Eminent Domain Disputes: The Role of Mediation

BY STANLEY A. LEASURE

Condemnation cases involve complex issues that are expensive, time consuming and unpredictable to litigate. In contrast, mediation is significantly more efficient and cost effective, especially when it comes to eminent domain disputes.

When you consider the downside of litigating a condemnation case, it is easy to see why mediation is preferable. Extensive resources are needed for legal pleadings, discovery requests, protective orders, validating the fair market value and determining highest and best use. Even in those jurisdictions where eminent domain cases are given preference in scheduling, it can take years to finally get to trial. Then once a verdict is rendered, the almost obligatory appeal follows with its own labyrinthine process.

With mediation, you can avoid the costly legal fees, as well as the lost productivity and other expenses associated with trial preparation. Using a neutral third party—a mediator—helps achieve a settlement that is acceptable to all the parties involved. A mediator is not a judge or jury, and because parties retain all the decision-making authority, a mediator cannot force a settlement. Theoretically, mediation can occur by agreement of the parties (or sometimes by court order) at any time during the life of a dispute, from the date of taking to the final resolution of the case on appeal. Nevertheless, timing is critical. It is possible to mediate too soon or delay too long for maximum benefit.

Benefits of Mediation

Confidentiality is one of the primary benefits of mediation, subject, of course, to variation in state law. While litigation is a very public process and a matter of public record, as a general rule third parties have no right to attend or learn about mediation communications. Additionally, neither the fact of the mediation nor the statements of the parties can be used in court if the case goes to trial. Communications made to a mediator in private caucuses cannot be disclosed without express consent. Of course, if one party conveys or permits the mediator to convey facts, those facts are subject to being used at the trial by the other party. However, statements made at mediation are generally inadmissible at trial. Most mediators also recommend that participants execute confidentiality agreements.

Another advantage of mediation is the control the parties themselves can have over the process and the result. With the help of an experienced and well-trained mediator, the parties can ultimately decide their own fate. Every condemnor and condemnee wants the dispute over as quickly as possible, and mediation permits resolution much sooner than litigation. Since it is not reliant on the dictates of court dockets, it can be scheduled at the first date agreeable to the parties.

Mediation has been underutilized in eminent domain disputes, despite the fact that many are particularly well-suited for this form of alternative dispute resolution. Legal disputes involving public use, fair market value, highest and best use, severance damages and leasehold damages have proven to be a good match for mediation. This is because the focus shifts from compliance and rules of evidence to the specific needs of the parties involved. The condemnor and landowner can focus on the unique requirements of their case in light of their specific interests. Mediation also provides the opportunity for creative solutions, giving the parties ultimate flexibility.

Mediator Selection

Selecting an appropriate mediator can play a vital role in the ultimate success or failure of the mediation. Eminent domain cases are not routine and involve a special language, special procedural rules and a measure of damages unlike other cases. Therefore, it is highly advantageous to employ a mediator who is experienced in eminent domain, if possible. Of course, subject matter expertise is another important consideration, as no one wants to hire a mediator they need to educate.

The mediator's style is another consideration. Mediators fall into two basic categories: facilitative and evaluative. Facilitative mediators see their role as assisting the dialogue between the parties. They help the parties brainstorm acceptable solutions and then facilitate an agreement based on what the parties find suitable. They do not generally offer opinions, and some even see it as improper to do so.

Evaluative mediators play a similar role to that of a facilitator, but can go a step further. They may offer opinions on any of the many issues which arise in eminent domain matters, including the potential outcome at trial. A qualified mediator using the evaluative technique can bring an important dimension to the dispute resolution process, particularly in condemnation cases. Once all parties have secured their own counsel, an evaluative mediator can offer their opinion on any of the issues regarding the eminent domain case, if asked. This is one of the main advantages of employing an experienced mediator with eminent domain expertise.

The Mediation Process

After executing an agreement with the selected mediator, the attorneys submit a confidential mediation memorandum, which is prepared separately and confidentially by each side. In a condemnation dispute, the memorandum details the history of settlement offers, value of the land, contested issues, perceived strengths and weaknesses, status of discovery, and a statement of points the attorney believes will affect the client's chances of winning at trial. Once the mediator receives the memorandum from each party, they will have a clear idea as to which specific issues and factors must be resolved.

The process can vary depending on the needs of the parties involved. In eminent domain cases, mediation generally has three phases: a group/opening session, several private caucuses and the preparation and execution of a settlement agreement.

The group/opening session allows the mediator to provide an overview of the process and outlines the specific parameters of their role. It is normally attended by the mediator, attorneys and the parties or their representatives. These presentations are akin to a combined opening statement/closing argument presented at trial. Their purpose is to persuade the decision-makers on the other side. Sometimes, the opening statement is the first time that the opposing decision-maker has a realistic view and faces the fact that their position is not legally, factually and morally unassailable. The mediator will use this time to clarify the facts, explore the pluses and minuses of each side, discuss the strengths and weaknesses of the parties' positions, and obtain an opening settlement offer to convey to the other side. It is not uncommon for the parties to start far apart and move very slowly in the early stages.

The parties then break into private caucuses with their own attorney and meet in separate rooms. The mediator will rotate between rooms in a sort of shuttle diplomacy. Discussions in the caucuses remain confidential and are not disclosed to the other party unless the mediator

is specifically authorized to do so. This allows for an open discussion between an attorney, their client and the mediator. Potential downsides can be explored openly and frankly, and an evaluative mediator can provide input into the risks and rewards of trial or any other subject the attorney or party wish to discuss.

The attorneys must be prepared to assess—for the mediator and their client—their prospects at trial, and form an opinion about the probable range of recovery if the case proceeds to trial. It is essential that individuals with decision-making authority attend the mediation, especially when a governmental entity is the condemnor. In almost every case, the attorney for the condemning authority does not have final decision-making authority. That authority usually rests with some official or governing body of the condemning authority.

The first topic of discussion may be on the cost to be incurred in proceeding with a trial case. Ideally, these discussions will have already taken place prior to the mediation session, but if not, the attorney should anticipate these discussions during the private caucuses. The client must be prepared to engage with the mediator on a range of topics. It is unlikely that the mediator will push the client for a bottom line, but it is common for them to probe the client about the strengths and weaknesses of the case and their interests. The real work occurs when the mediator, either directly or through questioning, can introduce the parties to the risks of proceeding to trial and some of the possible advantages of settling. This is the time to explore a verdict range and the percentage possibilities of ending up on either end of that range. This is also a good time to discuss the effects of a long delay before a trial can begin and how much expense they could incur should they decide to appeal the verdict.

Oftentimes the parties and their attorneys become discouraged with the slow progress. An experienced mediator with strong subject matter expertise will know how to best keep things moving forward so that the parties stay focused on the end result. Assuming the mediation is successful, the attorneys will draft a settlement agreement and encourage everyone to sign it while still assembled. This precludes a subsequent change of mind resulting from buyer's remorse or other factors, and gives all parties and their counsel a sense of closure.

Reasonable Results

Eminent domain cases are complex, time-consuming and expensive to litigate. They usually come with myriad issues attached. Mediation can play a vital role in helping to resolve condemnation disputes on reasonable terms and for a fraction of the cost of traditional litigation.

Most acquisitions can be accomplished without litigation or the involvement of a mediator. However, for whatever reason, some cases will have to be fully litigated through trial and appeal. For those cases that fall somewhere in between, mediation is a good solution that should be used more often in eminent domain.

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