

THE TYPICAL ISSUES IN CONDEMNATION

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I. The Underlying Law

“Again, we see (Dr. Jones) there is nothing you can possess which I can’t take away.”
Belloq, *Raiders of the Lost Ark*, 1981.

“(N)or shall private property be taken for public use, without just compensation”. U.S. Const.
amend V.

“The property of no person shall be taken or damaged for public use without just
compensation, therefore.”
Neb. Const. art. I, Section 21 (*Emphasis added.*)

These simple phrases protecting one of our most basic American rights raises many of typical
issues by the force of its own language.

- What is private?
- What is property?
- When is property taken?
- How is it taken?
- What is public use?
- What is just?
- What is Compensation?

[N]o Private property shall be appropriated to public uses unless a full and exact equivalent for
it be returned to the owner. . . .That equivalent is the market value of the property at the time
of the taking contemporaneously paid in money (the property owner) is entitled to be put
in as good a position pecuniarily as if his property had not been taken. He must be made whole
but is not entitled to more Just compensation includes all elements of value that adhere to
the property, but it does not exceed market value fairly determined.

Olson v. United States, 292 U.S. 246 (1934)

The Fifth Amendment guarantee ... was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Armstrong v. United States, 364 U.S. 40, 49 (1960).

II. Commonly Encountered Lingo and the Basic Rules of Condemnation.

“I’m sorry. You were sick the day they taught law in law school.”

Lieutenant Kaffee – “*A few good men*”, 1992.

A. The Basic Rules

1. “Just compensation means payment of the full and exact equivalent of the property taken, which is the market value of the property at the time of the taking contemporaneously paid in money.”

See, Seaboard Airline Railway v. United States, 261 U.S. 299 (1923).

2. The measure of damages is recovery for:

- a. The fair market value of the property taken, as of the date of taking, and
- b. Any decrease in the fair market value of the remaining property, to the extent that the decrease was approximately caused by the taking.

Nebraska Jury Instructions, 2d. Civ., No. 13.01.

3. Severance damage is the second element of the measure of damages, as stated above, which is the decrease in the Fair Market Value of the remaining property as a result of the taking.

4. “The owner is entitled to recover for every element of annoyance, inconvenience and disadvantage which has been caused by the taking, not a separate element to be independently compensated item by item, but as a whole as they would affect Fair Market Value.”

Armbruster v. Stanton-Pilger Drainage District, 169 Neb. 594, 100 NW2d 781 (1960).

5. “It is a principal of law in eminent domain that the condemner will exercise all rights acquired and use the property appropriated to the full extent (of the rights acquired)”.
Sorensen v. Lower Niobrara Nature Resources District, 221 Neb. 180, 376 NW2d 539 (1985).

6. “The power of eminent domain may be exercised only on the occasion, and in the mode or manner, prescribed by the legislature and . . . statutes conferring and circumscribing such power must be strictly construed.”
Engelhaupt v. Village of Butte, 248 Neb. 827, 539 NW2d 430 (1995).

B. The Rule Books.

1. USPAP refers to the *Uniform Standards of Professional Appraisal Practice* adopted by the Appraisal Standards Board of the Appraisal Foundation, authorized by Congress as a source of appraisal standards and appraisal qualifications throughout the United States, pursuant to the Financial Institutes Reform, Recovery and Enforcement Act of 1989. It is now updated and published every two years.

2. The Yellow Book refers to the *Uniform Appraisal Standards for Federal Land Acquisitions*, published by the Appraisal Institute, and followed for all appraisals involving projects using federal dollars. The 6th Edition was published in 2016.

3. The Right-of-Way Acquisition Guide for Local Public Agencies is published by a state’s lead agency, generally the State Department of Transportation, to ensure compliance with the various federal laws when federal dollars are used for a project. It will likely require all local public agencies to follow its directives regardless of the source of funding.

4. The Relocation Act is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC Sec. 4621, *et. seq.* More importantly, the procedures to comply with the Act can be found 49 CFR Part 24. These procedures must be met whenever federal dollars are used in any phase of a public project involving acquisition of property.

C. Key Appraisal Principles.

1. “Highest and best use of the property means an inquiry into the property’s fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted, to the extent that they are reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged.”
Reller v. Consumers Public Power District, 199 Neb. 720, 260 NW2d 622 (1978).

2. “Fair Market Value is the amount in cash, or in terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic

uses of the property. No other definition of market value for purposes of appraisals for federal acquisitions is acceptable”

The Uniform Appraisal Standards for Federal Land Acquisitions, the Appraisal Institute, Sections 1.2.4 (2016).

3. The larger parcel refers to the extent of property to be appraised and for which compensation is to be awarded. It consists of the property in which there is a unity of ownership in all parts of the whole and a unity of location and use.”

See, “The Yellow Book”, *The Uniform Appraisal Standards for Federal Land Acquisitions*, the Appraisal Institute, Sections A14, and B11 (2000).

It is that tract or those tracts of land that possess a unity of ownership and have the same, or an integrated, highest and best use.”

The “Yellow Book” Section 1.4.6 (2016)

4. The Unit Rule is a multi-faceted and sometimes misapplied rule that basically means you value the whole unit rather than its parts.

The land is not to be valued separate from its individual improvements under the market data approach to value. *Westgate Recreation Association v. Papio Missouri River NRD*, 250 Neb. 10, 547 NW2d 484 (1996).

The various property interests are not to be separately valued and then added together, but rather, the whole of the property is valued as a single unit and the various property interests then split out.

State v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 24 NW2d 300 (1946).

The entire larger parcel is to be valued as a single unit.

Rath v. Sanitary District No. 1 of Lancaster County, 156 Neb. 444, 56 NW2d 747 (1953).

5. “The Sales comparison approach is the process of deriving a value indication by comparing the subject property with similar properties that have recently sold, identifying appropriate units of comparison and making adjustments to the sale prices of the comparable properties based on relevant market – derived elements of comparison.”

The Appraisal of Real Estate, 13th Ed., The Appraisal Institute, page 297 (2008).

6. “The cost approach to value derives an indication of value of the property based on a comparison with the cost to build a new or substitute property, adjusting that cost for the depreciation equivalent in the existing property.”
Id., at 377.

7. “The income capitalization approach derives an indication of value through analysis of a property’s capacity to generate income and capitalizing that income into an indication of present value.”
Id., at 445.

III. The condemnation setting. You must understand the atmosphere in which condemnation takes place:

“You’re meddling with powers you cannot possibly comprehend.” Marcus Brody, Indiana Jones and “The Last Crusade”, 1989.

A. The property owner is often somewhat upset by the proceeding: This is because the owner cannot say:

1. It is not for sale.
2. She does not want to sell now.
3. She does not have time to think about it now.
4. She does not want to sell that much property.
5. She would rather sell a different parcel of land.
6. She will not sell unless she can receive a certain price.
7. She does not agree to the terms of sale.

B. The public agency usually has an appraisal of the property prior to commencing condemnation negotiations, and has legal counsel.

C. The property owner usually does not have a current appraisal and will need to either trust the public agency or take money from the owner’s pocket to obtain an appraisal or to obtain legal counsel.

D. The condemnation is a set of property problems, not a set of paper problems. To assist the client, an attorney must be familiar with the property. Photos, Google Maps or GIS maps can be of great assistance, but you cannot adequately practice condemnation law without personally inspecting the property and the comparables. The earlier you do this the better.

E. The property problems are people problems. You must know the people. What is it about the property that makes it important/valuable to the owner?

F. The Trial.

1. The appraisals are critical and will be a focal point of the trial. The appraisals will normally set the range of the potential final award of compensation. They are also:
 - a. Slow
 - b. Boring
 - c. A foreign language to many jurors.
 - d. Merely the opinions of credentialed experts.
 - e. Not all created equal.
2. The appraisal is not the theme. The theme for the owner's attorney is the people, their relationship to the property, and what they are losing.
3. The owner's testimony. Does the owner have an opinion of value and if so, what is the basis for the opinion?

IV. The Competing Forces, or Different View Points. To effectively represent a client in any adversarial setting, you must have at least a basic understanding of the client and the adversary and what each is trying to achieve.

"If you can learn a simple trick, Scout, you'll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view, until you climb inside of his skin and walk around in it."

Atticus Finch, *"To Kill A Mocking Bird"* by Harper Lee, 1960, movie, 1962.

- A. From the view point of the public agency acquiring the property:
- "Look at this. It's worthless - \$10 from a vendor in the street. But I take it, bury it in the sand for a thousand years, it becomes priceless."
- Indiana Jones, *"Raiders of the Lost Ark"*, 1981.
1. What's the big deal? It's nothing personal, it's just property.
 2. We must protect the public coffers.
 3. The owner wants a pot of gold.
 4. We have an appraisal and we know what the compensation should be

5. We have an engineer's/architect's estimate of the cost of acquisition and a budget based on that estimate.
6. We don't have time for this, the project needs to go to bid.
7. My supervisor will not be happy if I approve what the owner is asking for, and
8. the lead agency or feds will make me write a report to justify it.

B. From the view point of the property owner:

"Show me the money." Rod Tidwell, *"Jerry McQuire"*, 1996.

1. This is mine and it is not for sale.
2. The agency can build this project somewhere else.
3. I've worked hard for this and the agency does not want to pay what it is worth.
4. I can't believe they can do this to me.
5. I want to be treated fairly and with respect.
6. The agency has an appraisal, but I think my land is worth more than that and/or the remainder is damaged more than that.
7. I don't have time to get an appraisal and I don't want to spend the money for one.
8. I don't understand the appraisal or the acquisition documents.
9. I need legal help, but that will just cost money out of my pocket.

C. The Negotiation Process.

"Oh, I love to dance a little sidestep, now they see me now they don't ... cut a little swathe and lead the people on." Texas Governor, *"Best Little Whorehouse in Texas"*, 1982.

1. Are negotiations required before filing condemnation?
2. Is the condemning agency required to negotiate in good faith?
 "The agency shall make all reasonable efforts to contact the owner or the owner's representative and discuss its offer to purchase the property, including the basis for the offer of just compensation and explain its acquisition, policies and procedures, including its payment of incidental expenses in accordance with Section 24.106. The owner shall be given reasonable opportunity to consider the offer and present material which the owner believes is relevant to determining the value of the property and to suggest modification of the proposed terms and conditions of the purchase. The agency shall consider the owner's presentation."
 49 CFR Sec. 24.102(f).
3. Is the agency required to have an appraisal(s)?
4. What is meant by "good faith" negotiations?
 - A written description of the property to be acquired.

- A drawing of the property acquired.
- The terms of the acquisition.
- A statement of the amount of compensation and how it has been determined.
- The relevant plans for the public project.
- The appraisal.