The Legality of the Across the Fence Appraisal Approach in Eminent Domain Proceedings

By Todd Amspoker, Esq.

The abandonment of the active use of railway corridors, the deregulation of public utilities, and the exploding telecommunication markets have caused a heightened interest in the purchase and use of railway and utility corridors. Public utilities, municipalities, telecommunication companies and other entities have purchased, and will continue to purchase interests in such corridors for many and varied purposes including utility lines and telecommunication facilities.

The proper manner of appraising railway and utility corridors is often perplexing. The shape and size of such properties are almost always unusual, and such properties are rarely sold on the open market.

Railway and utility corridors are not normally appropriate for industrial, commercial or residential development. When such corridors are sold, there is an undeniable monopolistic aspect of the transaction.

Typically the exclusive source of such corridors is the seller, who often uses this fact as an advantage in purchase negotiations. Meanwhile, purchasers of such corridors may have already committed to their project and must purchase such interests in order to complete their work. In such circumstances purchasers must pay the price requested by the seller with little chance to change the outcome.

The appraisal profession typically assumes that the "Across the Fence" (ATF) appraisal approach is the proper method to value a railway or utility corridor. In summary, the ATF approach assumes that the value of a corridor should be equal to the value of lands that are adjacent to that corridor. This method of appraisal may work well in consensual sales where both sides are in agreement as to the proper appraisal approach. However, if the prospective purchaser is a public entity or a public utility with the legal right and political resolve to file an eminent domain proceeding to acquire rights in a corridor, all bets are off.

The purpose of this article is to suggest that legal principles that must be followed in eminent domain cases do not necessarily support the use of the ATF approach in all instances. In short, an owner of a corridor may not be assured that the ATF approach will be allowed in an eminent domain proceeding.

Legal Precedent

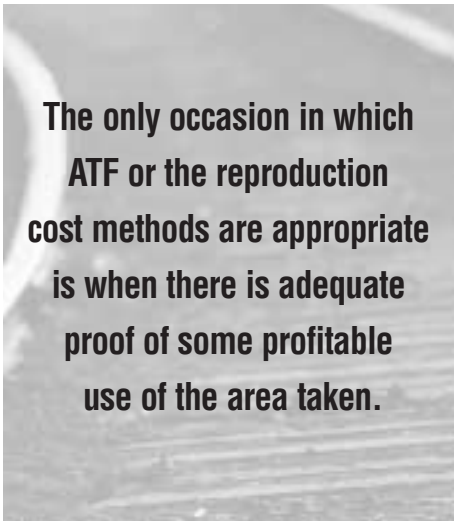
A search of all United States federal and state court jurisdictions yielded only two cases that specifically discuss the ATF approach. In *Oregon Department of Transportation v. Southern Pacific Transportation Company,* the Oregon Department of Transportation (ODOT) condemned fee title to an abandoned railroad corridor owned by Southern Pacific (SP).[1] SP contended that the highest and best use of its property was as a corridor for railway or other utility purposes, and that it should be paid based upon an ATF value. ODOT did not claim otherwise, but merely argued that because SP had abandoned its railway use of the property, only a nominal award should be given. Based on those positions, and due to the fact that the take was total, the court allowed the use of the ATF method. The court reasoned that once SP proved a justifiable highest and best use of the property as a railway or utility corridor, the ATF approach was appropriate. Likewise, in the case of *People v. Southern Pacific Transportation Co*., the court ruled that the reproduction appraisal approach was appropriate where the railroad showed that the condemned portion of its railway corridor could be used for railway or utility uses.[2]

In the recent case of *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.,* the California Court of Appeal interpreted the meaning of an easement agreement between a railroad and a pipeline company.[3] The agreement provided for future rents to be based on "fair market value." Unable to agree on a value, the parties submitted the matter to the trial court for a decision. The trial court summarily refused to allow the railroad to use the ATF approach, and instead required the parties to use a comparable rental approach based on actual rentals. Disappointed with the low judgment, the railroad

appealed. The Court of Appeal decided that the trial court should have considered the parties' original intentions to determine the admissibility of the ATF approach, and sent the case back to the trial court for further proceedings. Significantly, the Court of Appeal did not rule that the ATF approach was legal, but only determined that the trial court should have considered other criteria in making its decision whether or not to allow that approach. The Court of Appeal relied on basic principles of contract interpretation as opposed to specific rules and requirements of eminent domain law. In particular, the Court of Appeal focused on the fact that, historically, both of the parties had used the ATF approach to value corridor properties. This factor would have little relevance in a condemnation proceeding where the condemnor objects to the condemnee's use of the ATF approach based upon the eminent domain law.

Legal Objections to Use of the ATF Approach

There are several possible legal objections to the use of the ATF approach in an eminent domain proceeding. The first such objection is based on the elemental principle in eminent domain law that the search for fair market value depends upon what the property owner (condemnee) has lost as opposed to what the taking agency (condemnor) has gained or avoided.[4] In essence, and in the context of a taking from a corridor, a legal argument may be made that if a taking from a corridor has not caused any loss to the condemnee, or if the condemnee had nothing of value to begin with, ATF is not appropriate. This principle is often manifested in eminent domain cases by a judicial finding that only a nominal value is appropriate for a particular taking. On one occasion, a nominal award was ordered when a taking for roadway purposes was from a location on a parcel already burdened with a road easement.[5] On another occasion, a nominal award was made when a city took a street crossing over a railway that did not affect railway operations.[6] Another railroad operator was not entitled to use the reproduction cost method when there was no proof that its abandoned railway corridor could ever be put to any profitable use.[7] It would appear that the only occasion in which ATF or the reproduction cost methods are appropriate is when there is adequate proof of some profitable use of the area taken, combined with the owner having lost such profitable use as a result of the taking.[8]



Another possible objection to the ATF approach is by objecting to the ATF sales used by the condemnee's appraiser. Typically such sales will concern neighboring land which is developable in some form. There are two apparent justifications for using such sales to determine the value of a corridor.

The first is on the assumption that the corridor is itself developable on its own or by being combined with adjacent properties. The second justification is that the corridor is usable for transportation or utility purposes and that such sales give a rough approximation of the value. However, these two theories depend upon proof that the corridor is either developable to a higher and better use, or has potential profitable use as a transportation or utility corridor.

It may be the case that the corridor to be valued may never be developed because of its configuration, size; and/or all-adjoining properties have already developed and there is no potential buyer of the corridor for development purposes. In such a situation the use of sales of nearby development properties to value a corridor is potentially objectionable. The general rule is that to be admissible, a comparable sale must be sufficiently similar to the condemned property to be able to shed light on the value of that property.[9] It is usually not appropriate to compare developable property to property that cannot be developed.[10] The general rule also is that present market value must be determined only by uses for which the condemned land is adaptable and available.[11]

Alternatively, the condemnee must show that the corridor is suitable for use as a transportation or utility corridor. In some instances the corridor may not be available for any transportation or utility use. Other portions of the corridor may have already been sold and developed, or the corridor may not go anywhere useful for such purposes. In that situation, sales of other corridors should not be admissible in evidence. The condemnee should not be able to rely upon the condemnor's proposed use of the corridor to justify such a theory.

Valuation of a condemned property is usually made on the basis that the public project for which the property is condemned is not to be considered.[12] If the condemnor's proposed use is the only possible use of the corridor, it should be excluded from consideration. As one court has noted, it would be "monstrous" for the benefit arising from the proposed improvement to be taken into consideration as an element of the value of the land.[13]

Another objection to the use of sales of other utility corridors is that such sales are typically made to public agencies or utilities with the power of eminent domain. Evidence of sales transactions in which the purchaser is an entity having the power of eminent domain is normally inadmissible in evidence.[14] A possible exception to this may be found in state legislative enactments to the effect that a special use property (such as a corridor) may be appraised according to any use that is just and equitable.[15]

Actual Case Study

In a recent matter, a municipality condemned an irrigation district property which was "improved" with an irrigation ditch.[16] The municipality condemned fee title to the land, installed an underground concrete pipe to the district's specifications, and reserved a perpetual easement for the district so that it had the legal right to carry on its operations without any interference.

The district's appraiser admitted that 1) the condemned property was not developable, 2) no other public utility use was possible on the property, and 3) the irrigation district's use of the property had not been materially affected. Nevertheless, the district's appraiser still valued the property according to the ATF approach, on the grounds that the property was a public utility and therefore was entitled to be valued on that basis. After motion by the municipality, the trial judge threw out the district's appraisal and awarded judgment according to the municipality's nominal valuation. ■

Conclusion

In the author's opinion, there is no substitute for proof that the property rights condemned from a public utility or railway corridor had some open market value for some legitimate use, and that such potential use has been eliminated by the taking. Absent such proof, the ATF approach is not legal.

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1.(1988) 749 P.2d 1233.
2.(1978) 84 Cal.App.3d 315.
3.(1999) 74 Cal.App.4th 1232.
4.*United States v. Virginia E. & P. Co.* (1961) 365 U.S. 624, 6.33 [5 L.Ed.2d 838, 847, 81 S.Ct. 784]; *People v. Southern Pacific Transportation Co.*, supra, 84 Cal.App.3d 315, 324.
5.*People v. Schultz* (1954) 123 Cal.App.2d 925.
6.*City of Oakland v. Schenck* (1925) 197 Cal. 456.
7.*People v. Ocean Shore Railroad* (1948) 32 Cal.2d 406.
8.See *Oregon Department of Transportation v. Southern Pacific Transportation Company, supra; People v. Southern Pacific Transportation Co., supra.*
9.For example, see California Evidence Code section 816: "In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued."
10.*County of Los Angeles v. Union Distributing Co.* (1968) 260 Cal.App.2d 125.
11.*People v. Arthofer* (1966) 245 Cal.App.2d 454, 462-463.
12.*United States v. Miller* (1943) 317 U.S. 369, 375, 87 L.Ed. 336, 62 S.Ct. 276.
13.*County of San Diego v. Rancho Vista Del Mar* (1993) 16 Cal.App.4th 1046.
14.For example, see California Evidence Code §822(a)(1); Code of Alabama §18-1A-197(1).
15.For example, see California Evidence Code §822(a)(1); Code of Alabama §18-1A-197(1).
16.*City of Tracy v. The West Side Irrigation District,* San Joaquin County (California) Superior Court No. 283677.