NEGOTIATING THE BEST RESOLUTION TO YOUR CONDEMNATION CASE

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Preamble

The best way to maximize value for your client in a condemnation case is to know the property as if you were developing it. You must personally walk the building and property; locate the boundaries, preferably by monuments; question and understand all paint on the ground, especially in a partial take; contemplate the slopes soils, vegetation and views; drive the neighborhood; assess the zoning and current uses; observe traffic flow; evaluate utilities; tour the comparables and talk to the owner and tenants about the functionality and contemplated uses of the property.

Make a note of the professionals you will need to add to your team and engage them now! Find out who the best broker in the neighborhood is and befriend her. She will tell you where property values are headed, while your appraiser will, by professional training, be limited to historical observations of value. There is no substitute to leaving some shoe leather behind on the property and in the neighborhood. You would never buy a property you had not seen. You are in no position to sell a property to a condemnor you have not seen either.

Assembling your team

1. It goes without saying that it is critical to retain an appraiser early on for your eminent domain case. Valuation of the property will be one of the central issues in the case, if not the central issue.

2. However, there may be a number of other consultants that will be crucial to putting on the most effective case.

3. Depending on the nature and development status of the property you may need some of the following:

    a. Land-use attorney. If the highest and best use of the property involves further development, you may need a land use attorney to show that the proposed development is legally permissible under existing codes and regulations.

    b. Architect. Likewise, an architect may be able to assist in showing what is possible on the property and what it will cost to get there. I am a firm believer in visualization by models where the economics justify the expenditure.

    c. Landscape consultant. Trees on the property may add value, and a traditional appraiser may not be able to analyze that value.

    d. Soils engineer. Do you have wetlands, unstable slopes, need fill?

    d. Relocation consultant(s). Sometimes a condemning agency's relocation dollars can bridge the gap between the parties' differing value opinions. Obviously, it is helpful to know what relocation will realistically cost.

e. Real estate broker. In the case of development property, it may be necessary to retain an expert who can testify about the market demand for the finished product, to assist in making your case for highest and best use.

f. Noise and vibration consultant. Expert analysis may be needed to analyze the extent to which noise and vibration from the proposed project may possibly impact the property's value.

g. Parking/traffic consultant. The impacts on traffic and parking on the remainder property may be needed in a partial take.

4. This is by no means an exclusive list. Depending on the property, and the impacts of the acquisition and project on the property, any number of experts and consultants may add value. Do you need to mitigate the impacts of a partial acquisition of a commercial parking lot? You may need a parking lot design consultant. Are there contamination issues on the property? You may need an environmental consultant.

5. The key is to identify the issues early, and assemble your team early, so you can start building your valuation case early.

6. Perhaps most importantly, don't forget that the client is a key part of the team. He or she probably knows the property better than anyone, and may have insights that you and your highly paid consultants would otherwise miss! As the Washington Supreme Court has observed: "An owner of property may testify as to its value (without qualifying as an expert), upon the assumption that he is particularly familiar with it and, because of his ownership, knows of the uses for which it is particularly adaptable." *State v. Larson*, 54 Wn.2d 86, 88, 338 P.2d 135 (1959).

Introducing your property to the condemnor

1. In addition to assembling your team and discovering what makes your client's property unique early on, it is likewise invaluable to get the condemning agency acquainted with the property and its unique or non-obvious attributes as early as possible.

2. Specifically, there is a great benefit to getting the appraisers talking to each other early in the process. Many local appraisers know one another and work together frequently, and there is a great deal of collegiality and professional respect.

2. Discussion early in the process allows appraisers to recognize all of the potential issues affecting the value of the property, which is, ideally, reflected in the condemnor's initial offer for the acquisition. Once an appraiser commits his or her analysis to writing, it is much more difficult to change his or her mind. Thus, there is a lot of value in addressing unique valuation issues before the appraiser commits his or her opinion to writing.

3. Ideally, the appraisers will inspect the property together, and will share relevant information pertaining to the property.

4. It may also be appropriate to involve the property owner in that walk-through as, again, he or she will have unique perspective and insight on the property that others will miss.

5. You should attend all of the condemning agency's inspections of the site.

6. The key is to keep the dialogue going.

Building a case for highest and best use

1. "In determining the market value of a piece of real property for the purposes of a taking by eminent domain, it is not merely of the property as it is used by the owner that should be taken into consideration. The possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered." Nichols, Eminent Domain § 12B.12 (3d ed. rev. 1999). *See also State v. Hobart*, 5 Wn. App. 469, 471, 487 P.2d 635 (1971) ("In determining highest and best use, evidence of prior, present and future use in light of reasonably anticipated demands is admissible.").

2. Accordingly, the concept of "highest and best use" is built into the appraisers' valuation analyses. Plainly, if two opposing appraisers have two different theories about highest and best use, they could arrive at markedly different conclusions. This is another reason to get the condemning agency and property owner on the same page about the property early in the process.

3. Of course, the proponent of evidence of highest and best use must make a showing that the proposed use has some basis in reality. "'Mere possible or imaginary uses or the speculative schemes of its proprietor are to be excluded.'" *Grays Harbor Boom Co. v. Lownsdale*, 54 Wn. 83, 97, 104 P. 267 (1909) (quoting *Chicago, B & Q.R. Co. v. City of Chicago,* 166 U.S. 226 (1897)). As one Washington court has stated, "evidence of potential use of a parcel is admissible provided there are showings of (1) the adaptability of the parcel for the use, and (2) such likelihood of demand for the parcel devoted to that use to affect present market value." *Chase v. City of Tacoma*, 23 Wn. App. 12, 16, 594 P.2d 942 (1979).

4. Sometimes the property's highest and best use is obvious. For example, in a residential zone, you're limited to residential use. And few would dispute that an airport parking lot in SeaTac, Washington is taking advantage of its highest and best use, at least at the present time.

5. But you may be dealing with property that is not maximizing its value. For example, you may have a single-family home that is sitting on property that is zoned for mixed uses. In that case, you will want to build the case that the agency is not taking a house on otherwise vacant land, it is taking a development opportunity.

6. Of course, the valuation analysis must take into consideration the costs of development.

7. This is where your team of consultants come in. Can you build a mixed-use development on the property? Is it legally permissible, given the zoning code and other land use regulations in the neighborhood? What are the costs of doing so? If you are building condos, who are your buyers and what will they pay? If you will have retail, who are your tenants? Your land use attorney, architect, planner, and broker will be a crucial part of this analysis.

Partial takes and special benefits

1. In a partial acquisition, the owner is entitled to severance damages to the remainder.

    a. "[W]here only part of a single tract of land is taken, the measure of damages is the fair market value of the land taken, together with damages to the land not taken. In other words, just compensation is the difference between the fair market value of the entire tract before the acquisition and the fair market value of the remainder after the acquisition." *State v. McDonald*, 98 Wn.2d 521, 525–26, 656 P.2d 1043 (1983) (citations omitted).

    b. But this only applies if the two parts of land meet the larger parcel test — i.e., are not two separate parcels: "To decide that a tract of land constitutes a single larger parcel rather than separate parcels for the purpose of determining just compensation the courts require: (1) unity of ownership, (2) unity of use, and (3) contiguity. All must be present in order to find that a single larger parcel of land exists." *State v. Lacey*, 8 Wn.App. 542, 543, 507 P.2d 1206 (1973).

    c. Note that future or prospective unity of use is not sufficient to meet the larger parcel test. *See Doolittle v. City of Everett*, 114 Wn.2d 88, 91-92, 786 P.2d 253 (1990). (While *Doolittle* is an assessment case, it looked to condemnation case law to determine that unity of use means *present* unity of use.) Therefore, where the condemnee owns two contiguous parcels that could be developed together as one project, the larger parcel test will not be satisfied unless the parcels are in fact being developed as a unified project.

2. Offset for special benefits

    a. "Just compensation is the difference between the fair market value of the entire property and the fair market value of the remainder. It includes the value of the property taken and damages, if any, caused to the remainder by reason of the taking, offset by the amount of special benefits, if any, accruing to the remainder of the property as a result of the project which necessitated the condemnation action." *City of SeaTac v. Cassan*, 93 Wn.App. 357, 361, 967 P.2d 1274 (1998) (emphasis added).

    b. "If the building of the state highway benefited the railroad property in a special degree, and such benefits could be ascertained with reasonable definiteness, and not merely speculatively, we think that that benefit should be set off against the damages, injury, and inconvenience caused by the building of the highway in a

proper and careful manner." *Great Northern Ry. Co. v. State*, 102 Wash. 348, 356, 173 P. 40 (1918).

c. Thus, in the context of a partial take, the condemning agency may argue that the project for which the property is being acquired actually increased the value of the remainder property. A straightforward example is where a parcel that does not have access to a public right-of-way acquires such access as a result of the condemnation. Suddenly, the development potential and, thus, the value, of the property is enhanced. But consider when that benefit, if you acknowledge it, will actually inhere in the property. Certainly, there will be a time when the project development and construction may actually devalue the property.

c. Special benefits must be distinguished from general benefits. "Special benefits are those which add value or convenience to a condemnee's remaining property as distinguished from those arising incidentally and enjoyed by the public generally." *State v. Green*, 90 Wn.2d 52, 54, 578 P.2d 855 (1978).

d. This comes up frequently in light rail cases, where property is being acquired for a light rail station. The argument is that being in the vicinity of a rail station increases the value of the property. The counterarguments are that (1) this is more of a general benefit, and (2) any benefit is speculative and remote.

f. The special benefits offset has the capacity to be abused: We recently had a $0 offer for property that was purportedly benefited by having access to a new roadway. In that case the condemnor conveniently overlooked that our client had paid LID assessments to build that very road.

g. Note that special benefits may accrue to the "larger parcel," assuming the property meets the larger parcel test described above.

h. In Washington, procedural matters relating to special benefits offset may provide motivation for settling the issue. RCW 8.25.220(4) allows property owners to demand a trial to establish the fair market value of their property and damages, if any, to the remainder property without offsetting the amount of special benefits accruing to the remainder property. The property owner must consent to a lien against any remaining property, securing the condemning agency's claim for any special benefit offset. Under RCW 8.25.230(4), either party may request a second trial to determine whether there were any special benefits to the remainder. The purpose of this bifurcated proceeding is to address the potentially speculative nature of purported special benefits. "[The legislature] has prescribed a bifurcated proceeding by which valuation of special benefits is separately determined. The separate valuation proceeding helps insure against speculative special benefit offsets. Both condemnor and condemnee benefit from a precise determination of special benefits." *State v. Green*, 90 Wn.2d 52, 56, 578 P.2d 855 (1978).

i. Any specific evidence relating to special benefits is not admissible in the first trial. *Id*. at 58.

j. Depending on the nature of alleged special benefits, the condemning agency may not be eager to run the risk of trying the valuation case without evidence of special benefits in the first trial, then undertaking a second trial where it may or may not be able to prove that special benefits actually accrued to the property. At the same time, the property owner may not relish the idea of a lien on the property securing a later payment of the offset. The mutual risk and uncertainty may provide an incentive to settle.

Dealing with environmental issues

1. The quandary: The presence of environmental contamination on a parcel of property impacts the fair market value of that property and, thus, may reduce the owner's compensation in a condemnation case. But a property owner whose award is reduced to account for environmental contamination may also be subject to liability for remediation costs in a subsequent cleanup action under MTCA or CERCLA. Given that potential liability, reducing the condemnation award may result in excess liability for the property owner, deprive the property owner of the ability to assert defenses to liability for cleanup costs, and otherwise impact the property owner's rights and options in the environmental remediation action.

2. The solution is not so simple. A court faced with the issue has two relatively unsatisfactory alternatives: Either (1) admit evidence of contamination and reduce of the amount of the compensation payable to the owner at the risk of subjecting the owner to excess liability and otherwise affecting his or her rights in a subsequent remediation action or (2) prohibit the evidence of contamination and run the risk of overcompensating the owner at the expense of taxpayers.

3. Arguments against allowing evidence of contamination:

a. Excess liability: A property owner may receive a reduced condemnation award due to the environmental contamination on the property, then later be subject to additional liability in a subsequent remediation action under MTCA or CERCLA.

b. Potential procedural due process concerns:

i. Inability to assert MTCA defenses: MTCA provides the property owner with a number of defenses to liability, including an act of war, an act of God, and non-responsibility-in-fact for the contamination. Reducing the condemnation award to account for the contamination effectively saddles the property owner with full responsibility for the cleanup action, without allowing him or her the opportunity to assert any of these defenses. For example, the safeguard allowing the property owner to avoid liability by showing that he or she acquired the property without knowledge of or

reason to know of the contamination is not available in the condemnation context.

ii. Inability to bring a contribution claim in a condemnation action: Under MTCA, a property owner who is required to pay remediation costs may bring a contribution claim against other PLPs, who may have comparable or greater liability for the contamination. RCW 70.105D.040. The property owner who loses the property in a condemnation proceeding and receives a reduced award due to the contamination does not have the ability to bring a contribution claim, and may be left holding the entire bag.

b. Prohibition against speculative evidence. In Washington, in determining just compensation, the fact-finder is only to consider those factors "which will actually affect the fair market value of the property and which are established by the evidence." *State v. Evans*, 96 Wn.2d 119, 127, 634 P.2d 845 (1981). Devaluing property based on contamination arguably requires the jury to speculate about the extent of contamination, the necessary responses, and the response costs.

c. Difficulties in valuing contaminated properties. Because of the multifarious impacts of different types and degrees of contamination on different parcels of property, it is very difficult to evaluate the impact of environmental contamination on the market value of property. "[E]ach environmental problem is 'as unique as a fingerprint.'" *Housing Auth. of New Brunswick v. Suydam Investors*, 826 a.2d 673, 687 (N.J. 2003) (quoting The Appraisal Found., Uniform Standards of Appraisal Practice, Advisory Opinion a0-9 (1997 ed.)).

4. Arguments for allowing evidence of contamination:

a. Environmental contamination is property characteristic that undoubtedly affects the value of the property, just like any other property characteristic. Under traditional notions of "fair market value," the evidence should be admitted.

b. A condemnation action is an *in rem* proceeding. The proceeding is not designed to assign liability for environmental contamination; the only issue is the determination of fair market value. The value of the property is not affected by whether the property owner would be liable for the contamination. Therefore, injecting issues related to the property owner's personal liability — or non-liability, as the case may be — is inappropriate.

c. The outcome of the eminent domain proceeding would have no preclusive effect on the rights of the property owner in a subsequent MTCA action. Thus, if a property owner is not liable for the contamination as a result of one of the defenses set forth in MTCA, the property owner would not be barred from raising those defenses simply as a result of the eminent domain proceeding.

5. Possible solutions in judicial/legislative contexts

    a. "Under the trust/escrow approach, evidence of contamination is excluded from the eminent domain valuation trial, which is directed toward determining the full value of the property if it were uncontaminated. Once value is determined, the full award of just compensation is not paid directly to the owner. Rather, under this approach a portion of the award sufficient to cover cleanup costs is escrowed or held in trust until the exact amount of cleanup costs has been determined. Once response costs are determined, a corresponding amount representing the owner's liability is then disbursed from the trust or escrow account. Only the surplus, if any, is paid to the owner." *Housing Auth. v. Suydam Investors, LLC*, 826 A.2d 673 (N.J. 2003) (quoting 7A *Nichols on Eminent Domain* § 13B.03[4], at 13B-68 (3d ed. 2002)).

    b. One commentator has proposed a legislative solution providing the property owner with an offset in a subsequent remediation action in the amount of the diminution in value attributable to the contamination in the condemnation proceeding. *See* Andrea L. Reed, *Cleaning up Condemnation Proceedings: Legislative and Judicial Solutions to the Dilemma of Admitting Contamination Evidence*, 93 Iowa L. Rev. 1135, 1161–62 (2008). To implement this offset would require a judge or jury finding.

6. Better solutions in settlement context

    a. There's a lot more flexibility in the settlement context.

    b. The parties can include an indemnity provision in their settlement agreement, providing that the condemnor shall indemnify the property owner against environmental cleanup claims.

    c. Likewise, the parties can agree to value the property as clean, but place a portion of the proceeds in escrow, pending an environmental cleanup action.

    d. The parties may bargain for assumption of the risk for a price.

Whether and when to grant immediate possession and use

1. "Immediate possession and use" is the process by which the condemnor gets equitable title to the property in exchange for payment of the condemnor's offer into the court registry, which the condemnee is entitled to withdraw, assuming all parties to the action agree. *See* RCW 8.04.090.

2. For purposes of establishing just compensation, the property is valued as of the date of the taking. *City of Medina v. Cook*, 69 Wn.2d 574, 577–78, 418 P.2d 1020 (1966).

a. If the condemnor gets early possession and use, the property is valued as of the date possession and use is given. RCW 8.04.092.

b. Otherwise, the valuation date is the date of the trial. *Brazil v. City of Auburn*, 93 Wn.2d 484, 496, 610 P.2d 909 (1980).

3. Benefits to granting immediate possession and use

a. Immediate payment: In exchange for the property owner granting immediate possession and use, the condemnor must deposit the amount of his or her offer into the court registry. Assuming everyone with an interest in the property agrees, the property owner(s) may withdraw the amount of the offer, without prejudicing their right to argue for more. Getting the money early is plainly a benefit.

b. Possibility of getting attorneys' fees later on: If the property owner grants early possession and use, he or she has the right to take advantage of the section of the statute that provides for an award of attorneys' and experts' fees to the condemnee if they can beat the condemnor's thirty-day offer at trial by 10% or more. RCW 8.25.070.

- "Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law." RCW 8.25.070(3).

c. 30-day offer: As discussed below, the condemnor's thirty-day offer is a great incentive for both sides to settle before trial. In order to mitigate the risk of paying the owner's attorney fees, the condemnor will make a thirty-day offer calculated to prevent the property owner from beating it by 10% at trial. Obviously, the higher the offer, the better the bookends for resolution. However, because there is no risk of an attorney fee award if the owner does not stipulate to immediate possession and use, there is no reason for the condemnor to make a thirty-day offer at all. This makes resolving the case much more difficult.

d. Condemnor cannot back out: Ordinarily, a condemnor may abandon an acquisition, even after trial, and the only requirement is that the condemnor must pay the property owner's attorneys' fees. *See* RCW 8.25.075. However, if the condemnor has taken early possession and use, it cannot abandon the take. *State*

v. Buckley, 18 Wn. App. 798, 800, 572 P.2d 730 (1977). This is particularly important if the property owner has substantially changed his or her position as a result of the acquisition.

e. Property owner locks in valuation date: As noted, the date of immediate possession and use is deemed to be the date of the taking and, thus, the date of valuation. If property values are falling, the property owner may lock in a higher value by stipulating to possession and use.

f. Property owner may have the ability to influence the form of the deed or easement when granting use and possession as we often did in the monorail takes.

4. Detriment: In a rising market, the condemnor locks in a lower value by getting early possession and use.

5. Strategic issues if condemnor is in a hurry:

a. Sometimes the condemnor's funding for its project is dependent on getting possession and use by a certain date.

b. This can put the condemnor in a position of being desperate for possession and use, especially if they wait too long. This puts the property owner into a position of greater leverage with respect to negotiating for a higher price for the property.

The 30-day offer strategy

1. The 30-day offer is your last, best opportunity to settle the case. Assuming the owner has stipulated to possession and use, the 30-day offer mechanism provides a great incentive to the condemning agency to make a very reasonable offer.

2. The offer is calculated to make it very difficult for the property owner to achieve a 10% or more improvement on the offer. Essentially, the agency's strategy is to shift the risk to the property owner of having to bear his or her own fees at trial. But consider the incremental cost of trial. Depending on the values involved, you may be able to try the case for much less than that 10%. It could be worth taking the case to trial and that fact may allow you to close the last 10% gap.