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# Top Ten Hits of Assessing and Controlling the Cost of Land Acquisition Condemnation Law

**P**rior to becoming an attorney specializing in condemnation law, I was a professional guitarist specializing in rock and roll. Although I always considered my change of profession to be a logical progression, both my former colleagues in the entertainment world and those in the legal profession seemed to agree on one thing—I must be nuts. Faced with this condemnation of my thesis by such disparate groups, I struggled for many years to discover the missing link between eminent domain and rock and roll. When the answer finally came to me, it was all so perfectly clear that I wondered how it could have escaped me for so long. In a cathartic moment, I suddenly realized that when the most prominent songwriters penned their greatest hits, they delicately placed pearls of wisdom in their lyrics designed to address major issues in condemnation law.

In much the same way that I have enjoyed the experience of playing music ranging from Bach to Bachman Turner, I also have had the good fortune to represent property owners, as well as condemning agencies in eminent domain proceedings. Over the years I could not help but notice that some condemning agencies often fail to consider the many ways certain land acquisition costs can be minimized or even alleviated all together. I intensely began to listen to the songs of the masters in search of the keys to cost containment. That search resulted in this article.

Before I begin, a brief disclaimer is in order. The use of the lyrics contained herein solely is intended for educational purposes and therefore the use of said lyrics, or any portion thereof, is exempt from payment of royalties pursuant to 17 USC § 107. More importantly, the information contained herein is intended as general guidance. Application of these principles to a specific case may require legal guidance. Therefore, if any advice gleaned from this article is applied by the reader and a \$20,000 project results in a verdict of \$2,000,000, there are no grounds upon which you can sue me or any of the songwriters, their heirs, successors, entourage, fan clubs or assigns. But enough about the law! This article is about music—the Top Ten Hits of Condemnation Law.



**I Fought the Law**  
(Sonny Curtis)

*I needed money 'cause I had none  
I fought the law and the law won  
breaking rocks in the hot sun  
I fought the law and the law won*

In this song, the Cricket's Sonny Curtis emphasized that the land acquisition process is a legal process. Even preliminary steps, such as organizing a

downtown development authority, drafting good faith offers, resolutions of necessity and declarations of taking, must conform to strict legal requirements. I have seen far too many cases that were dismissed due to technical defects. In most instances, the costs associated with such gaffes are unnecessary.

On a more practical level, property owners' legal counsel often begin communications with various agents of the condemning agency years prior to the time a decision is made whether to implement the project. Statements and actions made years before a condemnation action are filed and may effect the posture and outcome of the case.

***Condemning agencies must play in harmony with controlling legal principles, which are constantly changing.***

Although the beginning stages of land acquisition should be far from a paranoid and adversarial process, it is necessary to think a few steps ahead and have centralized control over communications by an attorney well versed in condemnation law. Any actions taken must be made with an understanding of the potential legal consequences.

Finally, condemning agencies must play in harmony with controlling legal principles, which are constantly changing. While certain damage theories may have been liberalized by recent case law, others have become more restrictive. Thus, it is mandatory that the condemning agency's appraisers receive proper instruction regarding the applicable legal parameters that govern the particular appraisal problem. Few things can be more devastating to a case than an appraiser who has not even considered a viable damage theory and cannot explain why it was rejected. Regardless of the ultimate viability of a particular damage theory, controlling legal principles

should be addressed pro-actively so that any position can be defended through an offensive stance, rather than a dangerous patchwork of post hoc explanations.



**Can I Get a Witness?**  
(Holland/Dozier/Holland)

*Somebody, somewhere,  
tell her it's unfair  
Can I get a witness? Can I get a witness?  
Can I get a witness?*

In this song, the immortal Motown songwriting team of Holland/ Dozier/ Holland underscored the central role of the valuation expert in condemnation cases. Although the vast majority, if not all jurisdictions, permits property owners to testify regarding the value of their property, expert opinions ordinarily are the most important factor in condemnation cases. Therefore, it is crucial to find experts who convincingly can communicate a professional opinion to an opposing counsel in a deposition and to a jury. Unlike most areas of law, condemnation experts are chosen without input from the attorney who ultimately will be charged with defending the appraisal opinion.

It is extremely important to choose the correct expert for the particular issue. For example, if the appraisal problem depends upon the feasibility of building on a site, it is advisable to retain an expert who actually is involved in construction near the project area. I was involved in litigation, which largely turned on the experts' assessment of various infrastructure costs associated with a residential subdivision. Deposition testimony revealed that although the condemning agency's expert was a partner in a nationally renowned engineering firm, he had not been involved with construction of a

residential subdivision for over six years. The property owner's experts were locally involved in subdivision development on a day to day basis. Needless to say (but worth writing) - the case quickly settled.

After the proper expert is chosen, he or she should be given the opportunity to do a complete job. All necessary information must be obtained and the expert should have reasonable latitude to retain any support staff necessary to uphold the ultimate opinion. For example, if the possibility of obtaining a variance is at issue, the relevant municipality's history of dealing with similar situations should be closely examined and appropriate documentation should be obtained. The additional money spent to substantiate an opinion is not really "additional" money at all. Lack of preparedness seldom results in lower cost.

In many jurisdictions, the condemning agency must reimburse the property owner's reasonable expert fees. This statutory obligation often results in the curious situation where the agency pays top dollar for the owner to retain an effective expert, while spending a fraction of that amount for its own expert opinion. While fees are not the sole determinant of expertise, hopefully the agency is not in a position of having to choose experts based on competitive bidding. It is all too common to find that an attempt to save money on the front end results in substantially higher cost.



**You Can't Always Get What You Want**

(Jagger, Richard)

*you can't always get what you want,  
but if you try sometime you find  
you get what you need*

In this song, Mick Jagger and Keith Richard suggest that condemning agencies consider the feasibility of taking a lesser or different property interest, especially where damages will be

minimized. It is not unusual for the width or location of the right-of-way to be altered in some road projects to avoid taking adjacent property or to accommodate the wishes of potentially affected property owners. The decision as to precisely what property interests must be acquired to achieve the objectives of a given project, should not be viewed solely as an engineering decision. Practical, as well as legal considerations should influence the ultimate siting of the project. Relevant areas for inquiry might include: the property owners affected by the taking, whether a given siting will have an effect on the number

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of total/partial takings, and the extent to which a given siting will affect viable businesses operating on the property.

I recall a case where a municipality took 30 feet of frontage for relocation of utilities incident to a road widening. The taking eliminated three parking spaces serving a five-unit apartment building, resulting in a claim of a total taking. After receiving the owner's appraisal, the municipality discovered that it really didn't need the land in fee in order to bury the wiring for the traffic and streetlights. The court permitted an amendment to the complaint whereby the taking was reduced to a 10-foot easement, effectively alleviating severance damages. Although substantial costs for acquiring the real estate were eliminated, the condemning agency was liable for the owner's costs and attorney fees to the degree made necessary by the original taking. Had the city properly assessed

what was necessary for the project prior to filing the complaint, all of these additional costs would have been avoided.



**We Can Work It Out**  
(McCartney, Lennon)

*Try to see it my way,  
Try to see it my way,  
Do we have to keep on  
talkin till I can't go on?  
We can work it out  
We can work it out*

Tempered by the peace/love movement of the 1970s, John and Paul of the Beatles, encouraged condemning agencies to consider creative solutions that might serve the interests of both parties and avoid potentially costly delays associated with litigation. The "mop tops" suggest that the condemning authority consider non-monetary items that it can offer as part of an overall settlement. In a recent case in Detroit, Michigan, involving acquisition of property for the dual Detroit Tigers/Lions stadium project, the city negotiated a settlement with the owner of a historical theater that involved, among other things, moving the building to a new location. Transfer of development rights might prove to be another method avoiding litigation.

A condemning agency also might consider offering an incentive in excess of the estimated just compensation indicated by the appraisal, in order to avoid litigation expenses and delay. Prior to making such an offer, it is advisable to examine the law in a particular jurisdiction in order to be sure that the amount which includes the incentive will not be viewed as the good faith offer in the event that a lawsuit must be filed. In determining a proper incentive amount, the agency should consider all of the factors that effect the actual range of costs and attempt to make an incentive that will catch the owner's attention.



**Dancing in the Dark**

(Bruce Springsteen)

*you can't start a fire  
can't start a fire without a spark  
this gun's for hire  
even though we're just  
dancing in the dark.*

In this song, the "Boss," perhaps the most cryptic writer included in the Top 10 evidently was referring to expert appraisers when he alluded to the gun "for hire." The subsequent reference to "dancing in the dark" clearly serves as a cautionary note that appraisers must be aware of all pertinent information prior to tackling the appraisal problem.

In situations where the property maintains a business or is in the process of development at the time of appraisal, essential information is only available from the owner. Many jurisdictions have specific statutes, in addition to general court rules, that may provide a right for the condemning agency to obtain information relevant to the determination of just compensation. Because the request for information later might be the key exhibit in a subsequent court hearing, requests should be made in writing. The form and substance of the requests should be specifically tailored to the information actually needed to avoid the appearance of overreaching, if the matter is litigated.



**Time Has Come Today**

(Chambers Brothers)

*Now the time has come  
there are things to realize  
Time has come today  
Time has come today.*


In this classic hit, the Chambers Brothers emphasized that the passage of

time alone may have a substantial effect on land acquisition costs. Premature announcement of a project invites land speculation and often inflates the fair market value of the property to be condemned. Although most, if not all jurisdictions, preclude consideration of any increase in value attributable to the project, often it is impossible to extricate any "illegal" cause of the increase. Generally, the greater the time between

knowledge of the project area and the condemnation, the more difficult it will be to isolate the effect. To the extent possible, the site of a project should not be made public until it is apparent that the project will go forward within a reasonable time frame.

Similarly, the good faith offer should be made as close as possible to the time when the condemning authority is prepared to file the complaint. Similarly,

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the good faith offer should be based upon a recent appraisal of the property. In many jurisdictions, reimbursable attorney fees are calculated on the difference between the final verdict or settlement and the initial good faith offer. If the offer is based upon a “stale” appraisal, it is possible that the passage of time alone will produce a substantial increase. Further, it is not uncommon for the highest and best use of the property to change over a few years - especially if the public has been aware of the project for some time.



**Taking Care of Business**

(R. Bachman)

*I've been taking care of business  
every day  
taking care of business  
every way*

In this song, Canadian songwriter Randy Bachman of the Bachman Turner Overdrive alerted the American legal community to the importance of assessing potential exposure due to business-related damages. A taking of a commercial building might involve numerous claims from various business lessees. Additionally, in many jurisdictions, it is important to consider whether a taking might involve a business that has multiple locations. In such cases, what appears to be the taking of a small operation might have an effect on a larger entity.

The predominant types of business-related damages are damages resulting from a loss of going concern and business interruption damages. Generally, in order to set forth viable claim for loss of going concern damages, the condemnation must foreclose the possibility of the relocation of a business. If a business can be moved, as is commonly the case, business interruption damages must be considered. Business



interruption damages include the additional costs associated with the relocation or the business, such as increased rental expenses, advertising expenses and labor.

Business valuations can be costly and expert opinions can widely differ due to the many factors involved in making a determination. As Holland/Dozier/Holland cautioned in “Can I Get a Witness,” particular attention should be paid to choosing the proper expert, who can effectively communicate his or her opinion, evaluate the owner’s claims and educate counsel relative to the applicable methodology. Moreover, it is important to recognize whether business damages might be applicable. Generally, it is not advisable to wait to hire an expert until business damage claims are made. It usually is better to begin the process with a well-reasoned and substantiated opinion than to start the analysis with a defensive attack on the owner’s business appraiser.



**Taxman**

(G. Harrison)

*Should five percent appear too small  
Be thankful I don't take it all  
'Cause I'm the taxman,  
yeah I'm the taxman*

In “Taxman,” George Harrison brilliantly underscores the importance of considering interest, costs and attorney fees in condemnation actions. Throughout his early touring days in the



**The Gambler**

(Kenny Rogers)

*You've got to know when to hold 'em  
know when to fold 'em  
Know when to walk away  
when the dealing's done*

United States, Harrison reportedly was struck by the fact that many jurisdictions required the condemning agency to reimburse the condemnee for appraisals costs and attorney fees and to pay a healthy interest rate on additional just compensation payments. Although technically considered to be incidental costs, these factors substantially can increase the cost of land acquisition.

Depending on the type of issues involved in a case, expert fees can be considerable. It is mandatory that these costs be assessed prior to entering into settlement negotiations. Proper attention must be paid to factors that can affect these costs. For example, where attorney fees are determined by the difference between the initial good faith offer and the ultimate award, an offer based upon a “stale” appraisal will result in a needless inflation of attorney fees. Similarly, a large increase between the initial appraisal and an “update” can result in needless interest payments.

beginning stages of the acquisition process, the condemning agency should have a good idea of a reasonable settlement figure, as well as the likelihood of success should the matter go to trial.

Before attempting to arrive at a reasonable settlement position, relevant considerations may include:

- Range of value indicated by opinions of just compensation
- Range of value associated with potential attorney fees, costs and interest if case continues
- Relative strength of expert opinion[s]



### Money

(Barrett Strong)

*... money don't get everything, it's true  
what it don't get, I can't use  
give me money  
that's what I want*

If all attempts at settlement fail, the only thing at issue will be the subject of Barrett Strong's classic hit, "Money." If the condemning agency has followed the advice of the masters, as well as the writings of others, the agency will be litigating from a position of strength and will be able to accept the final verdict with the knowledge that the odds of success have been maximized.

### Conclusion

The land acquisition process is largely governed by a distinct set of legal principles and unique practical considerations. The condemning agency seldom is aware of which offers will be accepted, eliminating the necessity of filing a condemnation complaint. Therefore, it is advisable for condemning agencies to have competent legal guidance from the inception of the process. Proper preparation will increase the odds that the initial offer will be accepted. In the event that the matter must be litigated, the condemning agency who has heeded the

advice of the *Top Ten Hits of Condemnation Law*, as well as lesser hit records, will maximize the opportunity for a successful resolution of the case. ■

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