



EASEMENT VALUATION

The setup for a lawyer joke?

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According to an old lawyer joke, "A small town that cannot support one lawyer can always support two." In a twist on this joke, we took two eminent domain lawyers—one who works mostly for condemning agencies and one who works mostly for property owners—and had them tussle over a seemingly straightforward topic: the valuation of easements. Then to muddy things more, we threw in an appraiser (perhaps this is the start of another joke: two lawyers and an appraiser walk into a bar...). Since right of way professionals are frequently negotiating about and around easements and easement issues, here are some takeaways from this tussle over easement valuation.

What is an Easement?

Let's start with the basics. Something even the lawyers can agree upon is what an easement is. According to "The Appraisal of Real Estate, 12th Edition,"

an easement is an interest in real property that transfers use, but not ownership, of a portion of an owner's property. This is a fancy way of saying the legal right to use another's property for a specific, limited purpose.

Some common types of easements that right of way professionals deal with all the time include:

- Utility easements (overhead, such as transmission-line easements and underground, such as pipeline easements)
- Street and highway easements
- Slope easements
- Access easements

Less common easements that pop up from time to time can include conservation easements, view easements and scenic easements.

General Issues and Rules in Valuing Easements

The lawyers could also agree that the goal in valuing an easement is the same as the goal in valuing any property: to get to fair market value/to determine just compensation. The "how" to do this is where the tussling starts.

The first step in valuing an easement is the same as the first step in any property valuation: figure out *what* is being valued. As the appraiser points out, there is a specific appraisal rule on this (USPAP Std. Rule 1-2(e)) that requires appraisers to give a definition of the rights being appraised.

To define the "what" in valuing an easement, ask what part of the bundle of rights is being acquired? In other words, what is the scope of the easement? Additionally, what impact does the easement have on the larger property?

Session Info:

Easement Valuation – an Oxymoron? Can Easements Actually be Valued, or Are We Throwing Darts?

Monday, June 10

8:30 am – 9:30 am

Valuing the Scope of the Easement

The next step is finding an appropriate basis (data) for valuing the "what." Dive in a little deeper into the easement document itself. What does it say? Remember to analyze the body of the document and not the title.

For example, what if the body of the utility easement says, "Utility Company shall have the right to use all areas above, below and on the easement area for all of Utility Company's needs as they exist now and in the future, including for technologies not yet in existence, and Utility Company shall have the right to exclude Owner from any use that Utility Company in its sole, absolute and exclusive judgment, whether reasonable or unreasonable, may choose to exclude."

Both attorneys and the appraiser have seen easement language that is *broader* than this! The appraiser even saw one where the owner was required to indemnify the United States of America. Obviously, the more "sticks" in the bundle of rights that the easement is consuming, the greater the value of that easement. And here the focus needs to be on *what the easement document says*. The law is well established that it does not matter what the easement holder plans to do with the easement; if the easement holder is acquiring the right to do other things, it has to pay for those other things.

In fact, the law typically requires that the "most injurious use" that could be made under the language of the easement document establishes the scope of the easement that needs to be valued. In sum, figuring out the scope of the easement requires real thought, analysis and reading.

The Data for Valuing Easements

Once the scope of the easement is determined, the next step is measuring the value of it. And here is where things get mysterious. There are three standard approaches to valuing real estate: (1) the sales-comparison approach, (2) the income approach and (3) the cost approach. But when it comes to easements, none of these are very helpful.

For the sales-comparison approach, one would be looking for sales of other, similar properties. But how often do people buy and sell easements? And even if one could

find some sales of easements, how often would they be market transactions negotiated without compulsion? For example, if a property owner wants a driveway easement across her neighbor's property, she is the *only* buyer, and the neighbor is the *only* seller. That is not an open market transaction. And what if the property is landlocked without that easement, making her desperate to buy it? Now it is *really* not an open market transaction. The same problems arise in trying to use the income approach (what data can you find for income from an easement?) and the cost approach.

Without data from actual easement sales or actual income from easements, appraisers typically determine the value of the fee interest and then apply a percentage to that fee that the appraiser

believes reflects the percentage of "sticks" being removed from the bundle. It is fair to say that this is a standard appraisal practice, but it is also fair to say that this is far from scientific and far from objective.

Can Easements be Valued?

Both of the attorneys and the appraiser believe that easements can be valued. But the takeaway all three want the readers to understand is that valuing easements is not clear and it is not simple. It cannot be done by just applying a standard measurement, such as "10 percent of fee for utility easements." Additionally, it requires careful reading. Join us at our session in Portland at the Annual Education Conference to learn more about this important topic! ✪



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