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CONDEMNATION OF THE WHOLE:

Why a Full Taking Involves Unique Considerations That Condemnors Often Overlook

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Introduction

It is nearly axiomatic that a condemnor will base its initial offer of “just compensation” upon the “fair market value” of the real property being taken in its “as is,” “as used” and “as zoned” condition as of the date of take. This axiom is not intended to be derogatory towards condemnors. Rather, it simply states the obvious. Many condemnors will accept and recognize alternative uses and additional damages when those issues are persuasively presented. But it would be unusual for a condemnor to retain a land planner or other expert in advance of its initial offer, or undertake any significant analysis of the property, or the actual damages that will be suffered by the owner as a result of the taking, before its first offer of compensation is made.

Thus, it is not enough for an owner to simply debate the accuracy of the condemnor’s valuation of the obvious. Rather, it incumbent upon the owner and owner’s counsel to identify, assert, and ultimately prove, all valuation issues and available damages beyond the “fair market value” of the property as it is presently used if anything approaching full compensation is to be achieved. In short, it is the owner’s burden to identify the unique factors affecting the property that impact its value, as well as other sources of compensation, if maximum compensation is to be obtained.

I. Just Compensation Does Not Necessarily Equal Full Compensation.

The constitutional right of a property owner to be paid just compensation¹ for property taken through the exercise of eminent domain has not been interpreted to require the complete indemnity of the losses sustained. Rather, “just compensation” has generally been limited by court decision to require only that the property owner be paid the fair market value of the real property that is taken. And, even though flowery and expansive

¹ "Nor shall private property be taken for public use, without just compensation" U.S. Constitution, Amendment V.

language is often used to state this constitutional principle,² in practice the constitutional right to just compensation is often equated to the value of the real property taken and it does not provide a basis to recover other costs and losses incurred, such as attorneys fees, business losses, moving expenses, and the like.

Thus, in reality the artful phrases used to describe an owner's entitlement to just compensation carry less meaning than their words would lead one to believe. The language "put the owner in the same position as he would be in if no condemnation had occurred" has not been applied to require reimbursement of the owner's attorneys fees, or business losses, or moving expenses, or the loss of personal property. Rather, an owner must assert his entitlement to recover for such losses based on other authority.³ Nor does it mean value the property being taken as measured by the maximum price that may be paid if the property were effectively prepared for market and marketed efficiently for a sufficient time and in the most advantageous manner and market conditions. Rather, it means the price a hypothetical buyer would pay on a date selected by the condemnor.

These realities underscore the importance of quality lawyering in the representation of owners in condemnation actions. The burden is on the owners and their counsel to understand the valuation rules, condemnation procedures, additional statutory entitlements and how they may all be used to maximize the total compensation paid by a condemnor to close the significant gap that often exists between just compensation and full compensation.

II. A Review of Basic Principles.

A recent case from Maryland's highest court, *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. 500, 880 A. 2d. 307 (2005), provides a timely review of these basic principles and provides a framework to discuss why complete takings involve unique considerations that condemnors often overlook. In the *Reichs Ford* case the State of Maryland authorized road improvements that would require the condemnation of property that was leased for use as a gasoline station. But, the State's need for the property was not imminent. Indeed, the State's consideration of the project dragged on for well over 10 years. But the delay in taking the property and constructing the road did not stop the State from negotiating relocation benefits with the owner's tenant, the gas station operator, which caused the tenant to vacate the property years before construction began, rather than renew its lease, and leave the property vacant and unrentable years

² E.g. *United States v. Miller*, 317 U.S. 369, 373 (1943) ("[Just] compensation means the full and perfect equivalent in money of the property taken.") and *United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."). *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. 500, 880 A. 2d. 307 (2005) (The goal of just compensation is "to place the property owner in as good a financial position as if eminent domain had never happened.")

³ E.g. relocation benefits, or statutes specifically providing for the recovery of such losses in condemnation actions that provide for payments beyond the constitutional right to "just compensation" for the property.

before it was condemned. Of course, the owner suffered significant losses due to the State's action and delay, including lost rent, mortgage carrying costs, taxes and the like.

Because the State refused to initiate condemnation proceedings, the owner filed an inverse condemnation action seeking to recover its substantial damages. While the inverse condemnation suit was pending the State, finally, condemned the property and parties reached agreement as to the "fair market value" of the property and settled the condemnation suit. The owner sought to continue with the inverse condemnation suit, however, to recover the damages incurred as a consequence of the State's delay in bringing the formal condemnation action. The State objected to the owner's proffered evidence of rent loss, carrying costs and the like and argued that those damages, if they were recoverable at all, were subsumed in the award of fair market value to the owner in the condemnation case.

In its decision the appellate court discussed the compensation available to owners generally in a condemnation action and specifically addressed the issue of whether the precondemnation damages sought by *Reichs Ford* were included in Maryland's statutory definition of fair market value.

First, the court noted that an owner has a constitutional right to be paid just compensation and that just compensation is generally measured by the fair market value of the property being taken. But, importantly, the court also noted that just compensation is rarely full compensation. Rather, it is merely the "constitutional minimum" that a property owner is entitled to receive.

Although just compensation traditionally has been measured by the concept of fair market value, this conceptualization is merely the constitutional minimum. Fair market value was defined at common law as "what a reasonable owner, willing but not obligated to sell would accept and a reasonable buyer, willing but not obligated to buy, would pay." (citation omitted) This standard, however, as previously observed, may not compensate fully a property owner for all of his or her expenses relating to a condemnation proceeding. *Shipley*, 34 Md. at 343 (noting that it is for the Legislature to decide what, if any, other incidental damages are to be awarded beyond the Constitutional minimum of just compensation in a condemnation case). In order to bridge the gap between "just" compensation and "full" compensation, States and other governments are free to expand the range of available compensable damages by statute or regulation.

Thus, the Maryland court identified the problem that confronts all owners faced with a condemnation of their property, namely, that there may be "a gap" between just compensation and the actual damages the owner will sustain. The *Reichs Ford* court then proceeded to explain that the Maryland legislature had expanded the measure of compensation that an owner is entitled to receive when it liberalized the statutory definition of "fair market value" to include any diminution in value proximately caused

by the public project for which the property condemned is needed. Indeed, in its decision the Maryland court applied equitable principles to conclude that the legislature intended “to include all possible damages caused by public announcements regarding public projects in the assessment of fair market value at the time of the ultimate taking.”⁴

In keeping with the stated goal of just compensation, to place the property owner in as good a financial position as if eminent domain had never happened, it follows that fair market value, as contemplated by the definition provided by the legislature includes related lost rental income. We conclude, therefore, that the legislature intended to compensate property owners for a wide range of detrimental effects that the exercise (or threatened exercise) of eminent domain might have, including those categories of damages apparently sought by *Reichs Ford* in this case, from the time that the governmental body or agency vested with the taking power decides to take the specific property until the date of the actual taking. Under the statutory scheme of [MD Real Property Code] Section 12-105, any compensable damages resulting during the period prior to the formal condemnation ordinarily should be considered and awarded, where appropriate, in the condemnation action.⁵

The *Reichs Ford* case is significant in that it reminds us that “fair market value” is merely an often used short-hand description of just compensation,⁶ but that measure may not be appropriate in every case.⁷ Moreover, even if fair market value is an appropriate

⁴ *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. at 523.

⁵ *Reichs Ford Joint Venture v. State Roads Commission*, 388 Md. at 522-523.

⁶ *United States v. Miller*, 317 U.S. 369, 373-74 (1943) (“It is conceivable that an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.”)

⁷ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979) (“The concept of fair market value has been chosen to strike a fair balance between the public’s need and the claimant’s loss upon condemnation of property for a public purpose. . . . The standard [of market value] is most accurate with respect to readily salable articles such as merchandise, because the value of such property is ordinarily what it can command in the marketplace. . . . But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. . . . For there are situations where this standard is inappropriate.”) and *Township Dep’t. of Util. v. Even Ray Co.*, 716 A.2d 1188, 1195 (N.J. Super. Ct. App. Div. 1998) (“There is no precise and inflexible rule for the assessment of just compensation. The Constitution does not contain any fixed standard of fairness by which it must be measured. Courts have been careful not to reduce the concept to a formula. The effort has been to find working rules and practical standards that will accomplish substantial justice such as, but not limited to, market value. Thus, it is apparent that market value should not be the sole means of valuation in eminent domain cases.”).

measure, there are many variations on the definition⁸ and numerous factors that may be considered in determining what “fair market value” is, including, possibly, as in Maryland, a broader definition than that commonly applied by the courts. *Reichs Ford* also reminds us to imaginatively consider pushing the limits of present law in the appropriate case using the overriding principle that just compensation is, in the end, an equitable principle.⁹

The fact that just compensation is an equitable principle and that all factors that may affect the valuation of property should be considered in a condemnation case was also recently confirmed by Connecticut in *Commissioner of Transportation v. Bartholomew Lorusso*.

[T]he question of what is just compensation is an equitable one rather than a strictly legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken . . . We have stated repeatedly that [t]he amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking . . . In determining market value, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land . . . The fair market value is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use.¹⁰

III. A Framework for Case Evaluation.

The above cases and the principles they discuss underscore the importance for owners and their counsel to fully evaluate each taking to identify all damages and factors that will impact valuation of the property. So, with equity as a guide star and full indemnity of all losses sustained by the owner as the goal, owners’ counsel should fully examine all impacts that a taking may have on the owner and consider various means to recover compensation for all the losses actually sustained. Counsel should examine the subject property, the owner and the owner’s particular circumstances, the applicable valuation issues and alternative sources of compensation.

⁸ See, *Real Estate Valuation in Litigation*, J.D. Eaton, (2d Ed.) pgs. 17-18 where the author sets forth varying definitions of market value given by Nichols, Uniform Appraisal Standards for Federal Land Acquisitions, and the appraisal industry and then notes that “[v]arious jurisdictions have different definitions of market value.”

⁹ *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) (“Just compensation rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.”) and *United States v. Fuller*, 409 U.S. 488, 490 (1973) (“The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.”)

¹⁰ *Commissioner of Transportation v. Bartholomew Lorusso*, 2006 Conn. Super. Lexis 2355 (emphasis added).

A non-exhaustive list of some unique considerations often overlooked by condemners:

1. First, consider the property, its location, surroundings, and all factors impacting its value. The first issue to be determined is what is the parcel(s) to be valued. It may not be the parcel as identified by the condemner. Is the taking actually a complete taking, or is the subject property integrally connected to another parcel such that its loss would cause damage to the value of the second parcel? If so, may an argument be made that the taking is not, in reality, a complete taking, but rather it is a partial taking of a larger economic unit and the owner is entitled to severance damages? The classic case illustrating the principle of the economic unit is *Baetjer v. United States*¹¹ where the owner argued that 1,700 hundred acres being condemned on the island of Vieques near Puerto Rico was integrally connected to 19,500 acres on the island of Puerto Rico and part of a single business operation. The Court ruled in favor of the owner and held that the trial court erred in excluding the property owners' evidence that "their [entire] holdings [on both islands] by reason of the uses to which they are being put, or would be put in the reasonably near future, constituted a single, integrated unitary tract." ¹²

2. Conversely, should the property be valued *separately* from other contiguous parcels owned by the same owner that are also being condemned to maximize just compensation? ¹³ This issue presents opportunity for the owner of multiple parcels. If considering several parcels together may maximize the total value, the owner may be able to demand such a valuation. But at the same time, the argument may be made that the value of property should not depend on who owns it and, therefore, if the total compensation would be greater if separate parcels are valued separately, the owner should argue that they should be considered as if they were owned by different owners. (cite example) In short, what is the economic unit that should be valued? How can the compensation be maximized?

¹¹ 143 F.2d 391 (1st Cir. 1944).

¹² For a more recent discussion of the issues and proof necessary to prevail on such a claim, see *Commonwealth Transportation Commissioner of Virginia v. R.S. Glass*, 270 Va. 138 (2005) (The court reversed the trial court that had permitted proof of severance damages and held that the owner had not met its burden of proof on the element of unity of use.).

¹³ See, *Bernice Spiegelber v. Wisconsin*, 717 N.W.2d 641 (Wis. 2006).

3. Even if the property is not presently being used in connection with another parcel such that they comprise a single economic unit, is the possibility of assemblage such that damage to other parcels should be considered?¹⁴

4. What is the highest and best use of the property? How is it being used presently? May it be used more productively? Even if the property is improved, it may have a higher and better use that would justify the cost of demolition. If it is a single parcel, does it have a single use, or may its value be maximized if the uses are split, such as commercial use fronting on a major road, with residential or industrial use in the rear.

5. What is the zoning of the property? What uses are permitted in that zone as a matter of right? What alternative uses may the property be put to by special exception, which is often a lesser obstacle than rezoning of the property?

6. What is the possibility that the property could be rezoned to permit a more valuable use? The condemnor when assessing highest and best use of property often overlooks alternative uses. Look beyond the present use and step into the shoes of the developer, the broker, and the market.

7. If the highest and best use of the property is for development with townhomes, what kind of townhomes? Moderately priced, narrow, 2-story, on-slab townhomes, with street parking, or luxury, wide, 45' high, 4-story, townhomes, with basements and 2-car garages?

8. What are the unique characteristics of the subject property that differentiate it from properties that the condemnor contends are “comparable?”

9. Is there even a market for the property? Or is the property a special use property, such as a church, or clubhouse, that will require other valuation methodologies

¹⁴ Generally, in order for a court to consider the market value of a property pursuant to the assemblage doctrine, the following must exist: (1) the prospective, integrated use is the most advantageous use of the condemned land; (2) the most advantageous use can be achieved only through a combination with another parcel or parcels; (3) the combination of parcels is reasonably probable; and (4) the prospective, integrated use is not speculative or remote. See also the discussion in *City of Norwich v. Styx Investors in Norwich, LLC*, 887 A.2d 910 (Conn. 2006) (Court held that it was not necessary for the owner to prove that he would undertake assembly of separate parcels himself, but only that the possibility of assemblage would impact the market.). Note: Some jurisdictions permit an assemblage argument to be made even if different owners own the parcels. Other jurisdictions require unity of ownership. Of course, the law of the applicable jurisdiction should be checked.

to be used?¹⁵ If so, the absence of a market presents opportunities to enhance the valuation for the benefit of the owner.¹⁶

10. Does the property contain minerals, sand, timber, crops or other deposits that add to the market value of the property?¹⁷

11. What steps may be taken in advance of the date of take to enhance the value of the property? Maintaining the condition and appearance of the property is a

¹⁵ “If a property's current use is so specialized that there is no demonstrable market for it, but the use is viable and likely to continue, the appraiser may render an opinion of use value if the assignment reasonably permits a type of value other than market value. Such an estimate should not be confused with an opinion of market value. If no market can be demonstrated or if data is not available, the appraiser cannot develop an opinion of market value and should state so in the appraisal report.” The Appraisal Institute, *The Appraisal of Real Estate* P. 26 (12th Ed. 2001).

¹⁶ Often special valuation rules may be applied. In Maryland, a church is valued based upon its replacement cost less depreciation. Md. Real Property Code Ann. § 12-104 (2006). This may greatly exceed the property's market value under any scenario. Example: former school building owned by a religious organization condemned for a neighborhood park. The condemnor contended the property was a run down school with a market value of \$500,000. The owner contended the property was a church and its replacement cost, less depreciation, was \$2,000,000. The condemnation trial was not as much a trial over value as it was a determination of what the building was – was it a dilapidated school, or a church? Inquisition: \$2,000,000.

¹⁷ See e.g., *Commissioner of Transportation v. Bartholomew Lorusso*, 2006 Conn. Super. Lexis 2355 (“The many taking cases described by the Supreme Court over the years establish that, although elements of takings, such as lost profits on personal property, are not independently compensable because they do not constitute real property, the value of such elements nevertheless may be considered in determining the fair market value of the land. Citing *Edwin Moss & Sons, Inc. v. Argraves*, 148 Conn. 734, 173 A.2d 505 (1961).”) and *Ark. State Highway Comm'n v. Delaughter*, 250 Ark. 990 (1971) (“When a tract of land taken by eminent domain contains ore, stone, coal, sand, gravel, peat, loam, oil, gas or other valuable deposits constituting part of the realty, the existence of these features can be taken into consideration in determining the compensation so far as they affect the market value of the land. The same rule would be applicable where the land is covered with growing crops or trees capable of being converted into lumber. But even in such case, the market value of the land as land remains the test. Hence, there can be no recovery for any of the foregoing elements valued separately as saleable items additional to the value of the land.”) The valuation of crops is somewhat different. This depends on whether the crop is immature or ready to harvest. If the crop is mature, its value is generally determined by examining the market harvest value of similar crops in the same locality on the date of taking. With immature crops, they are valued by estimating the net revenue that would have been earned had the crop been allowed to mature. From these estimates, a gross revenue estimate can be made and the court then estimates the cost of labor and other expenses that would be incurred in order to arrive at net revenue. Because the prospective revenue comes from the property itself rather than from a business operated in a particular location, the courts are willing to permit this as a form of additional compensation. See *Lee County v. P & H Associates, Ltd.*, 295 S.2d 557 (Fla. 2nd District, Court of Appeals 1981), Nichols, Section 13.13[6]. Some states, such as New Jersey, have special statutes dealing with compensation for farm losses. Note: Christmas trees have another wrinkle, which permits additional compensation.

given, but what imaginative actions may be taken to protect, or enhance, the property's value before it is taken?¹⁸

12. In many jurisdictions, such as Maryland, the owner has the absolute right to continue using the property up until the date it is taken. If the condemnor does not have quick-take authority the owner may proceed to develop, renovate, or otherwise act to increase the value of the subject property, even though the condemnor will ultimately demolish the improvements once the condemnation is complete.¹⁹

13. What is the effect of delay on value? If the owner actually wanted to sell his property, what would he do, and what would he accomplish towards that end that he is prohibited from doing because of the condemnation?²⁰

14. Is there an operating business on the property? If so, can it reasonably be relocated? What will the costs of relocation be and how will the relocation impact the business? Because business losses are not recoverable in a condemnation action absent specific statutory authority it is important to "push" as much value into the "real estate

¹⁸ See, for examples, the two attached exhibits. The first exhibit is an agreement to share the costs of constructing a road between two contiguous property owners. In order to develop each property an access road would have to be constructed. Therefore, the cost of that construction would have to be subtracted from the "before" value of the property. By agreeing to share the costs, each property owner was able to increase the "before" value of his property significantly. The second exhibit undermined the condemnor's attempt to argue that the owner did not own sufficient road frontage to fully develop her property. The condemnor argued that its title search reflected that others owned a narrow strip of property, which separated the owner's property from the fronting roadway. The attached "acknowledgement" effectively negated the condemnor's effort to depreciate the value of the owner's property.

¹⁹ See, *J.L. Matthews, Inc. v. MNCPPC*, 368 Md. 71, 792 A.2d 288 (2002) ("Respondent's "regular" condemnation authority mandates that, in all condemnation cases involving Respondent, the fair market value of subject property be assessed by the jury as of the date of trial, and provides that Respondent does not "take" condemned property until it pays the judgment and costs assessed in the trial. *Up until that time, a property owner is free to use the property as he, she, or it normally would, including making improvements and developments on the land.*") (emphasis added). Jurisdictions have different rules on this issue. Counsel are advised to check the law of their respective jurisdictions.

²⁰ Consider, for example, a property that is very likely to be rezoned and the process would take 12 months to complete. If the owner wished to sell his property at its highest value he would either: (1) complete the rezoning of his property, or (2) contract to sell the property subject to it being rezoned. In either event, the owner would realize the full value of his property. If condemned, however, the likelihood of actual rezoning is minimal. (Governments are not known to rezone property to a more valuable use in advance of condemnations.) But the valuation rules applicable to probability of rezoning valuations prohibit valuing the property as if it was actually rezoned. Rather, they require a discount to be applied to reflect the cost, delay and risk of the rezoning process. In such a situation then, the owner loses value over what he would have been able to obtain absent the condemnation. May the owner argue that the inability to achieve rezoning is a diminution in value caused by the condemnation?

column” of the ledger as possible, as opposed to the “business” column.²¹ Operating businesses present the issue concerning how to separate the value of the business from the value of the real estate, e.g. hotels for example. An operating Marriott Hotel is more valuable than an operating no-name hotel. How much of the business is due to the physical improvements, which should be paid for in a condemnation, and how much is due to the name, franchise, operating system, marketing and other business attributes?

15. What fixtures are there in the property? Can they be reasonably removed and relocated? Will greater compensation be obtained by including the fixtures in the valuation of the real property, or through relocation benefits?²²

16. Is the property particularly suited to the use for which it is being condemned? Generally, the property must be valued without regard to the project for which it is being condemned. But if there is a market for the property for the same use for which the condemnor wants it, that market may be used to determine its value.

17. What is the state of the market? Is the value of the property increasing or declining as the condemnor delays? If the market is declining consider arguing that the decrease in value between the time of the announcement and the date of take is a recoverable damage, because “but for” the announced condemnation the owner could have sold the property at the height of the market.²³

18. In a quick-take case, where the condemnor’s estimate of just compensation is paid into court and the property is taken long before trial, consider whether interest at a rate greater than the statutory minimum may be obtained on the balance the jury determines is due.²⁴

²¹ Consider for example the valuation of a hotel. How much of the income is attributable to the efficient operation of the business and how much is the product of the hotel’s location?

²² *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). (“Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. ‘It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.’”)

²³ See, *In Re: De Facto Condemnation and Taking of Lands of WBF Associates by Lehigh-Northampton Airport Authority*, 903 A. 2nd, 1192 (Pa. 2006) where the Court stated: “In summary, once a property owner has been deprived of the ‘full and normal use’ of his or her property, the owner is entitled to delay damages from the date of the taking. In the instant matter, we hold that WBF (the property owner) is entitled to delay damages from the date of filing its petition for a board of viewers, to include all mortgage interest actually incurred until the date of payment of the award.”

²⁴ See, *King v. SRC*, 298 Md. 80, 467 A.2d 1032 (1983) (Prejudgment interest may exceed the statutory amount of 6%.) Note: although the recovery of attorney fees, costs, and business losses has been deemed a matter of legislative grace, the recovery of interest is a constitutional mandate.

Conclusion

Condemnors do not necessarily intend to under compensate owners in condemnation actions. But they do not, generally, look for reasons to pay more than the fair market value of the property being taken, in its present condition, “as is” “as used” and “as zoned.” It is incumbent upon owners and their counsel to identify and prove all unique characteristics and factors impacting the determination of just compensation in order to maximize the compensation paid. Just compensation is an equitable concept. It bears remembering the classic equity maxim: *Nulla injuria sin remedia est.*²⁵ Counsel’s job is to find the remedy.

²⁵ No injury without a remedy.