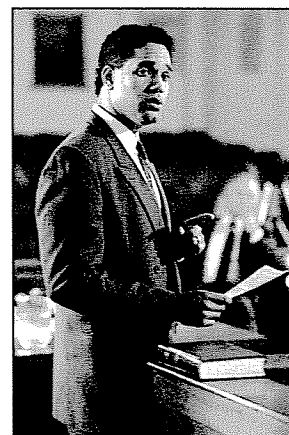
CONCLUSION

Although it is impossible to predict the ultimate outcome of a case, the key to staying on the island involves comprehensive analysis, understanding legal principles that affect the valuation process, identifying all areas of potential weakness, and properly preparing to meet all contingencies. Any savings realized at the expense of expert preparation often are short-lived.

The information contained in this article is general in nature and should not be considered legal advice. Each situation must be assessed on an individual basis.



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