

PRE-CONDEMNATION PLANNING

**By James L. Thompson
Miller, Miller & Canby**

Pre-condemnation planning is a very important part of the eminent domain process in Maryland. Obviously, the condemning authority (the “condemnor”) undertakes a planning process, which Janet Bush Handy could explain from the governmental perspective of the State Highway Administration. Sometimes, that process can extend for decades and become very complex. Consider a current example in our office. In Montgomery County, the County has just filed several quick take condemnations to obtain a portion of the necessary right-of-way for the Montrose Parkway, an east-west limited access parkway which will connect traffic from I-270 to the Rockville Pike. This project, originally called the Outer Circumferential Freeway, was identified in the Master Plan of Highways for the Maryland-Washington Regional District in a Master Plan adopted on May 7, 1953. Since then, it has been included on the 1955 Revised Plan of Highways, the North Bethesda-Garrett Park Master Plan of December, 1970 (then identified as the Rockville Freeway) and most recently in December 1992 in North Bethesda-Garrett Park Master Plan Amendment which recommended the construction of “Montrose Parkway.” Obviously the planning officials and the condemnor have been working on bits and pieces of this road for over 50 years.

This plan has impacted property owners who own land in the right-of-way -- many owners had to put their land in reservation, others sought rezoning and were denied rezoning and building permits as a routine manner. This has caused a nightmare of a pre-condemnation planning process. The government’s use of the zoning process to preserve future roadways free of development was successfully challenged. In *Carl M. Freeman v. State Roads Commission*, 252 Md. 319, 250 A.2d 250 (1969) the Court of Appeals held that this practice of withholding zoning and development of land within the right-of-way of a Master Plan road was an unconstitutional denial of the landowner’s right to receive just compensation for his property. The court went on to say that it would be unjustifiable for a condemning authority to both rely on restrictive provisions of a zoning ordinance to prohibit rezoning of land for a planned future road in order to depress land values and, in the same litigation, deny the property owner the opportunity to defend himself and his property against the asserted ordinance on the grounds of its alleged invalidity.

The *Freeman* property, when it was condemned, was a 7.9 acre parcel zoned R-A (residential-agricultural), at the intersection of Georgia Avenue and Bel Pre Road in Montgomery County. The R-A zone was a zoning classification, which was frozen by the ordinance rather than the R-20 or C-P commercial zoning that it was entitled to. By unfairly freezing the zoning to residential, the county denied the owner just compensation. Even following the *Freeman* case, however, it remained difficult at best to rezone property in the right-of-way of future roads.

This example is an extreme case of pre-condemnation planning and requires proactive measures to be taken to protect the property owner. What can be done when property has been frozen because the county or state draws a highway across it or places a park on it in a Master

Plan? Is a claim of inverse condemnation of viable remedy? John Murphy and I will discuss this at the end of our presentation if this issue is of interest to you.

Turning now to the usual issues in pre-condemnation planning which all property owners should consider. See, generally, Nichols on Eminent Domain, Section 1A.03 Precondemnation Planning.

A. What should a property owner do to prepare for condemnation?

- Collect general and specific information about the condemnation project and determine the effect of the project upon the surrounding area in general, the property in particular, and obtain a timetable for completion of the project.
- Determine what type of property interest the condemnor seeks to acquire. Is this an easement for purposes of laying underground utilities? Is this for a slope easement? Would it be a complete or partial take of your property?
- Identify the owner's goal in this case. To prevent the taking and challenge the right to take? To alter the scope or direction of the taking? To obtain maximum compensation for the taking? To mitigate damages to the remaining property in a partial taking case by obtaining concessions from the condemnor?
- If the decision is to contest the taking, is the proposed taking the least intrusive alternative? Is the taking for a public purpose post-*Kelo*? Is it necessary? If the project affects a number of property owners similarly situated, can you form an organization to oppose the taking as a part of the political process or, in the alternative, to share costs in hiring experts if the condemnation will be contested in court.
- If the project is slightly relocated at your request and your client's property is not taken, consider the detrimental effect that the project might have after it is constructed – will it significantly depress the market value of the property?
- Collect all of the descriptive data about the property: any plats, building plans, topographic materials and any planning documents. Use these materials and possibly a land planner to evaluate the highest and best use of the property.

B. Protect and enhance the value of the property.

If the property is improved, be sure that it is in good shape and makes a good appearance prior to its being appraised by the condemning authority's appraiser. Particularly in residential situations, it is wise for the property owner to clean up the property, do any repairs and maintenance and consider touch-up painting and aesthetic items, too, which would be done if the property were being listed for sale. Take color photographs that reflect the house and neighborhood at its best, preferably on a sunny day in the spring with flowers blooming or in the autumn with the leaves turning color. These photographic images of the property and the

neighborhood will be very valuable during a condemnation trial. The opposite is also true. If a property is left to stagnate and deteriorate, then not only is it less saleable, but it will not show well at a jury view.

The owner should carefully consider the value of making improvements to the property beyond normal maintenance. Will these improvements enhance the value of the property as of “the date of take”? Owners are entitled to use and enjoy their property while a condemnation is pending and they are entitled to continue to improve their property and increase its value in the face of an inevitable condemnation, even after a standard condemnation petition is filed. See, *Matthews v. Maryland-National Capital Park and Planning Commission*, 368 Md. 71, 792 A.2d 288 (2002) (the court held that the property owner was free to continue to develop his property after the standard condemnation suit was filed and right up to the date of trial (the date of take) and to introduce evidence as to the enhanced value of the property post-petition). Thus, owners should weigh the value of the enjoyment that the improvement will provide, the time value of money and the increased value the improvement will add to the property in considering the wisdom of making improvements of this sort.

In condemnation actions, there are at least three different staged periods of time in the planning process:

- a) The informal discussion period concerning the project and the possible condemnation (Phase I);
- b) The time from the “announcement of the project” (or the effective date of legislative authority for the acquisition) and the date of take (Phase II) or filing of a formal condemnation petition; and
- c) The time following the date of take or filing of a petition in court and the trial of the case (Phase III).

The maintenance and improvement of the property during these time periods is somewhat problematic. Owners are entitled to improve their property and enhance its value in a proactive manner and also in a reactive manner (they can mitigate any blight damages) during Phase I and II of the process and arguably fix blight damages in Phase III. A condemning authority cannot tell owners how to use or enjoy their property until a taking occurs. At that point, if the condemning authority has filed a quick take, paid money into court and appropriated the property to its public use, then it has the right of possession of the subject property. It can tear down any improvements and use it to construct the public project even though title does not vest with the condemnor until the jury inquisition is signed and filed and the jury award money paid following a trial. In a standard condemnation, the date of take is the date of trial. Hence, property owners have the right, in an effort to mitigate damages among other things, to improve their property right up until the date of take or date of trial, whichever is later. This should be analyzed with counsel.

During the pre-condemnation period, the owner of income producing property occupied by tenants can suffer significant damages. In *Reichs Ford Road Joint Venture v. State Roads*

Commission, 388 Md. 500, 880 A2d 307 (2005), our court held that where, after the date a project is announced, pre-condemnation activity on the part of the condemning authority interferes with the property owner's use and enjoyment of the property then the damages suffered are compensable. The property owner is entitled to receive as compensation any diminution in value or loss caused by the acts of the government or its officials. The court now permits a claim for recovery of lost rents and other damages to the real property prior to actual condemnation as a temporary taking, to be combined with the ultimate *in rem* condemnation action. This provides greater clarity and now the court has interpreted "just compensation" to be "full compensation" under the statutory scheme provided in the Real Property Article, §12-105. This permits expanded compensation for damages occurring in the pre-condemnation period and obviates the need of an inverse condemnation action to be filed to recover these damages.

C. The importance of the "date of take".

The date of take is critical in the condemnation process. It sets the date of value, the "as of" date for all appraisals. It also determines the boundaries of relevance at trial and affects the admissibility of evidence directly. In a standard condemnation case, the "date of take" is the date of trial when the inquisition is returned and the just compensation award is determined. Under the quick take procedure, the condemning authority acquires immediate possession of the property by filing a condemnation petition in the Circuit Court and paying an estimate of just compensation in the court registry. "Property is deemed to be taken...when the required payment has been made to the defendant or into court, any required security has been given, and the condemning authority has taken possession of the property and actually and lawfully appropriated it to its public purposes." *Matthews v. Maryland-National Capital Park and Planning Commission, supra*, at 299. The quick take case continues in the Circuit Court to determine the amount of just compensation to which the property owner is entitled and, if that amount exceeds the condemnor's estimate of just compensation, the property owner is entitled to receive that sum, together with pre-judgment interest on the excess in an amount equal to 6% or the market rate of interest, whichever is higher. See, *King v. State Roads Commission*, 298 Md. 880, 467 A2d 1032 (1983). Many public agencies do not have the power of quick take and those that do have certain limitations on its use. See, Maryland Constitution, Article III, §40A, B and C. The State Roads Commission's power is set forth in the Maryland Transportation Article, §8-318 et. seq. and there is a provision in the Maryland Rules §12-213.

The relevance of the date of take in pre-condemnation planning is significant. The property owner is entitled to use their property and improve it without prejudice until a taking occurs. Any improvements made after that date will not be valued when calculating the condemnation award. That date also determines the relevance *vel non* of proactive pre-condemnation activity to position the property advantageously and/or to acquire easements or access opportunities prior to the condemnation.

D. Pre-condemnation negotiations with the government.

The law requires the condemning authorities to make every reasonable effort to acquire the land by negotiation. They are supposed to negotiate in good faith and seek to reach a settlement. Maryland Real Property Article, §12-207 sets forth real property acquisition policies

in condemnation cases. In order to prepare for this process, the condemnor is required to obtain an appraisal and to provide the property owner with the opportunity to accompany the appraiser during his inspection of the property. Typically, once the appraisal is obtained, this would be followed by an offer from the condemning authority to acquire the land for its fair market value. The offer will be in writing and should summarize the basis of the offer. During this negotiation period, the condemnor may be willing to do things in order to achieve a settlement which is not required by law per se. For example, they may consider slightly changing the area of take or the area of the easement (if the project can accommodate a slight change), or planting screening trees, if that is an issue, or making other accommodations. Negotiations frequently occur at this time, however, it is ordinarily best for property owners to be represented since the highest and best use of the property may need to be evaluated, severance damages may be applicable (in a partial take case) and important planning and valuation issues should be considered before any settlement is reached. This process should be approached with care and caution since even though this is a negotiation process, sometimes the condemning authority, later in the case, may seek to use the owner's statements about the property to his detriment.

The law gives the condemning authority the right to enter upon the property of the landowner for purposes of surveying, setting stakes or markers and performing an appraisal. Maryland Real Property Article, §12-111 sets for the procedure for this process. The property owner should, under no circumstances, seek to obstruct these agents from making their evaluations or remove the stakes or markers. However, the condemning authorities, except for the State Highway Administration, do not normally have the power to do intrusive testing and excavation. See, *Mackie v. Mayor of Elkton*, 265 Md. 410, 296 A.2d 500 (1972), Real Property Article, §12-111(g).

E. Communications with the appraisers and other government agents.

Typically, the appraiser travels to the property to be condemned having first contacted the property owner by letter to determine a mutually convenient time for the inspection. This is an opportunity to acquaint the appraiser with important information about the property and to answer appropriate questions, which may be asked. If this is a residential condemnation, then the type of information the appraiser would elicit would be what you would expect a listing broker might ask concerning the various amenities in the house, the age of the house, any expansion opportunities, the age of the roof and appliances and matters of that nature. Ordinarily, the property owner is encouraged to participate in this process and provide any information requested, but the owner should not express any opinions of value at this point. In connection with a business, commercial or industrial property, where the valuation of the property depends upon income and expense information and projected sales figures, etc., the process can become more complex. In cases of this nature, it would be desirable for the property owner to discuss the situation with their attorney so that accurate data relevant to the case can be provided if it would be useful, and so that there is no confusion as to what was said or done at the time of any interview. If the property owner is unrepresented, then they may wish to permit the inspection without providing further information or data until a later date after they have had a chance to consult counsel. This avoids any misunderstanding or misinterpretation of what the owner said or provided.

F. Preservation of evidence for trial.

The owner is encouraged to maintain the property so it appears structurally sound and aesthetically pleasing. Photographs of the property should be taken to preserve the quality of the property and any special features which may be destroyed if the condemning authority files a quick take and the property is destroyed prior to trial. In addition, if there are tests, which the property owner would wish to run prior to giving up possession, then those should be undertaken. If there is a question concerning whether the property has been contaminated by oil, gas or PCB's and it is an industrial property, then the property owner should consider whether to make tests prior to the condemnation to establish its environmental status or, if there is a minor spill to seek to remedy it before condemnation. Also, in cases of farming or mining where surface or subsurface materials may need to be valued, then tests to establish that value should be undertaken. These tests and photographs should be taken as close to the date of take as possible since this increases their relevance and admissibility at trial.

Also, the property owner and counsel should be prepared to begin collecting comparable sales, sales contract information, rental information and any other economic data which would be of value to an appraiser. Although it may not be advisable to have a formal written appraisal done prior to the condemnation being filed, it is important to collect basic data for your appraiser to consider.

In addition, if there has been a lengthy period of time between the time the project is announced and the proposed taking and any condemnation blight has occurred, it is important to document that blight with photographs showing how and when the property and adjoining properties have deteriorated. The definition of fair market value in Maryland in the Real Property Article, §12-105(b) includes, "any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of the actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff [condemning authority] or its officials concerning the public project, and was beyond the reasonable control of the property owner." (Clarification added.) In the pre-condemnation period, those actions should be documented as well as those actions of the property owner to mitigate those damages, if any.

G. Tax Appeals and refinancing issues.

Ad valorem real property taxes in Maryland are reassessed every three years by the assessor. Property owners have a right to protest their taxes upon notice of reassessment or upon a petition to review the taxes on an annual basis. If the owner's property has been identified for condemnation, then it may be inadvisable for him to protest the real property tax assessment. The attorneys for the condemning authority may seek to use his statements in the tax appeal urging a lower value as an admission when the condemnation case comes to trial and when the owner testifies as to his opinion of its fair market value. If the value put on the tax assessment appeal differs from the value he used in the condemnation case, then this inconsistency may be exploited to his detriment. See, *Baltimore City v. Himmel*, 135 Md. 65 (75-76), 107 A. 522 (1919) (held that statements of the owners to the assessor showing the value of the property is

admissible to impeach the owner and as independent evidence of value.) And generally, 39 A.L.R. 2nd 209 (Valuation for Tax Purposes as Admissible to Show Value for Other Purposes) and *State ex. rel. Mendez v. American A.M. Support Foundation*, 100 P.3d 932 (Ariz. 2004). Normally, the condemning authority cannot use the assessed value of the owner's property as an indication of its fair market value. However, the property owner may put the assessed value of the property into evidence if it is supportive of his opinion as to fair market value.

In addition to tax appeals, refinancing can also be somewhat problematic for similar reasons. If the owner seeks to refinance his property after it has been targeted for condemnation and the bank hires an appraiser (which he pays for), he may get a value which is less than the full fair market value which he may be required to disclose to the condemnor. See Rule 12-206. Frequently, appraisers for financial institutions take a very conservative view of value in order to protect the lending institutions and this, from time to time, can become a detriment to achieving full fair market value in a condemnation case.

H. Ownership interest in the property – tenants and lien holders.

Maryland, like most jurisdictions, generally follows the undivided fee rule and unit rule in valuing property for purposes of condemnation. This rule requires that the entire property including land, buildings, fixtures and other improvements, be valued as a single property even though it may have a variety of separate interests. This means the value that is determined for the fee simple unencumbered property will then be carved up between the fee simple owners, the tenants, lien holders, easement holders and others with an interest in the property as their interests may appear and be valued. The owner may come out the worst for this process. Sometimes the sum of the parts, if valued separately, exceeds the value of the whole and when that happens, then the owner's just compensation is in jeopardy. Although Maryland generally follows the unit rule, the case of *Heritage Realty v. City of Baltimore*, 252 Md. 1, 248 A.2d 898 (1969), recognizes that under certain circumstances the total cost of the acquisition of separate interests in property by the condemning authority could, in the aggregate, be greater than the value of the property as a single parcel or unit. This is still a problem and should be mitigated or avoided, if possible, prior to condemnation. Therefore, we make the following suggestions to consider in pre-condemnation planning if there are multiple interests in the property, which is being condemned:

- Check the written lease to see whether it has a clause which extinguishes the tenant's leasehold interests at the time condemnation is filed and, if not, see if you can get one or make a deal with the tenant.
- Should a verbal rental agreement be reduced to writing in light of a pending or threatened condemnation?
- In a partial taking case, how should the rent/lease payments be apportioned or approached after a condemnation complaint is filed, assuming that the lease survives?
- Are there outstanding options to purchase and, if so, how are they derived?

- Consider quantifying the potential problem with the tenant insofar as apportionment is concerned. Normally, just compensation for the taking of a leasehold interest is generally measured by the fair market value of the leasehold interest for the unexpired term of the lease. *Mayor and Council of Baltimore v. Gamez and Bros.*, 132 Md. 290, 294, 104 A. 429 (1918); (J. Sackman, Nichols' Law of Eminent Domain, 12D.01[3][G], Cum. Supp. 2005). Another way of stating this is the fair market value of the leasehold interest is the amount of any positive difference between: 1) the present market value of the use and occupancy of the property under the terms of the lease for the remainder of the term, plus the value of any right to renew; and 2) the agreed rent which the tenant would pay for such use and occupancy. See, *U.S. v. Petty Motor Co.*, 327 U.S. 372, 381 (1946).
- Seek to minimize differences with the tenants pre-condemnation. Both the landlord and the tenant (with an unexpired lease) in a long term lease situation have an interest in the property being condemned. It is in both parties interests to insure that the award of just compensation is as great as possible. However, after the trial, the landlord's interest will be to minimize the value of the tenant's leasehold interest to retain more of the award for the landlord's reversionary interest. The tenant may seek to use evidence the owner presented at trial to support his claim that high market rents confirm the "bonus value" of his lease. Thus, both the landlord and the tenant must consider trial and post-trial issues when presenting their case.
- Holders of security interests and lien holders have priority in a condemnation award and their interests, secured by the property, will be satisfied out of the condemnation award. Thus, mortgages and home equity loans and other encumbrances must be satisfied in order that the condemnor receives clear title. This process is straightforward in a complete taking case but competing interests may arise with partial takings.
- Easements also should be considered pre-condemnation. The general method of valuing an easement is the difference between the fair market value of the property burdened by the easement and the value of the property without the easement. Easements raise issues similar to leases and counsel must be sure the valuation method employed at trial is consistent with the method used to value the easement after trial if separate hearings are held with respect to apportionment. The value of an easement or restrictive covenant to its holder, the dominant estate, often exceeds the value of the easement or restrictive covenant to the owner of the burdened property, the servient estate which is being condemned. Consider an access easement through the servient estate, which provides the only means for ingress and egress to the dominant estate. The presence of the easement may not diminish the full use and enjoyment of the servient estate, especially if the servient estate uses the same area for its ingress and egress. Thus, the difference in value to the servient estate with the easement and without the easement may be minimal. But, the loss in value to the owner of the dominant estate may be substantial, even total if no other access to the servient estate may be obtained. Thus, counsel in planning should carefully consider

whether the valuation issues presented by easements or restrictive covenants require an exception to the unit rule to be considered.

I. Should improvements to the property be undertaken before condemnation.

Under the law, the property owners are entitled to use their property in any way they choose and to improve it or not as they see fit prior to the date of take. See, *Matthews v. Maryland-National Capital Park and Planning Commission*, *supra*. However, a property owner should be guided by certain guidelines. First, the property owner will not be able to recover for any improvements, which are made after the date of take. Second, if there is a potential for condemnation blight to occur between the announcement of the project and the date of take, and reasonable maintenance of improvements would prevent more serious deterioration, then the property owner is expected to make those improvements in order to mitigate blight damage. See, Real Property Article, §12-105(b) of the Maryland Code.

In the pre-taking period, if the owner can enhance his property's value and, in a sense, recover more than his costs in the threatened condemnation proceeding, then the property owner would be well advised to proceed accordingly. This is precisely what happened in the *Matthews* case, *supra*, which represents a proactive precondemnation strategy. Here, J.L. Matthews, Inc. (Matthews), the property owner, purchased a 29,238 square foot parcel of land in Takoma Park, Maryland and obtained the necessary development approvals in 1997. When planning jurisdiction over the property was switched to Montgomery County under a unified plan, re-approvals were required. A preliminary subdivision plan was approved in 1999. However, at or about that time, the land acquisition specialist for the Planning Commission identified the parcel for development as a neighborhood park. The Planning Commission sought to purchase the property, but was unsuccessful. An initial offer of \$302,250 was made to the owner but it was rejected. A second offer of \$337,700 was also rejected. The property owner proceeded to obtain a building permit in March 2000. The Planning Commission, on March 15th, filed a standard condemnation petition to take the property. It did not have quick take powers. The property owner, Matthews, was not deterred and proceeded to begin the development process by trenching the land, erecting silt fencing and so forth while the case was pending. The Commission filed a motion for temporary restraining order, which was granted by the trial court. Ultimately, the condemnation case was tried and an inquisition was returned for \$320,000, however, the court excluded lost profits and expenses in connection with the development, as well as consideration of damages as a result of the injunction.

The case was appealed to the Court of Appeals. The high court reversed the trial court holding that it was error to grant a temporary restraining order and preliminary injunction and it stated at page 305:

“Nash [WSSC v. Nash, 284 Md. 376, 396 A.2d 538 (1979)] made clear that in a “regular” condemnation proceeding, a property owner is free to use his or her land in any lawful manner prior to the condemning authority’s taking of the land and that, therefore, an injunction to the contrary ordinarily is inappropriate in such circumstances.”

The court went on to find that petitioner's right to develop the property and to just compensation greatly outweighs the Commission's speculative showing as to its interest in retaining the affected trees and vegetation on the property for a potential park. In reversing the case and sending it back for a new trial as to damages, the court found at page 309:

"In this case, however, the grant of the temporary restraining order and preliminary injunction prevented petitioner from exercising that right, specifically from continuing its development of the property. As a result, the property's fair market value was determinable as of the date of the initial injunction (17 March 2000), not the date of trial (15 June 2000). The jury determination of the property's fair market value was constrained to the value of the property as of the date of the initial injunction. This was error".

The lesson derived from this case is that property owners may continue to develop their property for their own economic advantage up until the time the property is taken.

Finally, consider another example of whether pretaking improvements should be considered, where the subject property is improved with an apartment building. The apartment building should be painted inside and outside and this would help maintain attractiveness for rental purposes and maintain its life. However, the painting process may take a series of weeks or months to complete and, if condemnation is filed and a taking occurs, then the condemning authority may well seek to exclude compensation for the painting or even for the pictures of the painted building which appears more attractive after the date of taking. Should the owner paint or not? The same would apply to the building of an addition on a rental property which would enhance the income stream and improve the value of the property using the income approach. If the property owner is unclear as to when the date of take will occur, should he or should he not undertake this improvement if it will take 6 months to complete? Does the condemnor have quick take power or not? These are matters of judgment and should be discussed carefully with counsel before being undertaken.

CONCLUSION

As you can see from this discussion, the pre-condemnation planning process is extremely important. It allows the property owner to position his case in a manner, which will assist him in receiving just compensation. The factors affecting commercial, industrial or multi-family dwellings are more varied and complex than residential properties improved with single-family homes. Likewise, undeveloped properties have a host of additional factors impacting valuation and planning. Each property is unique. However, whatever the nature of the property, or its present use, owners are well advised to consider during the pre-condemnation period all factors that may impact the compensation they will be constitutionally entitled to receive once the formal taking procedures begin.