

The Appraisal of Easements Under the State Rule

Separating Fact From Fiction

by Wayne C. Lusvardi

Appraising easements is never easy. However difficult it may be to appraise them, it is immensely more complex when civil law requires that a real estate appraiser use what is called the State Rule (i.e., the Value of Take Plus Damages Rule) of compensation for possible acquisition of easements by eminent domain. Real estate appraisers, lawyers, judges, juries, public administrators, and right-of-way agents often do not recognize that the appraised value of an easement under the State Rule of just compensation is more of a legal fiction than a reflection of actual market value.¹

Defending such a fictional value can be a difficult, if not impossible, task in an appraisal report or a negotiated acquisition, let alone in a court of law.

The premise of this paper is that the two rules for appraising easements in the public sector have become so intermingled that the different problems they were intended to solve and methods for solving them have become lost and confused. One method the Federal Rule, is based more on fact; the other, the State Rule, on a legal fiction.

What has happened over time is that in those jurisdictions where the State Rule prevails, the compensation for easements has become mistaken for market value. Fiction has replaced fact. Law and public policy has become intertwined with appraisal in a way that make them indistinguishable from one another. These siamese twins of confusion must be split back into two so that they are not mistaken for one another.

Everything You

Thought You

Knew About

Appraising

Easements

Is Wrong

To do this requires what is called a paradigm shift. Paradigm is the term used in science for a taken for granted framework and set of methods that define a problem and its solution.² A paradigm is resistant to change because there are no other successful methods identified for solving problems, or it is supported by law. The institutionalization of the State Rule requires a radical shift from standardized appraisal concepts and methods. This shift may be called a forensic appraisal perspective. At first glance, some appraisers may view any shift from conventional to forensic appraisal methods as a compromise to the integrity of professional appraisal stan-

dards. However, armed with a forensic appraisal framework it can be seen that the integrity of the appraisal process is best preserved by separating fiction from fact in the easement appraisal process.

EXCEPTIONS ARE THE (STATE) RULE

A forensic appraiser may recognize that to appraise easements by the State Rule will require a departure from generally accepted professional standards of appraisal practice. Such standards proscribe that an appraiser must:

1. communicate each analysis, opinion, and conclusion in a manner that is not misleading, and,
2. must be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal.³

Armed with a forensic perspective, it will become apparent that appraisers must "mislead" in their opinion of the market value of an easement, depart from accepted appraisal methods, and deviate from the conventional definition of market value in order to conform to the provisions of the State Rule of just compensation in appraising easements. Moreover, a forensic perspective on the appraisal of easements will help in understanding that the usual admonitions to appraisers to avoid speculation, conjecture, and the contriving of values must be relaxed when appraising easements under the State Rule because the appraisal must often estimate hypothetical compensation where there may be market evidence to the contrary or no evidence at all.