

OWNER'S HANDBOOK

THE CONDEMNATION PROCESS AND JUST COMPENSATION IN THE STATE COURTS OF MARYLAND

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OVERVIEW

This handbook will provide a general overview of the eminent domain and condemnation process in the Maryland state courts. It is not intended, and should not be used, as specific advice or opinion on any particular case, or specific property. One of the most interesting and challenging aspects of this area of the law is that every piece of real property is unique. And every business operated from a property subject to condemnation will have different issues to address. Please use this handbook for general information purposes, as it is intended, and consult with counsel experienced in the substantive law and procedural rules peculiar to eminent domain actions for advice specific to your property or business.

The following information is addressed to Maryland state condemnation proceedings. Readers should note that condemnation proceedings in federal court or other state jurisdictions may differ significantly from those in Maryland.

What is eminent domain and condemnation?

- Eminent domain is the authority of the government to take private property for public use.
- Condemnation is the process by which such takings are achieved.

The government's right is not unlimited.

- The right of the government to take private property for public use is ancient and reflects the belief that a single individual should not be permitted to thwart the will of the entire community. At the same time, however, our society is founded upon the rights of individuals and private ownership of real property. Consequently, the government's "right to take" is tempered by the government's reciprocal obligation to compensate the owner for the property condemned. Because of the harshness of the act, the government's exercise of the right of eminent domain is limited to that specifically authorized by appropriate legislative authority.

- The framers of our constitution acknowledged the government's power of eminent domain. But the 5th and 14th amendments to the U.S. Constitution protect citizens and limit the exercise of the right.

- **The Fifth Amendment provides, in part:**

[No person] shall . . . be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

- **The Fourteenth Amendment provides, in part:**

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

- **Article III, Section 40 of the Maryland Constitution provides:**

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

Who can take my property?

- The power of eminent domain originates from the States, which have passed authority to the Federal government. The States, including Maryland, have also delegated authority to condemn down to local governments and municipalities and to numerous governmental agencies as well, such as the Department of Transportation (roads), the Washington Suburban Sanitary Commission (sewer and water), utility companies (electric and telephone) and WMATA (Metro).

Can the State, or these other bodies, take my property for any reason?

- No. The condemning authority may only take your property for a necessary public purpose.

Who decides whether the condemnation of my property is for a necessary public purpose?

- The courts are the final arbiters over a dispute as to whether any particular taking is necessary and for a public purpose. But the courts give substantial deference to the properly exercised discretion of the condemning bodies. In short, the courts will not second-guess the condemning authority. To forestall a condemnation, an owner has the burden to prove that the condemnor's exercise of its authority is not validly authorized, or that the taking is so oppressive, arbitrary or unreasonable as to suggest bad faith.
- Because of the difficulty of opposing a condemnor's right to take, any owner wishing to mount such a defense is well advised to start planning for the effort as early in the process as possible. In addition, an owner may wish to consider recruiting other property owners in a similar position to help share the costs of the effort.

THE PROCESS

The process of condemnation begins with the identification of a public need and a determination by the relevant governmental body that it is necessary to acquire private property to fill the identified public need. Most often there will be a period of public hearings where the issues are debated and the authority granted. Once the project is approved, the condemning authority will contact the property owners in an effort to purchase the needed property. If voluntary sales are not achieved, the condemning authority must file formal condemnation proceedings in court against each owner to obtain possession and title to the property and to determine the amount of compensation to be paid.

How will I know whether the government really wants to take my property?

- In most cases, you will learn far in advance of the proposed construction, which requires the taking of your property. Your first knowledge of the project may come from reading a newspaper article or talking to a neighbor.

- In many cases, the public agency will hold a public hearing at which the agency will describe the boundaries of the project, so that you will be able to determine whether your property is included within the project.
- The condemning authority will give you written notice that it intends to acquire your property. The condemnor is also required to give you a written offer to purchase your property prior to filing a condemnation action.

Do I have to take the amount of compensation offered by the government?

- No. You are entitled be paid “just compensation” for the property taken and the damages the taking will cause to your remaining property. The "just compensation" to which an owner is entitled to be paid has been held to be the *value* of the property at the time it is acquired pursuant to an exercise of the sovereign power. And *value* is generally considered to be the *market value* of the property, not the value to the owner or the condemnor particularly.
- The government will make an initial offer of an amount it contends is just compensation, but you are not required to accept the government’s calculation. If you and the condemning authority are unable to agree, a jury will determine the amount you are entitled to receive after trial.

Can the State take as much of my property as they want?

- No. The State can only take as much of your property as is reasonably necessary to accomplish the stated public purpose. If the court finds that only a portion of the property sought by the State is necessary, it may deny the State the right to take the remainder. But again, the courts will give deference to the condemnor’s determination of need.

The State is trying to take a portion of my property. After the taking, the rest of my property will be less valuable, or worthless. Can we force the State to take the entire property?

- No. The Court cannot require the condemning authority to take more of your property than it wants.

- But the compensation to which you are entitled includes not only the value of the property taken, but also compensation for any reduction in value to the property that the government does not take. This compensation is called “severance damages,” i.e. the damages caused to the remainder by the “severance” of your property.

PRE-CONDEMNATION PLANNING

Should I be doing anything before my property is condemned?

- Government projects that require the condemnation of private property generally have a long life from conception to implementation. The amount of just compensation to be paid to any particular property owner will be determined based upon the value of the property as of the date the property is actually taken by the sovereign. But a great deal of time may pass between the time an owner first hears about a proposed project and when the government takes the property. And actions taken by the owner during this period may significantly impact the property’s value.
- Actions an owner takes, or does not take, before a condemnation may help or hurt the case, or simply be a waste of money. Owners are well advised to seek the advice of a lawyer experienced in condemnation actions when they become aware that their property may be taken.
- Thorough precondemnation planning is important to an owner’s effort to receive just compensation and damages, or limit the detrimental impact of the project on the owner’s remaining property or business.
- It is important to understand the full impact that a project may have on the property, or any business being operated on the property, as well as the damages the project may cause to the remaining property, in order that the owner may take steps to minimize the damages and preserve the value of the property being taken.
- If an owner wishes to contest the reasonableness or necessity of the project, or challenge whether the project is for a legitimate public purpose, the owner is well advised to start early in the

government's planning process, and enlist other affected owners to support the effort and share the costs.

- The nature of actions that may be taken and whether such actions may stop the project, or increase the amount of compensation to be paid, depend on the specific facts of each proposed condemnation, the particular characteristics of the subject property, and the personal long-term goals of the owner.
- An owner should act to obtain and preserve evidence reflecting the property's condition and value. This is especially critical in "quick-take" cases, where the condemnor will take possession of the property early in the process and the property may be very different by the time of trial.
- Issues to consider include: whether to sell the property before it is condemned; whether to incur substantial expense to maintain or improve the property; whether to seek a change in zoning, or a variance, or extend or terminate leases; whether to purchase adjacent property, enter into agreements with surrounding or adjacent owners, or expand your business; and how to respond to the government's request for information about the property or the business being operated on it. An owner may also want to investigate whether the project may be modified to lessen or avoid detrimental impact to the property.
- The owner should avoid taking positions, especially written positions, which may be used against the owner in the condemnation proceeding. If the owner contests the tax assessment, for example, and argues that the property is worth less than the assessed value, that appeal may be used against him if, in the condemnation case, the owner asserts a higher value. Likewise, an owner's statements to the government's appraiser may also find their way into evidence at trial.
- Leases and mortgage agreements signed by the owner prior to a condemnation may affect the portion of the final award to which the owner will be entitled. The owner should review and consider the impact of condemnation clauses contained within these documents, or the consequence of the absence of such provisions.

- The owner should maintain the appearance and condition of the property. Visual impressions, even to sophisticated professionals, are important, and the condemning authority's appraisers will be inspecting the property long before it is condemned. It is important that the owner keep the property looking as good as possible.
- Contamination on the property may reduce the condemnation award, delay the payment of funds to the owner or result in the owner incurring liability for environmental cleanup charges. Thus, it is also important for an owner to take those steps necessary to assure that the property remains free of contamination. If the property is already contaminated, the owner must consider the impact such contamination may have in the condemnation action and whether precondemnation remedial efforts are economically justified.

What can a landlord and tenant do to avoid uncertainty and legal disputes over the condemnation award?

- The single best protection for both landlord and tenant is a clear lease provision called a "condemnation clause". This clause should spell out which part of the award goes to the landlord and what goes to the tenant in the event a taking occurs.
- The condemnation clause should anticipate an allocation in the event of a whole taking of leased property; a partial taking, which effectively destroys or severely damages the untaken remainder; and a partial taking that has little effect on the remaining property.
- The length or term of the lease may also have a significant effect on the amount awarded to the parties.
- If you have knowledge of a future taking, whether you are an owner or a tenant, it is wise to consult an attorney experienced with condemnation about your lease.

TRANSFER OF TITLE AND POSSESSION

When will I be required to give up my property?

- There are a number of ways the date for surrender of possession may be determined. In no event will an owner be required to surrender possession of his property until either (a) he agrees to a certain date; or (b) the condemnor obtains possession through a formal court action.
- If the owner sells his property to the condemning authority, the owner and the condemning authority should agree through negotiations upon a mutually acceptable date for surrender of possession. The owner typically indicates the time he needs to conclude business at the condemned property and relocate to a new site. The condemning authority typically indicates the time it needs to take possession of the property and demolish the buildings so as to meet its construction timetable. The condemnor will usually negotiate a date to surrender possession that meets both parties' objectives.
- If the owner does not sell the property and the condemnor acquires it through a formal condemnation action, the actual loss of possession will depend on whether the condemning authority obtains possession by "quick-take" or inquisition. See the discussion of each of these proceedings below.

Are there any disadvantages in getting the latest possible date to vacate my property?

- Yes, there may be. The condemnor often condemns several properties as part of a large project. Owners who remain in possession of their properties after others have vacated may experience burglaries and vandalism due to the absence of occupied surrounding properties. In addition, precondemnation blight may devalue the property or the profitability of a business being operated from the location.
- Also, if the state "quick takes" your property, that is, takes your property prior to the end of the case, the amount of interest to which you may be entitled may be less if you remain in possession.

What is "quick take?"

- In order to prevent an objecting property owner from delaying a necessary public project the State has authorized some

condemning authorities (State Roads Commission, WSSC in Prince George's County, and several counties for example) to use a process known as "quick take," which allows the condemnor to obtain possession of the property quickly (and proceed with the project), but still provide the owner with the right to a full trial to determine the amount of compensation to be paid.

- In a "quick take" case, the condemning authority may obtain possession of the property by paying into the registry of the court the amount of compensation it believes the owner is entitled to receive. A condemnor typically uses this method when it knows that it must proceed with the project and it needs the property to meet construction deadlines. Thus, the "quick take" procedure is often used in condemnations for roads, schools and utilities. The funds paid into court may be withdrawn by the appropriate parties (the owner, mortgagees, lien holders, etc.). The date the funds are first deposited into court becomes the "date of valuation" for the property at trial. Consequently, the owner will not be compensated for any improvements made to the property after the "date of take."
- In a traditional condemnation, the condemning authority does not decide whether to take title to the property until after the jury determines the amount of just compensation. The condemning authority may decide that the amount of compensation is too much and abandon the project. The State generally uses the traditional procedure to condemn property for parks or to preserve environmentally sensitive properties, or in other instances where cost may affect its decision. If, after the trial, the condemning authority decides to take the property, it will deposit the amount of the award into the court registry, and title will pass to the government as of that date. If the condemning authority decides not to take the property, it will decline to deposit the funds, in which case title remains with the owner. If the condemning authority abandons the condemnation, it is responsible to pay the reasonable costs and attorney's fees the owner incurred in defending the condemnation action.

Am I entitled to interest on the difference between the final award and the original amount paid into court in a "quick take" case?

- If the jury award is greater than the amount originally deposited into court by the condemnor, the owner is entitled to the

difference between the final award and the original estimate and prejudgment interest on that difference. An owner may seek to prove that the return a reasonable and prudent investor would have realized on the additional award, if it was paid at the outset, is greater than the amount of prejudgment interest allowed by statute, which is presently six percent per annum.

- If your case is resolved through settlement and not a jury verdict, however, you are not entitled to interest on top of the settlement amount, unless the settlement expressly provides for interest. If you feel that your settlement should include consideration of the delay in payment, you should take that factor into account in making or considering settlement offers.

How do I get my money out of court?

- Your lawyer will file a motion and schedule a hearing. The motion will ask the court for permission to withdraw the money and disburse it to you, as the owner. The motion and notice of hearing will be sent to all parties who have an interest in your property (mortgage and lien holders, tenants, etc.). Often such motions are consented to by all interested parties and no hearing is necessary.
- At the hearing, anyone who has an interest in the property may make a claim to the funds deposited by the condemning authority. If all of the property is taken, the court will generally pay all outstanding mortgage balances first. Prorated real estate taxes and special assessments are also deducted and paid to the appropriate officials before the owner's balance is determined and disbursed.
- In a small number of cases, usually involving complicated business property, the court will order the funds to be placed in a joint interest-bearing account. This situation arises when it is impossible for the court to make a precise apportionment of the deposit at the outset of the case, and often arises in cases in which the owner, tenant and subtenant are unable to agree on their respective shares. In cases in which joint interest-bearing accounts are established, the funds are disbursed to the parties at the conclusion of the case, after the court enters a final order of apportionment or earlier, if the parties are able to reach a settlement among themselves.

If I withdraw the money that the state deposits in the court registry, will I be able to ask for more at the trial?

- Yes. Your withdrawal of the funds paid into court is without prejudice to your final claim. This means that neither the amount of the state's deposit, nor the fact that you use it during the case can be used against you in the trial.

Is it possible that the final award may be less than the amount paid into court?

- Yes! The fact that the state makes an estimate of the compensation due does not preclude it from arguing at trial that a lesser amount is appropriate.
- *It is important for the owner to be aware that if a lesser amount is awarded after trial, the owner will be obligated to repay the difference to the condemnor.* The owner must acknowledge this obligation in its motion to withdraw the funds and the court order authorizing the owner to withdraw the funds will include this obligation as well.

BOARD OF PROPERTY REVIEW

- As noted above, the State has granted “quick-take” authority to the State Roads Commission. The Commission is authorized to take possession of property upon the filing of a condemnation petition and the payment to the owner, or into court for the owner's benefit, estimated fair compensation. The Commission is then mandated to seek to acquire title to the property from the owner by “amicable negotiation.” If such negotiation fails, the Commission may certify the case to the Board of Property Review for the county where the property is located.
- The county boards of property review are three member boards appointed by the circuit judges. The board will hear the case first and render an award. If any party is dissatisfied with the findings or award of a board of property review, the case may be appealed to the circuit court where the property is located. On appeal, the court will hear and determine the case *de novo*, i.e. from the beginning, as provided by law and the Maryland Rules.

The award of the board of property review will not be considered by the court or disclosed to the jury.

- If the Commission determines that the Board of Property Review procedure is inappropriate for a particular case, the Commission may elect to file a formal condemnation action in the circuit court from the outset.
- In short, the boards of property review provide an inexpensive procedure to resolve small cases. Rarely will both parties be satisfied with a board award in a large contested case that could not be settled by negotiation.

APPRAISING THE PROPERTY

Will I need an appraiser or other experts?

- The condemning authority will hire an appraiser to value your property and opine how much you should be paid. In order to effectively counter the condemning authority on this issue an owner should hire a quality appraiser.
- The appraisal of real property is a complicated endeavor and requires the expertise of a licensed appraiser. Moreover, in a condemnation action, it is critical that the appraiser not only have the expertise to accurately estimate the value of the property taken and the damages caused to the remainder, but also have the ability to effectively communicate his or her opinion at trial to a jury.
- In addition to an appraiser, it may be necessary for the owner to hire other experts, such as land planners and engineers, in order to provide the appraiser with the foundational information needed to accurately value your property, or address other issues affecting your property.
- Ultimately, if a negotiated sale is not achieved, the opposing opinions of value and damages will have to be submitted to a jury at trial for resolution. For this reason, it is important that an owner consult early with a trial attorney experienced in condemnation cases, so the attorney may insure that all experts are working together and all evidentiary factors impacting value are addressed. Prosecutors in criminal cases often complain that they “don’t get to pick their witnesses.” In other words, often

times the witnesses to a crime are co-defendants, informants, or other unsavory characters. An owner in a condemnation case, however, does not have the same excuse. Because an owner likely has substantial advance warning that his or her property will be condemned, the owner should begin preparing for the condemnation very early in the process, and that preparation should include consulting with experienced condemnation professionals.

How will my property be appraised?

- There are three methods of appraisal generally used to estimate the value of real estate: the market approach, the cost approach and the income approach.

How does the market approach work?

- Under the market approach, appraisers search for properties they feel are comparable to your property. They then use the sale prices of those properties to arrive at an estimate of value for your property.
- Since no two properties are exactly alike and because some of the dissimilarities between the appraiser's "comparable" properties and your property may be significant, the appraiser makes adjustments to the sales prices of the comparable properties before using the prices to arrive at an estimate of value for your property.
- Adjustments may be positive or negative, depending on whether the appraiser views the comparable property as having superior or inferior characteristics when compared to your property. For example, if the appraiser believes that the location of your property is superior to that of an otherwise equally comparable property, the appraiser will likely conclude that the value of your property is higher than the amount that the comparable property sold for.

How does the cost approach work?

- Under the cost approach, the appraiser first estimates the value of the land, as if the land were vacant. The appraiser then estimates how much it would cost to rebuild, at today's prices, all of the improvements on the property. Then the appraiser estimates the amount by which the present improvements have depreciated and subtracts the depreciation from the cost of reconstructing the improvements new. The depreciated cost of reconstructing the improvements is then added to the land value to arrive at an estimate of all the property. The theory supporting the cost approach is that a potential buyer would not pay more for an improved property than it would cost to purchase vacant land and construct similar improvements.

How does the income approach work?

- First, the appraiser estimates how much your property would rent for in the open market. This is accomplished by identifying comparable rental properties and determining their rental rates. This supports an estimate for annual gross potential income.
- An amount for stabilized vacancy and collection is then calculated and subtracted from gross income to arrive at an estimate of adjusted gross income.
- The appraiser then estimates the annual expenses that would normally be incurred by the owner and subtracts the total amount of those expenses to arrive at an estimate of net operating income.
- Of course, if the owner's property has a history of rental income and expenses, the appraiser will consider the actual income and expense data. But adjustments may be made to actual income and expenses to stabilize them over time. For example, a new roof would not be installed every year. Therefore, the cost of a new roof, or similar expense, would be allocated over the expected life of the roof.
- Finally, the appraiser converts his estimate of net operating income to value by dividing his estimate of net operating income by a capitalization rate. The capitalization rate is based upon the perceived risk of the investment in the market and the expected return on such an investment.
- For example, consider the value of a rental building that generates \$10,000 per year in net operating income. If a buyer paid \$100,000 for the building he would receive a 10% annual return on his investment, assuming that net operating income stream continued into the future. If the building was in poor condition, or in a poor neighborhood, or if the economy was depressed, an investor may want a higher return to assume the risk of ownership. In such a case a buyer may only be willing to pay \$80,000 for the building, which, if accepted by the seller, would result in an annual 12.5% return on the buyer's investment. Thus, the market value of the building depends not

only on the income it generates, but the perceived risk that the income stream will continue into the future.

Which valuation method will be used to appraise my property?

- Appraisers generally use as many of the three approaches as they deem appropriate. It is not unusual, for example, for an appraiser to use all three approaches when valuing an office building.
- Appraisers may chose not to use one or more of the three approaches if they feel application of a given approach would be inappropriate given the particular characteristics of the property. For example, because the cost approach considers the cost of reconstructing the improvements on the property, the cost approach is not used to estimate the value of vacant property. Likewise, because the income approach is based upon the amount of rental income a property may generate, the income approach is seldom used to value properties that are not rented, such as a single-family residence. Of course, if a particular single-family residence has a history of being rented, the income approach may be used and compared with the estimate of value indicated by the sales of comparable non-rented homes in the neighborhood.

Of the three approaches to value – market, cost and income – which approach will lead to the highest value for my property?

- Theoretically, each approach, if applicable to the subject property and applied correctly, should result in the same estimate of value. Thus, appraisers use more than one approach, if applicable, in order to check and confirm the values indicated by each. There should not be a large disparity of value indicated by any approach. If there is, the appraiser should check his analysis.

RELOCATION COSTS

Will I be paid the costs to move or relocate my business if my property is condemned?

- Maryland provides limited relocation assistance benefits to condemnees who are forced to relocate their home or business because of a condemnation. These benefits are provided by statute and are outside and separate from the compensation due to be paid in the condemnation action.

- The relocation statute provides for reimbursement of moving expenses and limited funds to reestablish your business in a new location, for such items as new stationary, business cards, signage, and the like.
- Seldom, however, does a business ever recover all of the costs of relocation because of the limitations on the nature of costs that are reimbursable and the fact that many categories of costs are capped at unreasonably low levels. Understanding these factors is important in a business case and should be considered as part of the overall strategy in responding to the condemnation. Often, condemning authorities will offer more and different benefits to reach a settlement with an owner than they may be required to pay in just compensation if the case proceeds to trial.

CONSEQUENTIAL DAMAGES

The State is not taking any of my property, but it is constructing a major highway close to my business that will divert traffic and substantially reduce my income. Will I be compensated for my loss?

- No. An owner is not entitled to any compensation unless at least some part of the owner's property is taken.

Are business losses recoverable?

- Loss of business is generally not compensable in a condemnation action, because the condemnor is only required to pay just compensation for the real property being taken and damages it causes to the remaining property. A business that relocates may be more or less valuable after being reestablished. But in neither event will the owner be entitled to compensation.
- But if the entire property is not taken and the business continues to operate from the original location after the condemnation, any loss in business resulting from the condemnation may be reflected in a lower value of the property and be compensable as severance damages. For example, a location that becomes less favorable due to a condemnation will attract lower rents. This lower rental value will be reflected in a lower market value for the property and the owner should be compensated for this loss.

I rent my property to tenants. Are they entitled to compensation?

- Maybe. And the compensation that your tenants receive may affect your own recovery.
- Your tenants' rights will be protected in any condemnation case or pre-condemnation negotiations. The condemning authority usually seeks title free and clear of all interests, including leases.
- In order to assure that it receives free and clear title, the condemnor will name the tenants as defendants in the condemnation case or will require the receipt of subordination or assignment of lease documents if the taking is settled before a condemnation lawsuit is filed.
- The compensation that the condemning authority is required to pay is an all-inclusive award and is subject to the claims of all persons and entities that have an interest in the property, including mortgagors and tenants. The award will be made in the name of all parties having an interest in the property.
- Whether a tenant may recover a portion of the award is generally determined by the terms of the lease and whether the tenant is paying less than fair market rent. For example, if a tenant is paying \$2.00 per square foot below market rent and the property is condemned, the tenant will lose the economic value of his lease and may be entitled to be compensated for that loss. If the tenant is stuck with a lease where he is paying rent that is \$2.00 per square foot above the market, the tenant will not be damaged by the condemnation. (Theoretically, the tenant could find other comparable space for \$2.00 per square foot less rent.) In such a case, if the property is condemned, the owner will lose the economic benefit of the lease and the owner should be the party compensated.
- If the lease is silent on the issue or allows the tenant to claim a portion of the award, the tenant may claim that portion of the award equal to the present value of the economic advantage of the lease for the duration of the lease and any option periods.
- Since compensation for the taking of the tenant's lease comes from the all-inclusive real estate award otherwise paid to the owner, the more the tenant receives for the value of his lease, the less the owner receives for his interest.

- Owners may protect their interests in a condemnation award with a well drafted “condemnation clause” in their leases. But whether you are an owner, or a tenant, you should give careful consideration to the condemnation provisions in your lease.

ATTORNEY’S FEES & COSTS

Must the government pay for my attorney’s fees and costs, over and above what it pays me for the property and damages?

- Generally no. Maryland requires each side in any litigation to bear its own attorneys fees and costs, unless the parties have a contract that provides for the recovery of attorneys fees, or a statute provides otherwise. As explained above, Maryland does have a statute that requires the condemnor to reimburse the owner for the reasonable costs and attorneys fees incurred in defending a condemnation, *if* the condemnor elects to abandon the condemnation. In all other instances, however, the owner must bear its own costs.
- The costs of defending a condemnation action may be substantial. An owner should discuss with his attorney various ways such costs may be paid and reach agreement at the outset of the representation. For example, you may wish to engage counsel on an hourly or fixed fee basis, or counsel may be willing to be paid out of the award itself, either a percentage of the entire award, or a larger percentage of any increase of the award over the amount of the original offer. You should not hesitate to discuss all options for covering the costs of the condemnation action with your counsel.

SETTLEMENT NEGOTIATIONS, MEDIATION AND TRIAL

How do I make the condemnor pay more than it originally offered?

- A condemnor should be willing to offer greater compensation if you demonstrate that its original estimate of damage was incorrect.
- The process of demonstrating the error in the condemnor’s original offer often requires the owner to fully prepare to try the case, because the ultimate leverage against the condemnor is that

if it does not voluntarily pay you just compensation, you will try the case and a jury will award the amount you are demanding, or more.

Is it better to negotiate a settlement or go to trial?

- The answer to this question will vary from case to case and it will depend on the long-term interests of the owner. Many times a condemnor will give concessions to reach a voluntary settlement that it would not be obligated to give if the case went to trial. For example, if only a strip of property is being taken along a road that is being widened, it may be of more value to the owner to have the condemnor modify its plans to build a buffer, or retaining wall, or decrease the slope, or otherwise modify the project in order to minimize its impact on the property, than it would be to receive a little more compensation for the small amount of property being condemned. Likewise, it may be more important for a business owner to negotiate with the condemnor to modify the plans to save a row of parking spaces, than be paid for the estimated lost value of those spaces.

What is mediation?

- In many cases, in spite of good faith efforts by both parties, the condemnor and the owner cannot agree on the amount of compensation due, or other requests. In such cases, engaging a quality mediator to facilitate negotiations may enhance the prospects of settlement.
- Mediation is a process in which an impartial third party presides over a settlement conference between the condemning authority and the owner.
- The impartial third party is known as the mediator. The mediator will listen to the presentations of both sides and then attempt to facilitate a discussion of the issues that will lead to a voluntary consensual settlement.
- Mediation is voluntary and confidential. The mediator cannot force either side to settle the case. And in order to promote open dialogue, statements made during mediation may not be used in court if the case goes to trial.

- Most importantly, mediation is NOT merely a means to compromise. The purpose of mediation is to use a trained neutral to facilitate a discussion of the case on the merits. Parties may come to appreciate weaknesses in their case that they overlooked before the mediation and for that reason the party may choose to moderate its settlement position. If an owner is well prepared for mediation and has adopted a reasonable settlement position, the owner may very well find a strong ally in the mediator who will seek to help persuade the condemnor of the unreasonableness of its position.

Will there be a mediation conference in my case?

- Probably. Although mediation is voluntary, most courts strongly encourage parties to participate in mediation in good faith before the court will schedule a trial date.

Who serves as the mediator?

- Most mediators are either retired judges or practicing or retired attorneys. Generally, a good mediator will have undertaken many hours of training to become effective at facilitating such conferences and, further, will have familiarity with eminent domain cases and their particular issues, having either presided over condemnation cases as a judge, or having represented condemnees or condemnors as a practicing attorney.

Do I need to attend the mediation conference?

- The order requiring mediation generally requires the parties and their lawyers to be in attendance. This requirement makes it more likely that a settlement may be reached since the persons who have authority to make binding offers, or approve a settlement, (the parties themselves) are in attendance.

Who else will be at the mediation conference?

- In most cases, only the mediator, the parties and their attorneys will be in attendance. From time to time, one side or the other may find it helpful to have one or more of their expert witnesses in attendance.

Do I need to say anything at the mediation conference?

- There is no requirement that the owner speak at mediation. Who will speak for you is a strategic decision the owner should make with his counsel. Even though statements parties make at mediation will not be admissible at trial, they may affect the outcome of the mediation conference or overall negotiations, so it is important to discuss statements you wish to make with your attorney in advance.

How does a mediation conference usually work?

- The mediator will generally begin the conference by introducing himself or herself and asking the participants to do the same. The mediator will then likely ask the attorneys to explain the facts of the case and their respective client's position. This may be the first time the decision maker for the condemnor hears about your case directly from your attorney, as opposed to having settlement demands filtered through its counsel.
- It is important to prepare for mediation as carefully as you would for trial. A sloppy presentation of your case at mediation will not engender fear from the condemnor that you will prevail at trial. On the other hand, if you demonstrate you are well prepared for trial and that your arguments and evidence are strong, the condemnor may agree to meet your demand.
- During the conference, the mediator may meet with the parties and their counsel together, or separately. The mediator may wish to meet with each side separately in order to be able to frankly discuss his or her view of the issues without damaging the prospects of settlement. This process helps break through the blustering and puffing that is sometimes a problem in direct negotiations, or in joint sessions.
- If a settlement is achieved, the mediator will write down the terms of the settlement and have the parties sign the agreement. If the case does not settle, the case will proceed to trial.

PRE-TRIAL HEARINGS

What types of hearings may be held prior to the trial?

- There are many different types of hearings, which may be held prior to the actual trial. As the case proceeds there may be disputes over discovery, or motions intended to limit issues in the case. There may be a preliminary hearing concerning the condemnor's right to take the property, or a challenge to the "public purpose" of the project. There will also be administrative hearings to set scheduling dates and the trial. The nature and number of hearings in each case will vary. Your attorney should keep you fully informed of all hearings and actions in your case.

Do I need to attend any hearings prior to the trial?

- That decision will be up to you and your lawyer. All hearings are open to the public and you are permitted to attend any of the hearings in your case. Some hearings may be evidentiary and may even require your testimony. Many of the hearings, however, concern the discussion of purely legal or administrative issues and you will not need to attend if you would prefer not to.

THE JURY TRIAL

In contrast to federal eminent domain proceedings, the Maryland constitution provides for the right to a jury trial on the issue of just compensation in State condemnation proceedings.

Who serves on the jury?

- The jury is selected from the voter registration and drivers license rolls in the county in which the condemned property is located. The judge will summon a panel of prospective jurors. From those prospective jurors, the parties and their lawyers will select 6 jurors to decide the case, and perhaps one or two alternates to listen to the evidence and serve in the event that one or more of the jurors selected is excused during the trial.
- The jury panel will be questioned in order to determine if any jurors have special knowledge of the case, the parties involved, or any other factor that may inhibit their ability to be fair and

impartial and decide the case solely on the evidence presented in court.

- Typically, each party to the case is allowed several peremptory challenges, which means each side may reject several prospective jurors from the case, without being required to state the reason for their decision. The small number of peremptory challenges does not permit a party to “pick” a jury, but it does permit a party to remove several potential jurors if they believe the jurors would be biased against them for any reason.

Are there rules I need to be familiar with during the trial?

- Yes, and here are a few:
 1. You should be at the trial from jury selection through final verdict. Although attendance is not generally required, it is strongly recommended.
 2. Dress professionally. Conservative suits and ties for men; professional office wear for women.
 3. When the judge or jury enters the courtroom, please rise. When the judge or bailiff says “be seated” after the judge enters, you may retake your seat. When the jurors have all taken their seats, you too may be seated.
 4. Do not speak to the jurors.
 5. Unless your attorney gives you prior approval, do not discuss any testimony you have heard with any potential witness.
 6. Speak quietly so your conversation is not overheard by jurors.
 7. Jurors are allowed to take notes during the trial and may, at the judge’s discretion, be permitted to ask questions, or submit questions to the judge.
 8. In short, jurors are very perceptive and they will be watching all trial participants throughout the trial, including

recesses. Everyone on your trial team should act accordingly.

How long will my trial last?

- Every case is different. A rule of thumb, for the “typical” condemnation case is two to four days for each piece of property involved in the trial.
- After the jury is selected and sworn, the judge will advise the jury of what to expect. The parties will be permitted to give brief opening statements to describe the property that is the subject of the condemnation. In most cases, the judge, jury and parties will then take a bus from the courthouse to the property to view the property in person. This procedure, known as the “View” is unique to condemnation cases.
- After viewing the property, everyone will return to the courtroom and the trial will proceed. Full opening statements will be given to address the specific issues in the case. The condemning authority will then proceed and present witnesses and evidence to describe the public project, the need for the property, the nature of the taking and the amount of compensation it believes the jury should award. The owner’s counsel will cross-examine the condemnor’s witnesses.
- Once the condemnor has rested, the owner’s case will be presented through countering witnesses and exhibits, subject to cross-examination by the condemnor’s attorney. There may be rebuttal and surrebuttal testimony, followed by jury instructions, closing arguments, and jury deliberation.
- The ultimate length of any trial will depend upon the number of issues and witnesses in the case. Of course, there is no time limit on how long a jury may deliberate before reaching a decision.
- The trial of a condemnation action is a complicated and serious matter. An owner is well advised not only to retain counsel knowledgeable about the substantive and procedural law applicable to eminent domain cases, but also skilled in the art of trial.

Do I need to testify at my trial?

- It depends. You and your lawyer will discuss the necessity of your testifying as a witness. Generally, the law allows an owner to testify as to his or her opinion of value of the property. In addition, there may be other facts or opinions about which the owner may be particularly suited to testify.

TAXES

Do I pay taxes on my award?

- It depends. A condemnation is considered an involuntary conversion and is treated differently from other sales and income. You may be able to defer taxes on the award, or proceeds of a sale in lieu of condemnation.
- If a portion of your award is considered severance damages (compensation for damages to property you continue to own), you may also be able to defer the payment of taxes on that portion of your award.
- Those portions of your award attributable to business damages or interest are generally taxed as ordinary income.
- You should consult a tax attorney for the current rules on the IRS treatment of condemnation awards.

SUMMARY AND GENERAL GUIDELINES

A condemnation action is a complicated and serious proceeding. There are substantive and procedural peculiarities to a condemnation action that differ from other civil actions. The government agency in charge of the project will have a team of professionals, including engineers, appraisers, and attorneys working on the project to move it forward. Generally, the government will be willing to work with property owners to minimize the disruption and damage caused by the public project, and seek to pay fair, but not excessive, compensation to the owners whose property must be taken. But if the parties do not agree, the government professionals will prosecute the condemnation action vigorously in the best interests of their client – the condemnor.

Property owners facing condemnation should consult early with counsel experienced in condemnation actions, in order to protect their

property and interests in the process. Condemnation counsel should assist the owner to understand and appreciate the full impact of the project, its affect on the owner's property, potential damages to any property not being taken, and the options available to the owner to identify and realize their long-term goals to the extent possible.

In addition to working closely with experienced counsel, there are several basic rules an owner should follow. These include:

1. **Do not** discuss the value of your property with anyone without first consulting with counsel and understanding the ramifications of such statements.
2. **Do not** take actions that may affect the value of your property without understanding the impact of such actions on your condemnation case.
3. **Do** maintain the appearance and condition of your property.
9. **Do not** permit the condemnor to conduct tests on your property without obtaining the condemnor's agreement that the results of such tests will be provided to you and that the property will be restored to its original condition.
10. **Do not** provide copies of leases, expense records, profit and loss statements, or similar documents to the government without first referring such requests to counsel.
11. **Do** maintain a log of all communications with representatives of the condemnor.
12. **Do** retain copies of all communications and correspondence from the condemnor.
13. **Do not** attempt to value your property or hire an appraiser without first consulting with experienced condemnation counsel. Appraisals for condemnation are different than other types of appraisals, and **ALL** appraisals of your property will have to be provided to the condemnor in the condemnation action, even if you do not intend to use the appraisal, or call the appraiser as a witness at trial.

14. **Do** take photographs and/or video of the property to memorialize its good condition for use at trial. This is particularly critical in a “quick-take” case where the condemnor will take possession of the property long before trial and its condition may change dramatically.

CONCLUSION

We hope you have found this handbook informative and helpful to your understanding of the condemnation process in Maryland. Please do not hesitate to contact us if you have any questions concerning a proposed condemnation of your property. Miller, Miller & Canby is committed to the aggressive protection of the constitutional rights of property owners in condemnation actions. We would honor the opportunity to represent you if your property is subject to the government’s exercise of its right of eminent domain.