The eminent domain case from the condemnor's viewpoint: seizing the advantage

by Michael H. Bailey

Methods are outlined in order that attorneys representing condemnors can obtain some measure of advantage in an eminent domain case.

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There have been numerous articles published concerning the development of an eminent domain case from the landowner's standpoint.[1] However, there has been a dearth of such published material involving the other side of the coin, *viz.* the eminent domain case as developed, filed and tried by the condemnor. This article will be a brief attempt to describe such cases on behalf of a governmental entity based on Texas factual situations and law.

The preliminary stage

Many employees of condemnors are burdened with the notion that the statutory requirements concerning negotiating with property owners are merely "window-dressing," which do not have to be strictly observed. The contrary is the law. When a land agent approaches a property owner with a ridiculously low offer, the property owner is not only going to be insulted, and reject it out of hand; he very likely will also be determined to prosecute his claims to the limit. Thus even at this early stage the condemnor's case is in potential jeopardy. This is not necessarily because of any lack of legal expertise or because of the "rightness" of the landowner's position, but because of a simple matter of human nature: people like to be treated fairly and with respect.

It is generally required that a condemning authority must use good faith efforts to reach an agreement with the property owner.[2] Such negotiations are a prerequisite to the exercise of the power of eminent domain, although a property owner may waive any failure of this requirement by making an appearance before the special commissioners at the time of the hearing.[3] At any rate, the condemning authority should conduct the negotiations in a fair and open manner, as if the power of eminent domain was not a consideration.

If the negotiations fail, the condemning authority is then in a position to file its condemnation petition with a court of competent jurisdiction.

So, the first rule is: insure that your negotiator makes a fair offer, in writing, and that he does it with courtesy.

Appointment of Commissioners

In Texas, the court is required to appoint a panel of "three disinterested freeholders" who reside in the county where the property sought by the condemning authority is located to determine the value of the property and any damages thereto.[4]

The attorney for the condemnor should carefully evaluate the qualifications of the commissioners appointed by the court. The court may give preference to persons agreed on by the parties, but such agreement is generally impossible. One suggested improvement in eminent domain procedure is in order here. It would appear that a better procedure would be to have a statutory requirement that the court appoint a panel selected by the parties from a listing of qualified property owners and/or licensed real estate brokers and appraisers, along the lines of a compulsory arbitration. Such procedures exist in labor disputes and civil service matters.[5] Each party would have a set number of preemptory challenges, as in jury selection. This type of procedure might be more cumbersome at the outset, but it would very likely reduce the number of cases appealed from the findings of special commissioners.

If any of the commissioners has exhibited any kind of bias or prejudice toward the condemnor in the past, the attorney should file a formal objection to that commissioner's appointment and service on the panel. The procedure for filing such an objection may not be spelled out in the statutes, but the grounds could be the relatively basic issue of fairness.

Governmental entities as parties to lawsuits are entitled to a fair trial.[6] Certainly the form of the objection should be as specific as possible. The courts generally do not look upon such an objection favorably, but bringing such potential problems to the judge's attention can have a beneficial effect for the condemnor, both during the case at hand and in future proceedings before the same judge. The court will hopefully place an excessive award in the proper context when the condemnor has to appeal from it, and the judge will not likely continue to appoint the objectionable commissioner to serve in subsequent cases.

The Commissioners' hearing stage of the case

One of the most important qualities of the eminent domain case at this stage is that it is not a full-blown lawsuit. Rather, it is in the nature of an administrative proceeding and is thus not subject to the rules of procedure pertaining to pretrial discovery. The most beneficial aspect of this fact is that any appraisal reports which the condemnor (or the condemnee) may have obtained are not discoverable by the other party prior to the time of the hearing of the special commissioners.[7] As a result, both sides enter the hearing stage unaware of the type of testimony which will be presented by the other. Prior to the hearing stage the condemnor should have made a decision on what type of formal appraisal report to request. The most prudent course is to have the appraiser arrive at his opinion of fair market value without submitting a formal appraisal report.

The presentation of expert testimony at the commissioners' hearing stage is, of course, dependent upon the circumstances of the case. While it is difficult to state a general rule, it is generally advisable to have the appraiser prepared to testify at the hearing. Of course, his testimony will have been reviewed in some detail by the attorney representing the condemnor. Since the panel of special commissioners is often composed of individuals who either have a real estate license or who are appraisers, they generally lend some weight to the opinion of one of their colleagues.

The pretrial stage

Following the hearing of the special commissioners and their determination of the award due the owner, the parties each have a most crucial decision to make: whether or not to file objections to the award. Naturally, if the condemnor feels that the award is excessive, the attorney for that entity must prepare and file his objections to the award (or the appropriate type of appeal, depending on the jurisdiction). The filing of objections or an appeal by either party transforms the proceeding from merely an administrative one into a case in court for the first time. Consequently, all the procedural requirements and rules of discovery attach to the case and become applicable in all subsequent aspects of it. The condemnor's attorney should keep in mind that eminent domain is one of the more obscure areas

of law to many judges. Consequently, the condemnor's attorney should begin immediately upon the filing of objections or an appeal to gently build his case with the court. (In fact, the initial stages of the case can be crucial. The advisability of a jury trial is always questionable from the condemnor's standpoint, in the writer's opinion, and the disposition of the eminent domain case by other means is always favored.) For example, it may be possible to limit the scope of the owner's expert's testimony concerning market value by showing that the project itself actually enhances and increases the value of the condemnee's real property.[8] This aspect of the proceeding can be brought to the court's attention early in the condemnor's development of its position. Of course, such matters can always be presented to the court through a motion *in limine* prior to trial.

Pretrial discovery is probably the most basic way for a condemnor's attorney to strengthen his case. An aggressive approach at this stage is often a key to any favorable settlement by the condemnor. The present state of the rules of discovery allowing and requiring a full disclosure of the testimony of any expert is especially helpful.[9] Any expert's written appraisal report may, of course, be obtained initially through a basic set of interrogatories to the condemnee and the subsequent deposition of the condemnee's experts. The condemnee's attorney may be clever enough to instruct his expert not to reduce any appraisal report to writing, and, if this is the situation, the condemnor's attorney must file a request for production and a motion to reduce the expert's appraisal and opinions to writing. The key is, of course, to be fully prepared if the case should be tried and to never be surprised by any testimony of experts.

The discovery process must be used specifically to determine and evaluate the expert's qualifications. It is the writer's opinion that juries are generally more impressed with an expert who is somewhat self-effacing and at ease during his testimony, rather than with an expert who is condescending and who actually tries to "instruct" the jury about the arcane aspects of real estate evaluations and appraisal work. The former type of expert will present a more "folksy" and honest appraisal, while the latter type of expert personality is often inclined to argue with counsel about the details of his appraisal report. The condemnor's approach should be to have your own expert admit that an omitted sale or even a completely different approach to the evaluation of the subject property may be possible, but in the expert's opinion he has obtained most of the applicable sales and has used the better and more acceptable approach.

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Striking of the condemnee's objections or pleadings and dismissal for want of prosecution

It sometimes happens that a condemnee's attorney will file his objections to the award of the commissioners and then pursue the case through vigorous efforts to settle (i.e., payment of more money to the condemnee) without a trial. Eminent domain can be a foreign shore to many practitioners who are not involved in such cases on a regular basis. If the case should remain dormant for some period of time, except for requests for more money from the condemnee, the condemnor's attorney should consider the possibility of filing a motion to strike the objections of the condemnee. There are a limited number of cases in Texas in which the courts have upheld the granting of such motions, although such procedure is certainly not favored in that it has some features of summary judgment or even a default judgment.[10] However, the condemnor's attorney should never discount the possible effectiveness of such approach as a means of educating the court and building the condemnor's credibility based on the law. For instance, it is well established, in Texas at least, that the party filing objections to the award of the special commissioners has the burden of proceeding to trial in a reasonable length of time.[11] That party also has the burden of proof before the jury.[12] Therefore, although the condemnor may be the petitioner in the lawsuit, the condemnee is actually in the position of a plaintiff, assuming that only the condemnee files objections. Again, this should be brought to the court's attention as soon as possible.

Another unique quality of an eminent domain case is the disposition of the case in the event of "dismissal for want of prosecution." In this situation, the order of dismissal should not result in a dismissal of the entire c'se, but rather the striking of any objections which have been filed. As noted above, until objections are filed, the eminent domain case is essentially an administrative proceeding and becomes a proceeding in court only upon the filing of objections. If the court, on its own, should dismiss the case for want of prosecution, the effect of its order is actually to strike the pleadings in the form of any objections which have been filed. Thus, the case returns to the status of an administrative proceeding.[13] In the writer's opinion, should this occur, the condemnor's attorney should wait until any jurisdictional period as may be specified in the rules of procedure has passed and then present the court with a judgment. After dismissal, the court may not have jurisdiction over the case as it existed when the objections filed were live pleadings, but it does retain jurisdiction over the administrative proceeding as originally filed by the condemnor. In other words, a judgment should be entered which reflects the "post-dismissal" status of the case: the condemnor has acquired the right to possess the property (and indeed title to it as requested in its petition), and the condemnee has been compensated through the award of the special commissioners.[14] The judgment should recite those facts and should of course note that the condemnee has withdrawn the award and appropriated it to his own use. It must be noted, however, that there is at the time of this writing on appeal to the Supreme Court of Texas a case which may alter the law in this particular area.[15] The case involves a dismissal for want of prosecution, and the condemnee had challenged in his objections to the award of the commissioners the constitutionality of the condemnor's

right to acquire the property in question. Since this case does not involve the state or a political subdivision but rather a utility company, the applicability of this case to condemnations by public entities may be questionable. At any rate, the condemnor's attorney should carefully evaluate the statutory and procedural requirements in his own state, should the case be dismissed for want of prosecution. It is also true that, by leaving the award in the registry of the court, the condemnee may preserve his right to challenge the taking on a constitutional level and may, therefore, be able to present a due process claim should the case be dismissed for want of prosecution.[16]

Trial of the case before a jury

If all other efforts to dispose of the case have failed, the condemnor's attorney should, of course, be ready for trial and confident that he has a viable case. In the writer's opinion, a jury trial is generally not advisable from the condemnor's standpoint; however, the condemnee's attorney will generally request a jury, hoping to play on the sympathy and emotions of the triers of the facts.

The voir dire should be conducted with the idea of informing the jury panel about why the case was filed. This may be done by informing the jury that the right of eminent domain is one possessed by the United States Government, the states and the political subdivisions thereof. It is not to be viewed as a "necessary evil" but rather a vital aspect of the continuing improvement of the quality of life in this nation, the state and the city. The panel should be assured by the condemnor's attorney that the power of eminent domain has been granted to the particular public entity by the appropriate constitutional provision, legislative enactment, and city charter language.[17] Another more subtle way to educate the jury panel is to ask them if they have ever had any disagreements or unfortunate contacts with any agency or employee of the public entity involved. One way to phrase such a question might be to ask if any members of the panel have had an opportunity to discuss a problem with the police department, the water department, the tax office or the public works department which may have ended badly from the jurors' standpoints. This will remind the jury that the entity which has found it necessary to file the eminent domain case against the property owner provides essential services and protections for its citizens. This question could also be asked in the affirmative. In other words, ask if any member of the jury panel has had a congenial experience with any of those same agencies and employees which may prejudice the jurors in favor of the condemnor. Other types of questioning should be framed with the idea of obtaining a "defense-minded" jury.[18] Opening statements should be brief. The jury is going to remember the last thing it hears more than the first thing, of course, and throughout the trial the condemnor's attorney must keep referring to things which have been said earlier and connect the evidence in his closing argument.

I do want to offer one observation concerning the cross-examination of the condemnee's expert, for, if pre-trial discovery is the most crucial stage in developing a condemnor's case, the cross-examination of experts is the most crucial part of a jury trial. Every eminent domain case presented to a jury will involve the evidence of one or more experts offered by the condemnee.[19]

It is well-known that a cross-examiner should not attempt to cope with a specialist in the latter's own field of inquiry. Lengthy cross-examination along the lines of the expert's own approach are usually disastrous and should only rarely be attempted. This is why it is so important to have obtained through discovery the written report of the appraiser in order to review it in detail.[20]

Conclusion

The purpose of this paper has been to outline the methods by which attorneys representing condemnors can obtain some measure of advantage in an eminent domain case. The trial of such a case before a jury is, in the writer's opinion, hardly the best method of achieving success. At best, jury trials may result in "limiting the loss," or in a verdict only

slightly above the value of the property taken and any damages to the remainder, as appraised by the condemnor's expert.

Other papers have treated the trial of such cases in depth, and I respectfully refer readers to such excellent presentations for detailed insights into trial strategy.[21] My advice to lawyers for condemnors is basically threefold:

(1) Get control of your case from the outset. Do not be misled or confused by bureaucratic inertia on the part of your land agents;

(2) Aggressively pursue pre-trial discovery and make every effort to educate the judge on the law. The law is in your favor, but the facts may not always be;

(3) Prepare, prepare and prepare for trial. Guard against surprises and be confident of your presentation to the court and jury.

Footnotes

1. *See, e.g.,* Stubbs, "Modern Techniques In Eminent Domain From the Viewpoint of the Property Owner," *Institute on Planning, Zoning and Eminent Domain* (Matthew Bender 1984); McKool, "Trial Tactics In Eminent Domain Cases," *Institute on Planning, Zoning and Eminent Domain* (Matthew Bender 1983); Bishop, "Trial Strategy Is Good When It Works," *Institute on Planning, Zoning and Eminent Domain* (Matthew Bender 1982).
2. *See City of Houston v. Plantation Land Co.*, 440 S.W.2d 691 (Tex.Civ.App. — Houston 1969, writ ref'd n.r.e.).
3. *Jones v. City of Mineola*, 203 S.W.2d 1020 (Tex.Civ.App. — Texarkana 1947, writ ref'd).
4. Tex. Property Code, Sec. 21.014 (formerly Art. 3266, Tex. Rev. Civ. Stat.)
5. *See, e.g.,* Art. 1269m, Tex. Rev. Civ. Stat.
6. *See Bishop v. Wood*, 426 U.S. 342 (1976).
7. *Shepperd v. Troilo*, 513 S.W.2d 813 (Tex. 1974); *Day v. Wooten*, 545 S.W.2d 16 (Tex.Civ.App — Dallas 1976, writ ref'd n.r.e.)
8. *City of Fort Worth v. Corbin*, 504 S.W.2d 828 (Tex. 1974).
9. *See* Rules 1666, 167, 168, 200 and 201, Tex. Rules of Civ. Pro. (effective April 1, 1984). With specific regard to the discoverability of appraisers' reports, see *Shepperd v. Troilo*, 513 S.W.2d 813 (Tex. 1974).
10. *See, e.g., Denton County v. Brammer*, 361 S.W.2d 198 (Tex. 1962), and *State v. Reeh*, 434 S.W.2d 416 (Tex.Civ.App. — San Antonio 1968, writ ref'd n.r.e.).
11. *See State v. Beever Farms*, 549 S.W.2d 223 (Tex.Civ.App. — San Antonio 1977, writ ref'd n.r.e.).
12. *See Stuart v. Harris County Flood Control Dist.*, 537 S.W.2d 352 (Tex.Civ.App. — Houston (14th Dist.) 1976, writ ref'd n.r.e.).
13. *See Pentikis v. Texas. Elec. Service Co.*, 470 S.W.2d 387 (Tex.Civ.App. — Fort Worth 1971, writ ref'd n.r.e.).
14. Such a procedure was followed by the trial court, without any motion by counsel, in *Pentikis v. Texas Elec. Service Co., supra* Note 4.
15. *Amason v. Natural Gas Pipeline Co.*, _____ S.W.2d _____, writ granted, 27 Tex.S.Ct.J. 460 (1984).
16. *See State v. Jackson*, 388 S.W.2d 924 (Tex. 1965), and cases cited therein.
17. Tex. Const., Art 1, Sec. 17; Tex. Property Code Ch. 21 (1984).
18. For an excellent analysis of jury selection techniques, see Bishop, "Trial Strategy Is Good When It Works," *Institute on Planning, Zoning and Eminent Domain* (Matthew Bender 1982).
19. An in-depth treatment of cross-examination methods was presented in two seminars of this Institute in 1962. See "Comparable Sales: Proceedings of a Practical Demonstration," and "Practical Condemnation Problems," *Institute on Planning, Zoning and Eminent Domian* (Matthew Bender 1962).
20. *See* in general Wellman, *The Art of Cross-Examination* (New York 1904; special limited ed. Birmingham 1983).
21. *Supra* §1.01, Note 1.

Publications

Preservation Easements: A Legal Mechanism for Protecting Cultural Resources, by Marilyn Meder-Montgomery, serves as a valuable resource for real estate appraisers evaluating easements. 165 pp, $27.50, plus tax. Colorado Historical Society, 1300 Broadway, Denver, CO 80203. (303) 866-2736.

Evaluating Private Rural Outdoor Recreation Opportunities, compiled by H. Ken Cordell and Barbara Stanley-Saunders. As government becomes less able (and, perhaps, less willing) to provide outdoor recreation opportunities because of inflation, budget cutbacks, and loss of political support, the private sector is becoming increasingly important. This bibliography lists publications that describe the private sector role in rural outdoor recreation in the United States. It should assist in determining how and where the private sector has been involved, where its successes have been, and what the issues and problems are. Price $17.00 for IAAO members, $20.00 for all others. IAAO, Bob Clatanoff, 1313 E. 60th St., Chicago, IL 60637. (312) 947-2054.

The Dictionary of Real Estate Appraisal, published by AIREA. Over 3,000 definitions are included in this new edition. Send $27.50 including postage and handling to Gateway Distributing, Inc., Attn. AIREA Book Sales, 940 North Shore Drive, Lake Bluff, IL 60044.

The Texas Real Estate Source Book published by the Texas Real Estate Research Center at Texas A&M University. This source book provides an array of real estate information and information sources at the city, county, state and national levels. It serves as a guide to real estate publications and regulations, to Texas colleges and universities that offer real estate courses, and provides a collection of practical formulas and tables for computing measures of one, two and three dimensions and determining monthly mortgage payments.

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