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TRIAL ISSUES IN A CONDEMNATION CASE

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The trial of a condemnation action requires the same thorough preparation and skill as the trial of any civil action – plus knowledge and use of some unique rules and procedures applicable only to condemnation actions. In addition to the standard Rules of Civil Procedure set forth in Chapter 2 of the Rules, Rules 12-201, *et. seq.* "govern actions for acquisition of property by condemnation under the power of eminent domain." Rule 12-201.

These rules provide that an action for condemnation shall be brought in the county where the subject property is located and cannot be brought in other venues permitted for standard civil actions. Rule 12-202. If the property straddles a county line, the condemnation action may be brought in either county and that court will have jurisdiction over the entire property. Rule 12-202.

Because a condemnation action seeks the transfer of title to real property, a complaint to condemn property must, in addition to the standard requirements set forth in Rules 2-303 through 2-305, identify with specificity in the property that is sought to be condemned, the owners of the property, the public purpose and necessity for the condemnation, and other detailed information. Rule 12-205.

Critically, in contrast to other civil actions, the parties in a condemnation case must, if requested, disclose to the opposing party the identity, findings and opinions of an expert, *even though the expert is not expected to testify at trial,* if the expert was retained in anticipation of litigation and the expert examined or appraised all or part of the property being condemned. Rule 12-206. Counsel that are used to retaining "consulting experts" in normal civil cases who may not be called to testify at trial, and thus may not need to be disclosed, especially if their opinions are not helpful, should be cognizant of this rule. Often property owners quickly order appraisals of their property when they are advised of a condemnation action and these appraisals may provide the condemnor with helpful evidence if they are sloppily prepared or not well considered.

In contrast to normal civil actions, a condemnation case shall be tried to a jury unless all parties waive a jury trial in writing. Rule 12-207. In a normal civil action a party's right to a jury trial is automatically waived if a jury trial is not affirmatively requested at the outset of the litigation.

One of the most unique aspects of a condemnation trial, the significance of which is often overlooked by trial counsel, is that the jury will leave the courthouse and view the subject property in person unless all parties waive this right in writing. Rule 12-207. The importance of the jury view will be discussed more fully below. But, at the outset, the jury view often gives counsel an opportunity to give two opening statements to the jury. Although Rule 12-207 only provides counsel the option of whether to give an

opening statement before or after the jury views the property, in practice, many judges, if requested, will allow the attorneys to split their openings and discuss the issues surrounding the view before the jury is taken to the property and complete their opening statements after everyone returns to the court. This opportunity to focus the jury's attention on the issues and factors they should look for when at the property without distracting them with a discussion of all the issues in the case is one counsel should use if the court will permit it. Rule 12-207, further, outlines how the view should be conducted and who may speak to the jury during this unique procedure that takes place off the record and outside the court.

Other rules in Chapter 12 concern the form and contents of the inquisition, which is the unique form of verdict in a condemnation case, the nature of the judgment to be entered, transfer of title and possession, recordation of the inquisition among the land records and other matters. Rule 12-213 covers the procedures before the Boards of property Review, which provide means to have a "low cost" trial in small cases brought by the State Highway Administration. Any party dissatisfied with the award made by the Board of Property review may appeal to the circuit court where the case will be tried *de novo*. Rule 12-213. Thus, parties are seldom happy with such awards in large cases that could not be resolved by settlement short of trial.

The Jury View

As noted above, the jury view of the property being condemned provides counsel with a unique opportunity to advance the jury's understanding of the issues in the case. But many counsel fail to take full advantage of this opportunity. In addition to the opportunity to speak to the jury twice in opening statement and focus the jury specifically on the facts you want them to notice and remember when they view the property, Rule 12-207 provides that each party shall designate only one person to speak to the jury on their behalf during the view. Often the condemnor will automatically designate a representative of the condemning authority and the owner will speak for him or herself. But these persons may not be the best representatives to speak for the parties.

Counsel should consider designating as their party's representative someone who will be able to persuasively discuss the physical factors about the property in the field and begin to build rapport with the jury in advance of their testimony in court. Owners are rarely accustomed to testifying in court and they may not be accomplished public speakers. Thus, owners often make poor choices to speak to the jury during the view. Likewise, representatives of the condemning authority who may be well versed in the boundaries of the taking, are not well versed or capable of addressing the actual issues being disputed in the case.

Example: A 5-acre property improved with a single-family house is being condemned. The condemnor's appraiser has valued the property as it is presently zoned and used, i.e. as residential property improved with one house. The owner, however, contends the property is suitable for development by special exception with a multi-unit senior living facility. The main issue, then, at trial will be whether there is a reasonable probability that a special exception for the construction and operation of a senior living facility may be obtained that would influence the price a reasonable buyer would pay for the property. The parties may be well served to choose as their representatives at the view, those witnesses who will be testifying on the main issue in the case. The expert, then, may direct the jury's attention to the physical factors of the property and the neighborhood that will impact whether a special exception would likely be granted.

The view of the property is evidence the jury should consider in the case. *Kurrle v. Baltimore*, 113 Md. 63 (1910) ("In Eminent Domain proceedings, the jury goes upon the land for the purpose of ascertaining its value, and their view should have more effect than in ordinary cases where they are generally and primarily permitted to go to the *locus in quo* so as to better understand and apply the evidence."). *Baltimore v. Smulyan*, 41 Md. App. 202 (1979) ("The jury viewed the site, and could see for itself all of the development going on around it. That view, though not sufficient by itself to support a verdict, is substantive evidence.") It is very important for counsel to take advantage of this opportunity to advance your case.

Counsel should make sure that all aspects of the trial fit together. And counsel should use the jury view as a tremendous opportunity to advance their party's position in the case. Of course, in addition to speaking and demonstrative issues, counsel should consider and advise their clients on how to dress, act, and speak when in the presence of the jury. Just as in every trial, the jurors are strangers to all the participants. The impressions they form of all participants in the trial, including counsel, parties and experts, may significantly affect their judgment.

Trial

Trial skills generally are beyond the scope of this seminar. But the same skills and preparation necessary to try any civil case are needed to try a condemnation action. It is not an administrative proceeding. Rather, it is a constitutional battle where counsel for the owner is protecting the owner's constitutional right to be paid just compensation in consideration for the property that the government is taking for the benefit of the public. Counsel should imbue the trial with equity and morality – that it would be unjust to take a person's property without paying its fair value. Property owners in a condemnation action are constitutionally entitled to "just compensation" in the same manner as defendants in a criminal case are constitutionally entitled to be presumed innocent and to remain silent and not testify at trial.

And counsel should never forget, as Judge Stern teaches, that many jurors believe the lawyers know everything about the case and what the truth is -- and it is their job as jurors to figure out which lawyer is lying to them. That admonition may be an exaggeration, but Rule 1 for any trial attorney is to protect your credibility with the jury. And consideration of this admonition leads to several factors that should be considered in every case.

1. Support your appraiser. A condemnation case involves a dispute over the value of real property. Because the subject property has not, in reality, been sold, the evidence of value is presented through opinion evidence. And opinions are only as good as the evidence upon which they are based. For example, many counsel ask an appraiser to opine on all issues bearing on the value of property and, due to the nature of the profession, appraisers may be willing to oblige. But do not shortchange your case in that manner. Appraisers are, generally, not experts in land planning. When a land use issue is critical to the valuation of the property at issue, support your appraiser and provide him the expert land use opinion on which he may rely. As you will note in the case, which was the subject of the trial outline memorandum below, the use of a land planner may add the substance and reliability to your appraiser's opinion that will help it carry the day with the jury.

2. Don't over reach. The adage that "pigs get fat; hogs get slaughtered" is applicable to condemnation cases. Jurors want to be fair, to pay "just" compensation. But if the jury thinks you are trying to rip off the public, they will punish you with their verdict. Likewise, if the jury thinks the government is trying to get the property "cheap" it is likely the award will be decisively in favor of the owner. Advance and defend a value that is well supported in both the law and the market and marshal substantial evidence to prove it.

3. Make sure all the pieces of the story fit together: through your opening, the jury view, your witness examinations, and closing argument. Identify the critical issues in the case and address them at every opportunity.

4. Use demonstrative and illustrative exhibits to bring the property and valuation issues to life in the courtroom. Consider: photographs, aerial photographs, video of the property, plats, surveys, land use plans, computer graphics, and/or models of development possibilities that demonstrate the compatibility of the proposed use with the surrounding community. With today's technology, the possibilities of presentation are endless and limited only by your imagination and financial resources.

5. Educate the jury in the critical valuation concepts necessary for them to understand the valuation issues and find in your favor. Do not ask them to simply rely upon the testimony of an appraiser or other expert. Many of these underlying concepts are undisputed and you should be confirmed by the opposing party's experts. Thus, have the opposing expert confirm their accuracy and meaning of the foundations of your expert's opinion. Then you can tell the jury that not only do they now understand the concepts, but in fact, there is no dispute among the parties.

With these few tips in mind, let's review the pretrial outline of an actual case and consider whether all the factors: morality and fairness, education of the jury, consistency and support for the appraiser are present.

MEMORANDUM

The case, as presently set up, is extremely favorable to Mr. and Mrs. Brown. Both the equities and the facts are falling into place beautifully. The County's appraiser, Roy Smith, updated his appraisal in December by letter to the County Attorney, which we received by e-mail on Friday. In Smith's update, he revised his damage analysis based upon the assumption that the Browns do have access to their property along the entire road frontage. However, Smith used the wrong comparables when he updated his appraisal. He used comparable sales numbers 1-5 of his second appraisal, which were based upon sales of vacant property that could only be developed into one building lot. These

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comparables were originally chosen by Smith to estimate the value of the Brown property when he believed it could not be developed, because it had only 10' of access to the fronting road. These sales resulted in a *per acre* value of $85,000. Smith simply multiplied $85,000 by the 5.155 acres of the Brown property and added the $160,000 value of the improvement (their house) to obtain his before value of $598,200.00.

But Smith admitted in his deposition that comparables 1-5 would not be the appropriate comparables to use if the property could be fully developed which, of course, is the case if the Browns own all 5.155 acres and have access all along the road. Smith testified in his deposition that comparable sales numbers 6-8 would the appropriate comparables to use in such an instance and those comparables result in a per acre value according to Smith of $140,000 per acre. Thus, even if Smith's *per acre* methodology was appropriate, using the per acre value of $140,000 derived from the correct comparables results in damages to Mr. and Mrs. Brown of $401,600.00 (based upon a per acre value of $140,000 times the 2.8277 acres condemned, plus $5,700 for the fence and landscaping), not $250,000 as opined by Smith in his letter update. Consequently, Smith's updated appraisal is both easy to undermine and leaves the County open to serious attack on the County's credibility and argument that it is acting in bad faith and trying to punish the Browns for not settling the case.

Outline of Case

This is a condemnation case. The County has condemned and taken possession of nearly 3 acres of Mr. and Mrs. Brown's property located at the intersection of Rt. 355 and Striptown Road in northern Montgomery County. Mr. and Mrs. Brown purchased their home on approximately 2.1 acres in 1961. Shortly after purchasing the home, Mrs. Brown began working for the Yanktown Restaurant in Waynetown, at the intersection of Rt. 355 and Rt. 122. Yanktown Restaurant is a historic landmark in Waynetown, having originally opened 1939. Mr. and Mrs. Brown purchased Yanktown Restaurant in approximately 1970 and the restaurant has been in the Brown family ever since. Mrs. Brown's two daughters now live in Waynetown with their families and co-manage the restaurant.

In 1989, Mr. and Mrs. Brown purchased a vacant parcel of approximately 3 acres immediately adjacent to their home as an investment for their retirement. After the purchase, then, Mr. and Mrs. Brown owned over 5 acres of valuable real property at the intersection of Rt. 355 and Striptown Road.

The County has condemned nearly 3 acres of the Brown property. The County has, in effect, taken the Brown's retirement. The government has the right to take private property for public purposes such as roads, government buildings and other uses. However, the Fifth Amendment to the United States Constitution, as well as the Maryland Declaration of Rights, obligates the government to pay the property owner just compensation for the private property taken for a public purpose. The purpose of this trial, for you, ladies and gentlemen, will be to determine the just compensation to which Mr. and Mrs. Brown are entitled to be paid by the County.

The standard method for valuing the damages in a case such as this is to determine the value of the property before the taking and the value of the property after the taking. The difference between the two values is the amount of damages and the just compensation due to be paid.

Because this case concerns the valuing of real property, the evidence will concern different efforts to value the Brown property, both before and after the condemnation by the County. There are many factors that must be considered in estimating the value of real property. Two factors will be particularly relevant in this case: (1) highest and best use; and (2) yield.

The highest and best use of real property is a concept which provides that in order to determine accurately the value of a piece of real property one must first determine what is the highest and best use of the property. In other words, what can the property be used for? If it is 10 acres of swampland, it is obviously not as valuable as 10 acres of real property in downtown Manhattan. Can the property be used productively, if so, what is the most appropriate use of the land?

Overlaid onto the highest and best use concept are government regulations on land use. There are zoning and land use ordinances in place that restrict how different properties may be developed. If your property is zoned residential, it cannot be used for a commercial office building. Land use and zoning regulations are used by the government to protect the public interest in managing development and land use so various uses are located together and work together to for the benefit of the entire community. For example, industrial uses are concentrated in an industrial zone, commercial uses in the business area of town or county and residential uses in neighborhoods and the like. Zoning restrictions impact the value of a particular piece of property and must be considered in estimating its value.

The second real estate concept, "yield", is related to highest and best use and provides that the value of even similarly zoned properties may differ greatly depending upon the yield that may be achieved through the development of the property. For example, compare a 10-acre piece of property that is fully developable with another 10acre piece of property that has the same zoning and land use regulations applicable to it, but has very steep slopes and a stream running through the middle of it. Possibly half or more of the second 10-acre parcel may not be developed because of flood plain, creek, and water issues and the steep slopes. Consequently, the first parcel could support a much greater density of development than the second parcel, i.e., its yield would be substantially greater and, because its potential yield is greater, the value of the first parcel, all other things being equal, would be substantially greater than the second parcel.

Both of these factors, highest and best use and yield, will be issues in this case which you must consider in determining the value of Mr. and Mrs. Brown's property and the damages they are entitled to be paid.

Generally, a condemnation case such as this is limited to a discussion of land values to determine the value of the property at issue. Unfortunately, in this case, an element of bad faith and improper motive has insinuated itself into the process and it will be for you, ladies and gentlemen of the jury, to evaluate the motives of the witnesses and representatives of the County as they testify and opine on the value of Mr. and Mrs. Brown's property.

In a condemnation case, once the government authority determines it is necessary to take private property for public use, the government is required by law to obtain an appraisal of the property and make a good faith offer to the property owner. In this case, the County hired an appraiser, Mr. Smith, to appraise Mr. and Mrs. Brown's property and determine the damages they sustained as a result of the taking. Mr. Smith will testify for the County in this case. The evidence will show that Mr. Smith inspected the property and, in light of the fact that the majority of the property was vacant and undeveloped, Mr. Smith undertook an investigation to determine the highest and best use of the property.

Mr. and Mrs. Brown's property is located in the R-90 zone in Montgomery County. The R-90 zone is a residential zone, which provides for a minimum of 8,000 s.f. lots. Generally, if R-90 property could be fully developed, it would be possible to locate up to 3.6 dwelling units/houses on every acre of R-90 property, including the land necessary for roads, utilities, public easements and the like. Because Mr. and Mrs. Brown own 5.155 acres of property, if their land could be fully developed with single-family homes, it would yield approximately 18 lots. Eighteen building lots at a value of $140,000-150,000 or more per lot would mean the Brown property would be worth over $2.5 million.

Unfortunately, as we all know, the Waynetown area has a great deal of traffic congestion and there has been in place for a number of years a moratorium against further residential development, until the road system is improved sufficiently to support the additional rush hour traffic. Because of this building moratorium, Mr. and Mrs. Brown's property could not, as of May 2002, be approved for residential development to its full potential under the R-90 zone. The maximum number of residential lots that could be developed on the Brown property as of May 2002, would be 5 lots total, which Montgomery County considers a "diminimus" level of development.

In all residential zones in Montgomery County, however, there are alternative uses that are permitted by special exception. The County has identified these alternative uses as appropriate uses in residential zones. The uses support the community by providing needed resources within residential communities. These alternative uses include such things as churches, elderly housing facilities, day care centers, and other uses of that nature.

In investigating how the Brown property could best be utilized in light of the traffic moratorium in Waynetown, Mr. Smith went to the Maryland-National Capital Park and Planning Commission, which is the government agency that deals with land use issues. Mr. Smith spoke with Paul Green at the Maryland-National Capital Park and Planning Commission to discuss the development potential of the Brown property in light of the moratorium and the restrictions on traffic during peak morning and afternoon rush hours. Mr. Green confirmed for Mr. Smith that the Brown property could not be fully developed residentially because of the moratorium and at most, the greatest residential development that would be permitted would be 5 building lots. However, Mr. Green also told Mr. Smith that the Brown property would be appropriate for special purpose use, such as elderly housing, which is a recognized need in Montgomery County. Mr. Green explained to Mr. Smith that with such development the traffic is, first, limited as the residents do not drive and, second, what traffic there is from employees and health care professionals may be scheduled for off-peak hours. In addition, in light of the aging population in Montgomery County, as well as across the country, Montgomery County has a dire need for additional senior assisted living facilities. The 1997 Master Plan for the Waynetown area recognizes this community need and states that special exceptions for such facilities that are compatible with the surrounding neighborhood are appropriate.

Mr. Smith agreed with Mr. Green's conclusion that this property would be appropriate for special purpose use and determined that the highest and best use of Mr. and Mrs. Brown's property was for it to be developed for special purpose use.

The evidence will show that when the County needs an appraisal for condemnation purpose such as this, the County puts the contract out to bid and provides the contract to the lowest bidder. Mr. Smith was the low bidder on this case and was paid only $900-$1,000 for his appraisal. Because of the minimal compensation being paid by the County, Mr. Smith had to proceed from this point in his appraisal with generalized assumptions about the development potential of the property and it is these generalized assumptions that were inaccurate and caused his valuation of Mr. and Mrs. Brown's property to be inaccurate. Mr. Smith did not have the resources or the ability to determine what specific special purpose use would be most appropriate for Mr. and Mrs. Brown's property, nor was he able to determine the yield potential of the property.

Once the highest and best use of a piece of property is determined, the appraisal process generally requires that the appraiser attempt to locate other similar properties that have been recently sold in order to determine how those market sales reflect upon the value of the subject property. This is called a comparable sales analysis approach to estimating the value of real property. In doing a comparable sales analysis, it is important to try to find other properties that are as closely similar to the subject property as possible in order to avoid having to make significant adjustments for great dissimilarities. The greater the adjustments that need to be made, the less reliable the comparable is for determining value.

Because Mr. Smith did not have the information necessary to determine the specific appropriate special purpose use for this property, or its potential yield, he was forced to make general assumptions in estimating the value of the Brown's property. First, in choosing the comparable sales to use, Mr. Smith chose other properties that were purchased for a multitude of different uses. One of his comparable sales was a property that was purchased for a church. A second of his sales was a property that was purchased for a day care center. A third was a property that was purchased for a research and development facility. A fourth sale was a piece of property that was purchased for the development of senior assisted living facility. Thus, only one of Mr. Smith's four comparable sales concerned the sale of vacant land that was purchased to be developed with a senior assisted living facility.

In addition, and equally as important, Mr. Smith did not have any information concerning the *yield* of Mr. and Mrs. Brown's property. Consequently, he could not make a precise comparison between the yield potential of the comparable properties and the Brown property. Rather, Mr. Smith was forced to compare the properties on price *per acre* basis. As we noted earlier, however, two pieces of real property that are exactly the same size may differ greatly in value depending upon the potential yield of the property, such as whether there are steep slopes, creek beds, or other development restrictions that would prevent the property from being fully developed. Mr. Smith simply did not have this information. Consequently, he could not incorporate that information into his appraisal.

The evidence will show that, based upon his generalized analysis, Mr. Smith determined that the value of Mr. and Mrs. Brown's property before the condemnation by the County was $762,000. Mr. Smith derived that value from his opinion that the comparable sales of other special purpose use property indicated a value of $140,000 per acre. He multiplied $140,000 per acre x 5.155 acres owned by Mr. and Mrs. Brown and added to that the interim rental value of the house, under the theory that a buyer would be able to continue renting the house for a period of up to three years while the development process was under way. Mr. Smith then determined that the after value of the

multiplied the amount of land remaining by $140,000 per acre and added to that the interim rental value of the house. The difference between Mr. Smith's before value of $762,000 and his after value of $362,700 is $399,300 and that is the amount of damages that he opined Mr. and Mrs. Brown were entitled to receive.

We do not dispute the good faith effort of Mr. Smith, initially, to value the damages that Mr. and Mrs. Brown were entitled to be paid. The evidence will show, however, that his estimate of the damages was inaccurate because of the generalized assumptions he was forced to base his opinion upon and the lack of specific information concerning the best use of the Brown property.

Based upon Mr. Smith's appraisal, the County offered to pay Mr. and Mrs. Brown $399,300 for the property. Because of the importance of this matter to their future and in order to consider the fairness and reasonableness of the County's offer, Mr. and Mrs. Brown needed to retain their own appraiser. In addition, in order to provide the appraiser with the specific information particular to the property that is necessary to accurately estimate of its value, they also retained the services of a land planner to investigate and analyze the best use of their property both before and after the condemnation. Mr. Thompson and I as her lawyers assisted Mr. and Mrs. Brown in this process.

Al Blumberg is an expert land planner who has worked in Montgomery County for over 30 years. Indeed, Mr. Blumberg started his career as a planner with the Maryland-National Capital Park and Planning Commission dealing with precisely the issues that are involved in this case. Mr. Blumberg investigated and analyzed the best use of the Brown property and, as had been previously determined by Mr. Smith and opined by Mr. Green at M-NCPPC, the highest and best use of Mr. and Mrs. Brown's property in light of the moratorium in place in May 2002, was to develop the property with a senior assisted living facility.

Mr. Blumberg then went the next step, however, and actually designed a land use plan and a specific design of an appropriate assisted living facility that could be developed on this site. This development plan included considerations of forest retention issues, storm water management, parking, neighborhood compatibility and all the other factors that must be considered in developing and designing a land use such as this. This process and analysis by Mr. Blumberg resulted in information related to the second critical factor that is necessary to determine value, namely the potential yield of the property. Could a 20-story high rise with 5,000 apartment units be constructed on this property? Obviously not.

Mr. Blumberg determined that the property was appropriate for development with a senior living facility and that it was reasonably likely that a special exception could be obtained for that use. Further, that based upon the size of the property the maximum number of living units that could be built was 286. But, Mr. Blumberg determined that the most appropriate use of the property would result in a 3-story garden apartment type facility, which would accommodate 156 assisted living facility units. This yield of 156 units was conservative, compatible with the neighborhood, and, most importantly, it was a critical piece of information that Mr. Smith did not have and its absence hampered Mr. Smith's ability to accurately appraise the property.

With the highest and best use and yield information determined by Mr. Blumberg, Mr. and Mrs. Brown's appraiser, Ryland Mitchell, was able to accurately estimate its fair market value. Because the most appropriate use of this property was for a senior assisted living facility, Mr. Mitchell was able to search the market to find comparable sales that involved the sale of vacant land that was intended to be developed for assisted living facilities and not other uses, such as churches, research and development or day care centers. In addition, he could compare the potential yield of the Brown property with the yield of the comparable properties to achieve a more defined estimate of value. A buyer who knows he can build, and then either rent or sell, 100 assisted living units out of a particular piece of property would be willing to pay a certain amount whether that property is 2 acres, 4 acres or 8 acres in size. It is the sale or rental of the assisted living apartments that will generate the economic return on the development, so it is the yield that determines value. It would make no sense to pay more for a larger piece of property, unless that property could actually be used to build additional units.

Mr. Mitchell determined that the market reflected that the market value paid by buyers for property to be used for an assisted living facility is $12,000 per unit. The value of a specific piece of property, then, would depend upon how many living units could actually be built upon it.

Mr. Mitchell also determined, as did Mr. Smith, that it was appropriate to discount the market value by 15% because a buyer of the Brown property would have to go through the application and development process to obtain the special exception. That process takes time and money and involves some amount of risk because the Planning Board might deny the request. However, as the evidence will show, every expert that looked at the property agreed that this property is appropriate for special exception use and it is reasonably probable that the Planning Board would approve a request for that development and, therefore, the market value of the property should be determined based upon such use potential.

Using Mr. Blumberg's land plan design and his determination that the yield of Mr. and Mrs. Brown's property before the taking would be 156 units, Mr. Mitchell determined that the value of the Brown property before the condemnation was $1,285,200. This is the amount of 156 units x $10,200 per unit ($12,000 per unit value less 15%) that a reasonably knowledgeable buyer wanting to develop an assisted living facility would pay the Browns for their property.

Using Mr. Blumberg's analysis that the units that maximum number of units that could be built after the condemnation by the County would be 56, Mr. Mitchell determined that the value of Mr. and Mrs. Brown's property after the taking is $571,200. The difference between $1,285,200 and the value after the taking of $571,200 is $714,000. That is the damage that Mr. and Mrs. Brown have suffered from this taking and we will prove that $714,000 is the amount of damages to which they are entitled to be awarded by you in your inquisition.

I suggest that is where this case should end. But, the County was unwilling to pay Mr. and Mrs. Brown the full compensation to which they are entitled. The evidence will show that because Mr. and Mrs. Brown did not agree to accept the County's offer of $399,000, the County has sought ways to decrease the opinion of value given by Mr. Smith and threaten Mr. and Mrs. Brown with a greatly reduced value if they went to trial. The County now seeks to have you ladies and gentlemen award Mr. and Mrs. Brown less than it originally offered to pay. This is unfortunate, but this is what the evidence will show.

In order to counter Mr. Blumberg, the County hired a land planner, Bill Plane. Based on two faulty assumptions, Mr. Plane wrote the County attorney a letter opining that he had "some concern" whether a special exception for an assisted living facility would be approved on the property. First, it is important to note that Mr. Plane did not opine that a special exception would not be granted, nor did he opine that it was probable that a special exception would not be granted. Rather, Mr. Plane could only bring himself to opine that because of one fact, which we will discuss in a moment, that he had "some concern" whether a special exception would be granted. The evidence will show that Mr. Plane's opinion, as limited as it is and opposed by everyone else that opined on the issue, was based on a mistake. Mr. Plane believed that Stringtown Road east of Rt. 355 was a secondary residential road and for that reason he had "some concern" that the Planning Board might not think it appropriate that traffic to and from the facility would have to go by 7 houses before reaching the entrance. Stringtown Road, however, is designated as a Primary road and it is the main road for the entire community east of Rt. 355, which includes a church, the Smather's Apartments and hundreds of town homes and single family homes, all of which go by the 7 houses Mr. Plane referred to. Mr. Blumberg will explain that the minimal traffic generated by an elderly assisted living facility would not cause the special exception to be denied. Indeed, Mr. and Mrs. Brown's property, for many reasons, which we will learn and discuss, is uniquely suited for such a use.

Having Mr. Plane's letter in hand, however, the County asked Mr. Smith to update his appraisal in light of Mr. Plane's opinion. In spite of the weakness of Mr. Plane's opinion on the issue, Mr. Smith elected to disregard the earlier opinion he received from Mr. Green at the Maryland-National Capital Park and Planning Commission and his own earlier determination that the highest and best use of the property was for special purpose use. The evidence will show that in order to support the County's goal of reducing the compensation to be paid to Mr. and Mrs. Brown, Mr.

Smith changed his opinion as to the highest and best use of the subject property and newly opined that the highest and best use was for the property to be developed with residential building lots which, we know, is limited to 5 lots. In his efforts to please the government, his employer, on this issue Mr. Plane has become an advocate.

Based upon his new highest and best use conclusion, namely that the property should be developed residentially, Mr. Smith searched for sales of residential property to obtain various values. We submit, however, that Mr. Smith will admit on the stand that he used inappropriate comparable sales to derive a very low value for the Brown property. Indeed, the comparable sales used by Mr. Smith violate the very critical tenet of yield in real property valuation. Mr. Smith used comparable sales of property that could only be developed with one building lot, even though the Brown property, even under its restricted development, could be subdivided into 5 lots. Mr. Smith used sales of vacant land 2, 3 and 4 acres in size that could only support one dwelling unit and applied those values to the Brown property. This improper comparable sales analysis resulted in a per acre value of only $85,000 per acre, rather than the $140,000 per acre that Mr. Smith determined was the value of Mr. and Mrs. Brown's property in his original appraisal.

Mr. Smith then revised his opinion of the value and damages that Mr. and Mrs. Brown are entitled to be paid by multiplying 5.155 acres x $85,000 per acre to come up with a before value of $438,175 for the land. He then added $160,000 to that as the value of Mr. and Mrs. Brown's house that is built on the property for a total value before the condemnation of $598,175. After the condemnation of 2.8277 acres, Mr. and Mrs. Brown have 2.3273 acres remaining which, multiplied by $85,000 per acre is $197,820. Mr. Smith added the house value and $3,300 for landscaping and $2,400 for a fence for a total value after the taking of $352,100 a difference of only $246,100. That reduced amount is the amount the County suggests you should award in this case.

But we will prove to you that Mr. Smith had identified comparable sales of vacant land zoned R-90 that could be developed into more than one unit and based upon those comparable sales, he previously determined that the value of Mr. and Mrs. Brown's property -- even if it was developed residentially -- would be $140,000 per acre. This fact proves two points. First, that the least amount of damages Mr. and Mrs. Brown are entitled to receive is $401,000, even based upon a residential valuation. And second, that Mr. Smith original appraisal in which he obtained a value of $140,000 per acre for special purpose development was substantially undervalued. Obviously, special purpose development would result in a much greater value than residential development under the moratorium restrictions. Yet, Mr. Smith has come up with the same per acre value for both.

The County, because Mr. and Mrs. Brown did not settle with it, is attempting to have you ladies and gentlemen of the jury award the Browns less money for the property it took than it originally offered. We submit that the evidence will show that the County is acting in bad faith. Rather than discuss the legitimate issues explaining the difference between Mr. Smith's original appraised value of the damages at $399,000 and Mr.

Ryland Mitchell's determination that the actual damages are $712,000, the County is injecting into this trial a great deal of irrelevant argument.

We will prove to you that Mr. Smith's valuation is without merit and that Mr. Mitchell's valuation is both well supported and, indeed, conservative. And we will ask you to return an inquisition in favor of Mr. and Mrs. Brown in the amount of $712,000.

Conclusion: The government paid $399,000 into court in this quick take action. At trial the government changed its valuation premise argued that the property was actually only worth $246,000. In contrast, the owner claimed the amount of just compensation that should be paid was $712,000. The jury returned an inquisition in the amount of $693,000. The combination of the government over reaching, i.e. dramatically reducing its opinion of value and the well-supported valuation of the owner resulted in an inquisition in an amount over 97% of that which the owner sought.