

THE MIGHTY MOTION

AN OFFENDING APPRAISAL BLOCKING YOUR SETTLEMENT? IT MAY BE TIME TO UNLEASH THIS POWERFUL TOOL.

BY GARY DAVID STRAUSS, ESQ.

There often is such a great disparity between government and property owner estimates of just compensation, that I sometimes wonder if we are even valuing the same property. If a case with a big difference in just compensation proceeds to trial, it can be very difficult to predict what a jury might do. A persuasive witness or sympathy for the property owner may serve to influence the proceedings, regardless of the relative soundness of the parties' positions.

One of the most effective ways I have found to reduce the differential in the opinions of just compensation is to explore whether the opposing appraisal is deficient in a fundamental way that will support a ruling to strike the appraisal. If a fundamental deficiency is discovered, it may be time to unleash the awesome power of the Mighty Motion. The hope is that if an offending appraisal is stricken by the court, a new appraisal may report a more reasonable value and lead to a basis for settlement. If the errors are clerical or will not significantly affect valuation, it is generally a waste of money to pursue this strategy, since the cost of litigation will typically outweigh any benefit to the client.

Know the Law

It is extremely important that the condemnation appraiser is well versed in the specific laws affecting valuation. Appraising property for a condemnation case can be uniquely challenging, because in this case, the appraisal must be consistent with many idiosyncratic laws. Generally, the violation of a legal principle must be very clear for a

judge to take decisive action. Otherwise, the judge is more than likely to utter those famous words "leave it to the jury."

As Leo Tolstoy wrote in his treatise on eminent domain, "The law condemns and punishes only actions within certain definite and narrow limits; it thereby justifies, in a way, all similar actions that lie outside those limits." Applying Tolstoy's observation, it is very difficult to have an appraisal stricken when it resides in the gray and murky areas of appraisaldom.

The Case of the Disappearing Project

In most all jurisdictions, the appraiser must ignore the effect of the project when valuing the property before the taking, or in a total taking case. In other words, the appraiser should know what the project entails so that it can be ignored. While this principle seems easy enough to follow, I have had numerous appraisals stricken for violation of this principle.

I took over an airport case that had been dismissed on jurisdictional grounds. In Michigan, when a case is dismissed, the condemning agency must pay actual fees and costs. The case must then be refiled. I argued that even though the case had been refiled, the date of taking should remain the same. The only case dealing with the issue supported this view. Furthermore, the property certainly was not subject to changing market conditions during the two years when the

case languished in the Court of Appeals. Legal fictions should have their limitations. However, the judge used the date of the refiled case, which was a couple of years after the original taking.

Although there had been no market activity during that time, the appraiser's value was substantially higher than the initial appraisal. When I received the appraisal, I couldn't believe what I was reading. Three of the four positive attributes that supported the before value were the new airport road, the new airport entrance and the increase in hangars.

We filed a motion to strike the appraisal. Although I thought it was a legal slamus dunkus, I wondered what explanation the judge would give for denying us. To put it charitably, the judge had not been kind to the airport up to that point. He actually granted the motion, and after I recovered from my shock, an order was entered directing the appraiser to reappraise the property.

What is the Project

Sometimes, it might not be clear to the appraiser what the project is. Quite a while ago, I was involved in a case when private property could be taken to assemble for use by another private developer. The property at issue was a veterinary clinic across the street from land acquired and assembled for a proposed hotel/convention center. At the time, there were no discernable plans for the condemned property.

The owner's appraiser arrived at an extremely high value, largely based on the synergy created by the convention center. Research revealed

that, due to earlier commitments to the federal government, a portion of the hotel/convention center site was being held for a federally-funded light rail station. The property involved in the condemnation case was being acquired as a substitute for the property actually needed for the project. Due to this gaffe, the appraisal was stricken and the case quickly settled.

This case occurred nearly 10 years ago. I pass by that site almost every day on the way to my office. The condemned veterinary clinic is now a grassy area with a stone monument and the proposed hotel/convention site is still vacant.

Be Aware of Land Use Restrictions

It is very important to discover and consider all land use restrictions when valuing property. Cases involving airports often involve existing easements and airport zoning ordinances that are not as apparent to the appraiser as typical land use restrictions. In a case involving a runway extension, the owner's appraiser's highest and best use was based on gravel being mined across the street from the airport, the subsequent creation of a lake and the eventual sale of lakefront residential lots. I often wondered if Donald Trump could predict the value of hypothetical lots that far into the future.

Title work revealed that the county purchased an easement in the 1980s which involved a portion of the proposed gravel pit lake. The easement contained the typical clause which precluded use of the land "in such a manner as to endanger the landing,



10 years following condemnation, this site is still vacant.

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taking-off or maneuvering of aircraft." It is common knowledge among people involved in aviation that large bodies of water attract birds. It also is common knowledge that when airplanes hit a bird in flight, the consequences usually aren't that great for either the bird or the pilot.

The judge agreed that the language of the easement did preclude putting a lake under the flight path and struck the appraisal. The judge also ruled that the appraiser was not permitted to use the development approach, in which the appraiser present valued 180 lots, which would not even be developed until after the gravel pit filled up with water.

Zoning ordinances also can play a significant role in valuing property. It is especially important to check for additional zoning restrictions around airports because they are not always as obvious as general zoning ordinances. In general, developers or cable companies putting in towers are very aware of these restrictions, primarily because ignorance is not a virtue in the real world. As a general rule, they contact the airport, the State and the Federal Aviation Administration to see what is permissible.

In Michigan, the Zoning Enabling Act states that any rezoning of property cannot be inconsistent with "any airport zoning regulations, airport layout plan, or airport approach plan." Airport



Birds are attracted by large bodies of water. If a runway path is nearby, let the pilot and bird beware!

Protection Plans divide areas near the airport into various zones that discourage certain land uses. Under normal circumstances, an appraiser might base his or her valuation on the possibility (or probability) of rezoning. If an Airport Protection Plan, or on other airport-related restriction is already in place, it is likely that an appraisal which relies on a more intensive zoning classification will not have a smooth landing.

Know the Local Customs

Sometimes it can be very important to learn about the local customs. Appraising property in unfamiliar areas can be especially dangerous. In one instance, while reviewing the owner's appraisal, I couldn't believe that his per acre value was about four times higher than anything else selling in the area. Our appraiser actually lived in the community. He informed me that the owner's appraiser apparently did not know that, when the equalization department sheets listed the sales price and the acreage, the little superscript number by the acreage meant that other parcels also were involved in the sale. Therefore, what the appraiser thought was a \$4,000 per acre sale, actually was a \$1,000 per acre sale. As Mark Twain wrote, "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

Communication Breakdown

Finally, it is very important that the appraiser, attorney and client communicate. After a road widening case was filed, the owner asked the county if it could reduce the taking as much as possible to minimize the effect on his extremely tight parcel. The road commission agreed and reduced the relatively small taking by about 50%. That was the good news. The bad news was that the client forgot to tell the appraiser about the amended declaration of taking. After the appraisal was stricken, the case settled.

Conclusion

In order to avoid the wrath of the Mighty Motion, regardless of the position eventually taken, it is important to actually do the research and consider the fundamental facts and laws affecting valuation. The appraisal position should then arrive at a value that has some relation to reality. In the words of Mark Twain, "Get your facts first, then you can distort them as you please." ✪