

JAMES A. GRAASKAMP COLLECTION OF TEACHING MATERIALS

V. INDUSTRY SEMINARS AND SPEECHES - SHORT TERM

I. Other Presentations In Which Either The Date And /
Or Sponsoring Organization Is Missing

2. Appraisal Topics

- x. "Comment on Condemnation Appraisal",
Notes on Eminent Domain", no dates

COMMENT ON CONDEMNATION APPRAISAL

- I. Real Estate is owned or held subject to the right of the State to appropriate it for public good if a need can be shown to exist. The State can be defined as any governmental agency or private body with special legislative powers to take private property, such as a public utility.
- A. However we no longer live in futile times and so just compensation must be paid for that property which is taken, a safeguard found in the Fifth Amendment to the U.S. Constitution:
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.
- B. Public necessity is generally so broadly defined that the only real issue in condemnation cases is how much money is going to change hands, i.e. what is the value of the property taken.
- C. The definition of a taking of property and values which are compensable will be found in the civil procedures of the various states or in special legislation related to certain improvement programs such as a highway act or urban renewal, etc.
- D. The source of authority for the condemnation action and its applicable empowering legislation will determine what the appraiser must analyze and value, and so appraisal must begin with knowledge of the purpose for which the property is sought.
- E. Since many public purposes will give special benefits to the property effected but not taken the appraiser is generally interested in the net differential in value before a taking and after a taking with the subsequent improvement. For example taking a small strip of land from a vacant lot for street widening and curb might not damage the value of the lot at all. On the other hand if the street widening involved a change of grade which made it almost impossible to enter or leave the remainder, the loss might be almost the full value of the lot, even though the same amount of land were taken in each case. Thus the appraiser must begin with knowledge of the purpose for which the land is sought, and once the property is taken the condemned property cannot be used for any purpose other than the one alleged without payment of additional compensation if there is further damage.
- F. Next the appraiser must know the time for which the damage estimated is to apply. Generally for the purpose of assessing damages and compensation is considered to be the date of the issuance of a summons growing out of the filing of a complaint for condemnation. In addition where delays are not caused by the defendant, failure to try the issue within a year advances the date on which damages are assumed to have occurred to the date of the trial.
- G. In addition there is a cutoff date on what property improvements are to be compensated - generally the day upon which the summons is served upon the individual.
- H. Before plunging ahead there are a few legal terms with which you should be familiar. Generally there must be a physical taking of some property. Under most state laws there can also be suits for excess condemnation where the property owner requests the authority to take the entire property since the residual of itself would not be useful. Inverse condemnation is a suit by a property owner for damages where the owner has not had his day in court and wishes damages.

- I. Once the condemnation award has been decided, it is paid directly to the individual owner or to the court, where there are a number of people at interest such as a mortgagee, lessee or chattel mortgage holder.
- II. In Wisconsin the basic eminent domain law appears in Chapter 32 of the Statutes, but remember the many special Statutes apply to various programs which extend or modify 32, such as Statutes for railroads, urban redevelopment, Milwaukee County, University of Wisconsin, and so on.
 - A. The procedure in Wisconsin requires anyone desiring to acquire property by condemnation to present a verified petition to the County or Circuit Judge of the County where the property is located. The petition must set forth a description of the property, the parties, the purposes, and assurance that various corporate and survey requirements have been met.
 - B. The petition is for establishment of a commission to determine the compensation, and the court is to appoint the commissioners. This is a statutory requirement, and until the commissioners are appointed and have made an award, condemnation is not a judicial matter. The judge is merely an administrator, except in the matter of necessity.
 - C. The judge will fix a place and time for a hearing to determine necessity and the need for commission, giving twenty day notice to all parties, and if any party could not be found, after three weeks advertisement in the newspaper. There may also be need for appointment of a guardian.
 - D. For rights of way of up to 100 feet in width for any public utility, the petitioner can determine the necessity. A municipal corporation must have a hearing on three days notice following a twenty day notice of an eminent domain hearing, and if there is a challenge of necessity, the judge will establish a jury trial on the issue of necessity. In all other cases the judge can determine the necessity.
 - E. The judge appoints three land owners and residents of the county or adjoining county as commissioners, and their appointment will not exceed one year. Commissioners swear to value the property fairly and to hold a meeting within sixty days from the time they are requested to proceed. They are paid at a rate set by the judge by the condemnor.
 - F. Under 32.10 of the Statutes the value is defined "as of the date of the taking and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be determined as of the date of the taking. Value shall be determined by deducting the value of the property as it will be immediately after the taking from the value of the property immediately prior to such taking, the remainder being a compensation to which the owner is entitled.

In making such determination the commissioners shall consider the property upon the basis of its most advantageous use, but only such use as actually affects the present market value."

"Where a part of a parcel of land is condemned severance damage shall be allowed if shown to exist. Special benefits accruing to the property and affecting market value . . . shall be used as an offset to damages, but benefits are not allowed in excess of damages.

"Where depreciation in value results from an exercise of police power, even though in conjunction with the taking by eminent domain, no compensation shall be paid."

G. Procedure requires that the land owner present his testimony first, followed by the condemnor, and then a rebuttal by the land owner. A majority of the commissioners, all being present, will determine all matters, and they must file a report within twenty days of the hearing in the office of the Circuit Court Clerk.

H. Any party may appeal the award by filing a notice within ninety days of the Commissioners report. The procedure is the same thereafter as for any original suit. Costs are allowed to the successful party, being deducted from or adding to the original award. In addition the court may request owner and condemnor to file a pre trial statement on their respective contentions in regard to:

1. Highest and best use of property.
2. Applicable zoning.
3. Designation Of claimed comparable lands, sale of which is used for appraisal opinion.
4. Severance, if any.
5. Maps and pictures to be used.
6. Cost of reproduction less depreciation, including rate of depreciation.
7. Statement of capitalized income and supporting schedules.
8. Separate opinions as to market value by not more than three appraisers.
9. Qualifications and experience of witnesses offered as experts.

The court may create rules for the exchange of such statements so long as both parties furnish statements and for the conduct of pre trial conferences for the purpose of simplifying the issues.

I. The report of the commission or court decision is recorded as the judgement, and the condemnor must pay to the owner or the clerk of the court the amount of the award to the various interests. A writ of assistance may then be acquired to put the condemnor in possession of the land within 24 hours.

J. The judge may also conduct proceedings to clear title flaws, Vacate easants disburse receipts. The land owner has the right to sue for damages for the next twenty years where he can show that severance damages were greater than allowed because of a change in use.

K. The speed with which the process is conducted and payment made is important to the condemnor. For example in a recent case involving urban renewal in Albany, it was discovered through cross examination, that the expert witnesses for both sides had been pressured into tampering with their opinions. The claimant's expert testified his original appraisal was for \$75,000 although his testimony had been for a fair market value of \$93,000. The states experts swore the value was \$49,700 although he admitted his original appraisal was for \$57,000. The judge felt the original difference might have made possible an out of court settlement. Instead the case had been pending since 1959 and produced not only legal expense for the parties but a total sum of \$13,000 in interest payable by the state in addition to the award.

II. Many appraisers owe their living to the good impression they can make in court as an expert witness. While we do not expect to teach court room appraisal, what goes on in the courtroom does affect the manner in which the appraiser may write his report so we will continue with the legal side a few minutes more.

A. The expert witness is questioned by the friendly attorney in such a way as to establish his professional ability, the care with which he considered the property in question and the method of his appraisal, and then is asked to state his opinion of value.

B. Direct examination might consist of only four major questions, and the appraiser must be careful to explain to the court or jury the detail of his reasoning:

1. What is your occupation, place of business, and experience?
2. What did you do before forming an opinion of value or damages?
3. Before forming an opinion what did you consider?
4. By reason of the investigation and experience, what is the value conclusion?

C. Any statement made during direct examination is subject to questioning upon cross examination. If a witness should die before cross examination or counsel has waived further examination, all testimony would be stricken from the court record. The purpose is to discredit the expert's qualifications, his testimony, or to bring to light facts which might have been purposely omitted from direct testimony. The result is to strengthen or undermine the validity of the valued estimate.

D. As you know the cross examining attorney may attempt to discredit the testimony on the facts or on inference. The appraiser must be careful to base as much as possible on factual data, and the appraiser who can remember a great variety of detailed information, has an edge.

1. The attack might be on suitability of experience, assumptions in computations, selection of comparable properties, on the basis of employment (the amount of the fee, for example, may be too high - implying perjury - too low - implying poor regard in the market place, or contingent - calling for testimony being stricken).
2. Friendly counsel may then redirect examination to clarify matters obscured by the cross examination.

X E. The courts tend to prefer clarity rather than excessive precision in an explanation how value was derived so long as justice is still possible. However, the appraiser should be careful not to bring in extraneous material, or at least unnecessary material, to support his arguments as it provides additional targets for cross examination. He may prepare any charts, photographs, or other material which can be admitted into evidence and is portable for transfer into the jurors room.

IV. The exact definition of just compensation and the measure of damages will vary with the various statutes in each state, and part of just compensation may be for consequential loss rather than for the property interest taken.

A. For example consider the liberal and uniform Pennsylvania Statute enacted in June in Pennsylvania, after five years of work with lawyers, appraisers, etc.

B. Just compensation and market value are not synonymous as just compensation represents the difference between fair market value before and after plus additional damages listed in the Statute. These include:

- 1. Machinery, equipment and fixtures forming part of the real estate.
- 2. Moving costs of machinery and equipment not part of the real estate.
- 3. Good will losses when it is shown that business cannot be relocated without substantial loss of patronage.
- 4. Moving expenses up to \$500 for a residence or \$25,000 for a business.
- 5. Delay or interest compensation.
- 6. Pro-ration of real estate taxes.

C. In addition consequential damages, which previously were compensable only by non public agencies, must now be paid by the State as well whether or not any property is actually taken. Only abutting property could collect damages for reduction of accessibility, injury to surface support, and so on.

D. Additional reform of procedures of evidence excuses a qualified appraiser from not having made sales of property in the area or actually having inspected the property, providing he made provision for obtaining accurate information.

*v. Where an entire property is taken, appraisal of the real estate interest is no different than any other to determine the fair market value as of a certain date. However where a part of the property is taken, there is the problem of apportioning the total value of a property between the part taken and the remainder in private hands.

A. The shrinkage in value of a parcel because of a loss in its plottage values when part is taken is known as severance value. Severance value assumes that the property taken is only a part of a larger parcel and therefore there is a question of what is a larger parcel.

B. Where one owner has title to two or more lots, definition of the larger parcel is controlled by court opinion on contiguity, unity of ownership, and unity of use.

C. Also remember that property is looked at as a single piece of property including the building and the land so that each cannot be handled separately under the law.

D. The before and after method of appraisal is simply analyzing the difference between the value of the whole lot before taking and the value of the remaining lot after taking. The difference is the total damage suffered by taking the lot.

E. The major concern is with severance damage, consequential damage, or with the beneficial results of the public improvement which is planned. Severance damage is distinguished by an actual taking of the property while consequential damages do not involve taking of any physical property.

F. Schmutz suggests some of the ^{following} causes of severance damage:

- 1. A changing use which brings decreased value because of distortion of shape, shrinkage ~~and~~ in building area, or loss of access, i.e. anything causing injurious interference.

G. A property may also be subject to a burden, a kind of severance cost, because taking of a portion of the property requires construction of a retaining wall, a fence, etc.

H. The first step in judging severance is a conclusion as^{to} the highest and best and most profitable use to which the property can be put. One must be careful to be consistent in the choice of use for the before and after values and between valuation for the taking and valuation for severance damages.

1. Schmutz gives an example of a lot best used for retail purposes which loses some depth to a street widening project. For retail use it has a value of \$6000.

2. However there is an old 2-story frame dwelling of negligible value, but which would cost \$2000 to adapt to the smaller lot.

3. Many people would value the lot at \$6000 and then add damages to the value of the residence. However, if the value of the land is for retail purposes, then the old building is a hindrance and should be moved away. The real value of the land is therefore its market value for retail use less the cost of making it available for its most profitable use.

4. Another example is that of a golf course which lost a strip of land to a highway. For golf uses the land was worth \$400 an acre. For subdivision purposes it would be worth \$1500 an acre. The owners claimed value according to the subdivision use and then requested severance damages for the burden of building a special fence to keep golf balls off the highway. The court ruled that if they assumed a value for subdivision purposes, they could not assume the need for a fence for golfing purposes. The appraiser must choose between one use and another and then proceed consistently.

I. The sum of the values of the taking and the remainder cannot be more than the full value of the property. One cannot make partial estimates for each component and simply add them together to reflect the total value of the property. One must begin with the total value before the taking.

1. For example consider two 33 foot lots in Madison, and the City takes a 11 foot strip from the full side of one of these lots. If A owns both lots, he will be left with a 56 foot lot which is worth more than a 33 foot lot per front foot. Plottage value is not reduced by 1/6 for having taken the 11 feet. On the other hand, if A and B each owned one of the lots and B lost 11 feet, the market value of his lot would be much less than 2/3 of the market value of A's lot. In other words, it is the value of the lot after the taking that determines the value of the taking to the owner affected.

2. Even where ownership of contiguous lots is the same, if the uses are different the severance damages may differ. If both lots above were zoned retail, and one had ~~the existing house~~ a sound house while the other was vacant, if part of the vacant lot were taken, the remainder would be worth much less because it would not contribute to the existing use of the adjacent lot.

J. Severance damage need not be permanent. So long as land alone is affected, severance damage is determined in perpetuity. However where the damage is the result of impairing the use of the building, it would apply only over the remaining useful life of the structure.

1. Where there is a 10 year lease on a building with a 20 year useful life, the lessee would collect the present value of 10 years impairment and the owner-

lessor would receive only severance damage accruing from the 10th to the 20th years. In all of these cases utility- that is, efficiency in use - is the key element for consideration.

VI. Awards for severance damage must also be relatively equitable among parcels; often they are based on comparable sales of property, such as negotiation of a right-of-way. Many right-of-way condemnations seek an easement rather than fee simple title, but the easement is good so long as the land appropriated is used for the pipeline, the railway track, or the highway.

A. Severance damages are often compared in dollars per square foot of building area or with purchase multiples in the case of land. For example if a right-of-way were purchased for \$3843 while the value of the land was \$2101, it follows that the purchase multiple was 1.83 times the value of the land, indicating severance was 83% of the land value.

B. Generally purely speculative, doubtful, or imaginative damages are not compensable. Fears that cars will run off the highway or that the public parking lot will fall on the house next door or will increase the danger of a traffic accident are not compensable where they are incapable of proof.

VII. In many cases the remaining property may be benefitted by the taking and improvement thereon. If the property benefitted is also assessed to pay for the improvements as part of a general benefit-general assessment, then benefits cannot be considered as an offset to severance damages.

A. Therefore the appraiser is concerned with special benefits, peculiar to the land in question, and obvious in its increase of utility and value for the property. For example, a street opening which makes an inside lot a corner lot.

B. Benefit values are often underestimated. For example, in the appraisal of land for the interstate system, little recognition was made of the benefits of an interchange to land values in presumably rural areas.

C. A number of studies indicating the amounts and standards of benefits are now available. One is "Control of Highway Access" by Ross Netherton and published here in Madison. A second is by Charles Haar of Harvard Law School called "Determination and Offset of Benefits in Land Acquisition."

D. For example jet airports presumably hurt property value. However Herman Walther can show that the presence of O'Hare Field has increased land values from 35¢ a square foot to a current price of 70¢ a square foot. This is felt to be the result of employment at the airport, good highways servicing the airport, and industrial relocation near the airport.

E. On the other hand the Supreme Court has held (Appraisal Journal, April 1962) that excessive noise in the approach zone of airports will entitle owners to compensation for a "taking for public use". In May 1964 the State of Washington held that homeowners nearby the Seattle-Tacoma International Airport were entitled to consequential damages for declines in the market value of their property caused by jet airplane noise.

VIII. A lessee has a compensable interest in property. Without lease provisions to the contrary the tenant is obliged to pay the rent even though part of the property has been taken.

A. The tenant may suffer because with loss of the property his rent per square foot may increase.

B. The tenant may also suffer because the leasehold bonus value which he may have enjoyed might be lost or reduced. An example from Schmutz concerns a corner lot 100 feet square which is leased for a filling station at \$600 per year, payable at the end with three years to run. Presently the rental value of the land is \$900 per year. Assume the city wants 10 feet from the lot.

C. The amount of the award should be the present value of the rent value lost because of reduction in the site size - creation of an annuity which would offset the nominal increase in rent relative to size. In addition he should receive the present value of the loss in market value of the lease.

1. The space taken represents 10% of the whole, and assuming rent is directly proportional, rent should be reduced 10% or \$60 per year. Since it is not they should pay the present value of \$60 or 2.829×60 or \$169.74 assuming 3% interest.

2. In addition the tenant enjoys a leasehold advantage of \$300 a year, 10% of which is lost. The appraiser might use a higher interest rate, say 12%, because this profit is subject to the uncertainties of the real estate market. Hence an additional award of 2.402×300 or 720.6 would be made. The total award to the lessee would be \$241.80.

3. Since the values awarded the tenant and the landlord cannot exceed the total present value of the site, anything awarded the tenant must be at the expense of the landlord. Therefore funds awarded the tenant to compensate for a change in rental value or a lost leasehold advantage should be placed in a trust fund, with the lessor to receive the balance of funds if the lease should be terminated before the end of the contract period.

NOTES ON EMINENT DOMAIN

- I. Special attributes of eminent domain appraisal business
 - A. Special appraisal theory for each state for condemning authority
 - B. Report format to anticipate courtroom strategy
 - C. Definition of value
 - D. Definition of interest taken
 - E. Highly stylized review process for uniformity
 - F. The question of indemnity goes beyond real estate valuation
- II. Summary of eminent domain process in Wisconsin
 - A. Delineation of public and private agencies with power of eminent domain
 - B. Condemnor files description of project and property affected and to be taken, owners of record etc. with equity court to determine for each county the public purpose.
 - 1. Appointment of commission, permanent or temporary
 - 2. Setting of date for hearing on public purpose
 - 3. Setting of date for valuation hearing before commission
 - 4. Award by commission must precede court action
 - C. Appeal of commission finding to circuit court
 - 1. Right of trial by jury
 - 2. Payment to property owner of commission award plus escrow of balance provides condemnor with possession.
 - 3. Legal services for property owner often on contingency basis
 - 4. Each party may present no more than three appraisers; condemnor must provide all appraisals to condemnee
 - 5. The problem of a qualification of the appraiser
 - 6. Pretrial definition of factual issues for jury
- III. Defining the interest taken and valued
 - A. Wisconsin-Michigan Law - before and after value
 - B. Other states distinguish among:

1. severed parcel, remainder parcel
 2. severance damage to remainder
 3. general benefits of public project
 4. special benefits of public project
- C. In special situations condemnee may sue for:
1. inverse condemnation
 2. excess condemnation
 3. partial condemnation
- D. Until recently eminent domain considered only the real estate position loss. It did not compensate for
1. loss of bargain on interest rate, rent, lease hold interest etc.
 2. loss of business goodwill, opportunity, etc.
 3. relocation cost including search, counseling, or moving
 4. result - courts squirmed to provide equity by twisting real estate logic
- E. result - condemnors paid more than necessary to avoid blackmail or less than necessary if they had bargaining advantage, sometimes misleading property owner with an exceptionally low appraisal.
- F. Federal highway act led to revision of compensation for all federal takings
1. loss of rental value for up to five years
 2. loss of profits up to three years as measured against previous three years
 3. \$200 or actual moving cost deemed reasonable
 4. requirement that relocation assistance be provided interms of search and counseling
 5. compensation for loss of interest advantage
- IV. New complexities in condemnation
- A. land use control - when does police power become a taking since no economic use remains to owner?
 - B. taking of development rights for all future use as in a scenic easement or billboard control area

- C. possibility of trading in kind rather than in cash
- D. demonstration of change in highest and best use to avoid excess payment to land owner
- E. measuring degree of noise, pollution, or encroachment on privacy or safety which constitutes a taking of a private property right
- F. the use of expert counsel for the judge in complex appraisal issues