

THE VALUE OF PRECONDEMANATION PLANNING

By: Joseph P. Suntum

The drumbeats are unmistakable. The ICC is coming. After decades of study, debate and indecision, the State and County governments have decided to move forward, in spite of strong local community opposition. Inevitably, lawsuits will be filed in a final effort to stop construction. But owners of property in the path of the chosen route are well advised to plan for the likely event that all, or part, of their property will be condemned and taken by the government. Wise planning *before* the State initiates its taking procedures will protect, and possibly enhance, the value of your property and the “just compensation” the government is constitutionally required to pay for any property taken by eminent domain.

Although the government may take private property for public use by eminent domain, it must pay the owner “just compensation” for the property taken. But how much compensation in any particular case is debatable – and will most assuredly be debated by the government. Formal rules have been established as to how “just compensation” must be determined, including the “date of take,” which is the date all value calculations must be made, what is compensable and what is not, and acceptable methods of calculating the loss. In addition, relocation assistance benefits are available to supplement the compensation paid for the real property and reimburse owners for the costs of relocating. Property owners should consider how these myriad factors will impact their particular property and situation and plan accordingly, in order to maximize their property’s value as of the “date of take” and the total package of compensation they will be entitled to receive.

The government is statutorily required to negotiate in good faith with the property owner in an effort to reach a negotiated transfer of the property. Consequently, government representatives will inspect, survey and appraise the property long before the date of take. Indeed, the State Highway Administration has already contracted with appraisers to perform this function. The government’s appraiser will seek to contact the owner in an effort to obtain information from the owner respecting the property and any damages the owner believes will be suffered. These early visits, and statements made by the owner to the government agents, may impact the government’s valuation of the property. And evidence developed at this time may be used by the government at a subsequent trial. For these reasons, owners should be aware of the process, their rights in the process, how to

communicate with the government agents, as well as what to say, or not say, when speaking with these representatives.

The property should be well maintained throughout this period, so it appears structurally sound and aesthetically pleasing during inspection by both the condemnor's and the property owner's appraisers. This may include cleaning up the property, completing landscaping projects and finishing repairs prior to the inspections. The owner should also capture the condition of the property and the surrounding neighborhood with photographs as the condition of the property – and the neighborhood -- may change greatly by the time a formal condemnation case gets to trial. Take color photographs that reflect your property and the neighborhood at its best – on bright sunny days, in the Spring with flowers blooming, and in autumn with the leaves turning. The surroundings of the property are equally important because by the time the case is ready for trial, those may have been altered by the demolition of earlier-acquired structures and by visible attributes of neglect, whether by neighboring condemnees -- owners no longer interested in maintaining their properties -- or by the condemnor acquiring some of them and letting them sit vacant. In other words, photographic images of the neighborhood uninfluenced by the coming condemnation should be preserved before it deteriorates.

Owners should be cognizant of the impact normal actions may have on their ability to receive full compensation. Contesting a tax assessment, refinancing a mortgage or securing a home equity loan, preparing financial statements for any number of reasons, applying for a variance or building permit, or listing the property for sale, may all be used against the owner in the condemnation case and should be undertaken only with proper consideration of their impact.

The status of ownership and all liens on the property should be reviewed. How is the property titled? Who owns the adjacent property? Given the complexities of modern finance, condemnation cases often contain issues concerning the competing rights of the owner of the fee and the various other interest holders in the property. Other interest holders may include tenants, mortgagor and lien holders, and easement or rights-of-way holders. A tenant's interest in the property may impact the amount of compensation to be paid to the owner. All leases should be reviewed to determine how the condemnation will affect the rights of both owner and tenant. What are the terms of the mortgages and Deeds of Trust on the property with respect to the application of any compensation paid by the government? Depending upon the debt instruments, lienholders may have a

claim to the final award or to interim payments under a "quick take" procedure. The mortgagor's claims to the proceeds may differ if it is a partial taking as opposed to a taking of all the property. If the owners wish to retain the award rather than retiring or reducing the mortgage or secured debt obligation, they may wish to explore the possibilities of providing substitute collateral or amending the mortgage agreement with the lender or lienholder.

Owners should carefully consider the value of improvements to the property beyond normal maintenance. Will such 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, even in the face of an inevitable condemnation. 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 to the property.

Such measures taken by owners in anticipation of condemnation may result in government charges that this is an improper effort to "enhance" damages. *It is not.* There is nothing wrong, morally or legally, with arranging one's affairs so as to reduce the impact of the rules of noncompensability of losses actually suffered. Both the U. S. Supreme Court and Maryland's highest court have held that owners are free to make any lawful use of their property, whether or not a condemnation is imminent, up to the time a taking occurs. A condemnor is no more entitled to tell owners to curtail their normal activities in anticipation of the condemnation than can the owners demand damages for normal government planning.

An eminent domain proceeding is not a user--friendly environment. It is probably the only field of constitutional law where litigants who are not charged with any wrongdoing and who try to invoke for themselves the benefit of an express constitutional guarantee are viewed with suspicion and hostility by many judges and many jurors. A prospective condemnee's position can be improved over that which might result if no preventive or strategic measures are undertaken. But careful consideration of the myriad factors discussed here, in a timely fashion, can make landowners less vulnerable to the harsh rules of eminent domain law and contribute to their peace of mind as they face the taking of their land.

The factors affecting commercial, industrial, or multifamily properties are more varied and complex than residential properties improved with single-family homes. Likewise, undeveloped properties have a host of

additional factors impacting valuation. Each property is unique. Whatever the nature of the property, or its present use, owners are well advised to consider, during this “pre-condemnation” period, all factors that may impact the compensation they will be constitutionally entitled to receive once the formal taking procedures begin.

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