

Purchases by Condemning Authorities as Comparable Sales:

Interpreting the New Federal Appraisal Standards for the Valuation of Environmental Real Estate

by Donald C. Wilson and Craig D. Hungerford

Uncertainty persists whether purchases by condemning authorities may be used as comparable sales in the valuation of environmental real estate¹ for other acquisitions by condemning authorities.

Fortunately, the recently published Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) sheds significant light on this issue, in the case of acquisitions by federal agencies. Further, it may inform non-federal transactions guidelines, also, since federal guidelines are sometimes adapted by states and other organizations.

A Prohibition with Significant Exceptions

UASFLA, completed in March, 1992, says "...the overwhelming view of the federal courts is that the sum paid for similar land by an agency having condemnation authority, even if condemnation proceedings have not begun, is inadmissible."²

However, UASFLA immediately conditions this statement by adding:

"The only recognized exceptions to this rule are in cases of voluntary sale, or where the fact that the parties were condemnor and condemnee either was

not known or had no influence because the sale was not in connection with, or in anticipation of, condemnation proceedings."³

This exception, alone, here referred to as the *voluntary sale exception*, should permit many purchases of environmental real estate by condemning authorities to be used as comparable sales for the following reasons:

First, in many purchases of environmental real estate, condemning authorities may have difficulty proving public necessity, a prerequisite for exercising rights of eminent domain. Wetlands, for example, may typically be acquired at one of several locations, so public necessity of a specific parcel may be difficult to demonstrate. Where public necessity cannot be proven, or where attributes targeted for conservation cannot be proven to be essential to the public good, no condemnation could have been possible and the sale is probably a voluntary one.

Second, much environmental real estate acquired by federal agencies has been acquired by *negotiated purchase*, a voluntary process by definition. In negotiated purchases, the owner is able to negotiate, or withdraw from

negotiations, or negotiate with other buyers, as he or she wishes. Thus, negotiation tends to qualify these transactions as comparable sales under the voluntary sale exception.

Third, federal agencies have not tended to indicate that negotiated purchases of environmental real estate are made in "...connection with, or in anticipation of, condemnation proceedings."⁴ They have tended instead to use language that indicates neither connection with, nor anticipation of, condemnation.⁵

For example, the National Park Service's (NPS) recent Land Protection Plan for Petroglyph National Monument outside Albuquerque, N.M., discusses condemnation, as a means of acquisition, as follows: "Where an interest in private property is necessary for resource protection and public use, *every effort will be made* [authors' emphasis] to reach a price agreement with the owner. However, if an agreement cannot be reached, a complaint in condemnation *may* [authors' emphasis] be filed."⁶ From this language, one infers NPS negotiates in anticipation of price agreement, not condemnation. And NPS refuses to link condemnation when price agreement is not possible.

If price agreement fails, NPS says, it "may" file in condemnation. It also may not.

Even in the extreme circumstance of damage being done, or being done imminently, to property sought, NPS says only that "...emergency action [read purchase] can be taken [authors' emphasis], subject to the availability of funds."⁷ Here, again, NPS refuses to say it will take emergency action, only that it can, and if it has sufficient funds. The only thing NPS says for certain is that if a property is being damaged, and if NPS takes emergency action, i.e., NPS tries to buy the property with whatever funds are available, and then fails to reach a purchase agreement, "...congressional concurrence in the filing of a declaration of taking will be sought to prevent resource damage..."⁸ In effect, even if the property is being damaged and the owner refuses to accept NPS's offer, the strongest action NPS will take is to seek congressional concurrence in the filing of a taking. Thus, Congress could concur, or not, for whatever reason.⁹ Hence, even in an exceptional, worst case scenario of an owner intentionally destroying a resource, NPS cannot literally anticipate condemnation prior to negotiations, nor link condemnation to negotiations with certainty, because its request may be ultimately refused by Congress.¹⁰

Fourth, concerning the voluntary sale exception, transacting parties, including those with condemning authority, do sometimes enter into agreements with private parties to transact without the ability to exercise their powers of condemnation.

UASFLA also articulates what may be called a *complementary sale exception*. According to UASFLA, "...there is a small minority view [in the courts] under which evidence of purchases by a condemnor is admitted on the theory that objection to this type of evidence goes to its weight, not its competency."¹¹ Essentially, UASFLA says some case law supports inclusion of purchases of property by condemning authorities, as comparable sales; if sales not involving condemning authorities are also given

sufficient weight. While UASFLA does not define what weight would be sufficient, UASFLA does make clear purchases by condemning authorities may be included, as comparable sales.

The complementary sale exception is particularly significant. Typically, in a comparable sales search, an appraiser or consultant finds a variety of negotiated purchases of environmental real estate. Some are bought by condemning authorities and some are bought by non-condemning authorities (land trusts, wildlife organizations, individuals, etc.). Therefore, the complementary sales exception applies to many sets of comparable sales data that an appraiser is likely to encounter.

To summarize, UASFLA cites two significant exceptions to its general prohibition of using purchases by condemning authorities as comparable sales; what the authors refer to as voluntary sale and complementary sale exceptions. Further, these exceptions apparently permit many purchases by

condemning authorities to be used as comparable sales in the valuation of environmental real estate being acquired by condemning authorities.

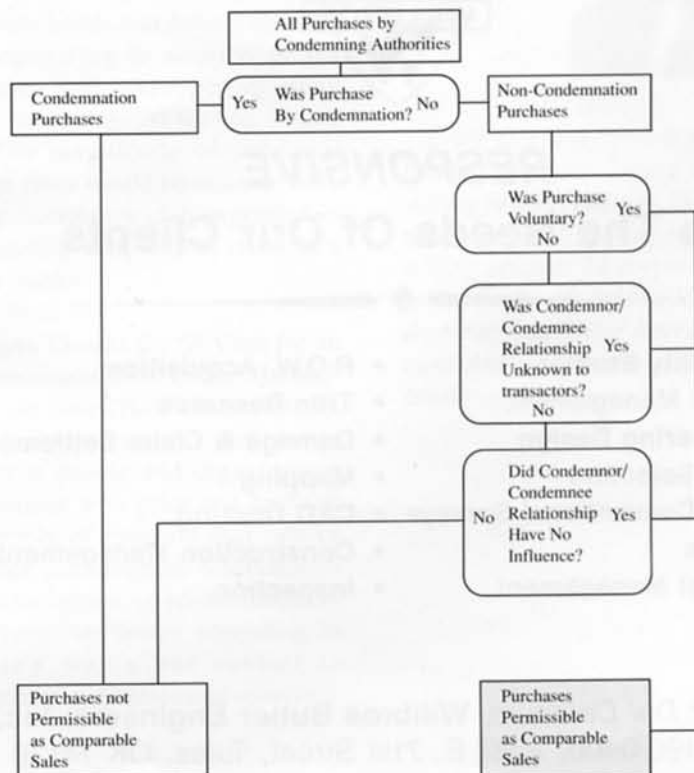
Informing the Uninformed

New rules can take time to filter through a system. If an appraiser meets resistance to ethical use of sales permissible under these exceptions, he should educate the party in question by referring him to the previously cited sections of UASFLA.

Some parties may insist that, exceptions or not, the "implied threat" of condemnation taints even negotiated purchases by condemning authorities. The argument of implied threat has at least three invalidating flaws.

First, the argument contradicts the reality that federal agencies do not generally claim an "implied threat" of condemnation to landowners with whom they negotiate transactions. If they did, many landowners might claim such an implied threat of

Evaluating Purchases by Condemning Authorities for Use as Comparable Sales



condemnation was tantamount to a taking and demand just compensation under rules of condemnation. Federal agencies probably pursue negotiated purchases precisely to avoid triggering condemnation.

Second, the argument contradicts an assumption of the UASFLA: that a condemning authority can, in fact, participate in a voluntary sale—unclouded by a threat of condemnation. Otherwise, why would the voluntary sale exception be explicitly stated in the regulations?

Third, the argument contradicts the reality that some landowners have started and stopped negotiating with federal agencies, as if there were no implied threat of condemnation, or, at the very least, as if they were indifferent to one, were it to exist.

Two Assumptions to Avoid

All purchases by condemning authorities that fit the UASFLA exceptions cited are not necessarily

permissible as comparable sales. Some purchases by condemning authorities, particularly those where sellers say they negotiated in anticipation of condemnation, probably are not permissible.

Further, all permissible purchases by condemning authorities under these exceptions are not necessarily appropriate for use in a sales comparison approach. Some permissible purchases may still lack other characteristics of an arm's length transaction and/or significant comparability.

Implications for Valuation

The new UASFLA criteria do permit as comparable sales, through voluntary sale and complementary sale exceptions, many purchases of environmental real estate by condemning authorities. This permissibility is significant for three reasons:

First, the inventory of comparable

sales available for valuation is greatly expanded. And with a greater number of significant sales available for analysis, more understanding of market dynamics should be possible, and reliability of estimates should improve.

Second, use of comparable sales with similar attributes (environmental significance) bought for similar use (conservation) by similar buyers should improve reliability of market value estimates, also. The historical tendency of appraisers to use comparable sales purchased for uses other than conservation of environmental real estate to value such property has always been problematic. Who cares, after all, what the value of environmental real estate is, if it were put to another use? The question is, what is it worth as environmental real estate—if that is, indeed, its highest and best use? Fortunately, the UASFLA exceptions discussed allow appraisers to view environmental real estate this way, when appropriate.

Third, by allowing these sales into the appraisal process, the value and use tendencies they indicate may legitimately influence highest and best use analysis toward a systematic recognition of conservation of environmental real estate as a valid highest and best use.

This last reason is particularly significant, because transactors and society are poorly served by appraisals based on unrealistic, improbable assumptions about highest and best use. Appraisals of environmental real estate lacking realistic assumptions of probable use are subject to unnecessary estimation error. This error triggers unnecessary distortion of values in the environmental real estate market¹², and indirectly in the general land economy. Such distortion perpetuates transactor conflict, builds unnecessary transaction costs into market values and impedes improvement of market efficiency.

Summary

The new UASFLA regulations should clarify much of the uncertainty over whether or not purchases of environmental real estate by



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condemning authorities may be used as comparable sales. In many cases, they can. The voluntary sale and complementary sale exceptions, as described by the authors, indicate conditions under which such transactions may be permissible as comparable sales. Essentially, transactions, where price and terms are negotiated without connection with, or anticipation of condemnation, are permissible (the voluntary sale exception). Alternatively, virtually any purchase by a condemning authority may be permissible, if used in complement with sales involving grantors from the private sector (the complementary sale exception). These exceptions allow consideration of a larger data set with more similarity in terms of probable use than would otherwise be possible. This should lead to a systematically determined highest and best use assumption of environmental real estate and reduced error in estimating market value. □

NOTES

¹ Wilson, Donald C., "A Case for an Environmental Real Estate Market," *Real Estate Issues*, Fall/Winter 1991, 45. "Environmental real estate is a space time delineation...relative to a fixed geography that has been delineated by humans to conserve, rehabilitate or introduce attributes of geographical, biological, ecological, archaeological, or historical significance." More simply, it is real property with environmental significance transacted to preserve that significance.

² Hartman, Barry, Chairman, Interagency Land Conference 1992, *Uniform Appraisal Standards for Federal Land Acquisitions*, (U.S. Government Printing Office: Washington, D.C., 1992), A-18, 51.

³ *Ibid.*, A-18, 51-52.

⁴ *Ibid.*, A-18, 51-52.

⁵ Had federal agencies said condemnation was a certain outcome of failed negotiations during negotiated purchases, owners might have argued such a condition made negotiations tantamount to a taking and demanded just compensation under rules of condemnation.

⁶ Southwest Regional Office, National Park Service and The City of Albuquerque, New Mexico, "Land Protection Plan, Petroglyph National Monument," October, 1991, 34.

⁷ *Ibid.*, 34.

⁸ *Ibid.*, 34.

⁹ For example, if a resource were being damaged to extract minerals critical to national defense, Congress might decide that the damage to the resource was in the interest of national security.

¹⁰ It is worth noting, also, that if federal agencies like NPS did expressly anticipate or link condemnation to negotiated purchases, such negotiated purchases might well cease to be considered negotiated, or voluntary and, instead, might be considered takings, requiring just compensation to be adjudicated and settled. Hence, claiming condemnation is anticipated or linked to negotiated purchases could trigger takings in the cases of many properties targeted for acquisition but not yet acquired by the federal government, for example. As anyone who has ever looked at the lists of properties in and around federal park and wilderness areas targeted for acquisition, or any of the tens of millions of wetland acres still in private hands that federal agencies are negotiating to acquire, or the extensive lists of properties along scenic rivers targeted for acquisition, etc. The magnitude of potential takings cases would be matched only by the cumulative cash expended in adjudicating and settling them in a timely fashion.

¹¹ *Ibid.*, A-18, 52.

¹² Wilson, Donald C., "A Case for an Environmental Real Estate Market," *Real Estate Issues*, Fall/Winter 1991, 49. "...the environmental real estate market is people and organizations with money who price and facilitate the supply of property that will be used for conservation, rehabilitation and introduction of environmentally significant attributes according to people's wants but subject to government regulation and subsidy."



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