

Five "Simple" Rules for Partial Takings

Eminent Domain and Land Valuation

ALI-CLE February 2015

**By: Christian F. Torgrimson, Esq.
Elizabeth R. Story, Esq.**

Five simple rules? Nothing complicates the issue of compensation more than a partial taking. When property is only partially condemned, the notion of a "simple" taking often is acquired right along with the part taken. However, to try and simplify the important components of a partial taking, a basic framework of rules can help guide your way through the many issues that may arise. These rules can apply to takings in all jurisdictions, regardless of how the applicable laws value partial takings.¹ What better way to demonstrate simple rules than in the words from the best of the 80's lyrics?

Rule 1 — Watch for Impacts on Present Use: Under Pressure

*"Pressure pushing down on me, pressing down on you, no man ask for.
Under pressure that burns a building down..." ~ Queen*

A partial taking can put the present use of an improved property not only under pressure, but throw it into total chaos. This pressure can come in all forms of consequential damages from a loss of access rights to the installation of retaining walls and parking lot reductions. How to alleviate this pressure? Start with understanding how the present use of the property will be impacted and whether those impacts can be reduced through negotiation. Even with a partial taking, severe impacts may so disrupt present use as to change the property's highest and best use. Whenever the partial taking puts the present use under this kind of

¹ Partial takings are valued differently, for example: The only acceptable appraisal methodology is to perform a complete before and after appraisal of the entire property, not a value plus damages or strip appraisal approach. (Ala. Code § 18-1A-170(b)). Value includes the fair market value of property taken with severance damages to the remainder. (C.C.P. § 1263.320(a)). In addition to fair market value, property can be valued with an additional heritage value that compensates for real property that has been owned by same family for more than 50 years, giving property 150% of fair market value. (Mo. Rev. Stat. § 523.039; 523.001.2).

pressure, just and adequate compensation should be pursued to the full extent if the state law recognizes the impact as compensable.²

Don't let those pretty colored plans from the acquisition agent fool you. Impacts caused by a partial taking, even a "strip" take, go well beyond the actual property taken in fee or easement and are not always immediately identifiable on a two dimensional plan. A full set of plans, including right of way plans, cross-sections, driveway profiles, utility, drainage, signage and marking to name a few should all be reviewed to determine the full impact of a partial taking. The functionality of a commercial building for example changes significantly if a strip take results in a retaining wall that blocks visibility of the building or the loss of an entire row of parking along the road frontage. Even though the commercial building is not directly taken, the impacts can change a tenant's ability to continue leasing the property for its intended purpose. Some tenants may require a certain amount of parking or have certain access requirements for deliveries. If the partial taking changes these elements, the tenant may have the right to terminate its lease. Identifying these issues early on may provide an opportunity to demonstrate how devastating these impacts are to present use, warranting a change to the plans to save the building and the lease.

Finally, the severity of these impacts can increase once actual construction begins on the property. For example, it is not uncommon for the height of a retaining wall to be shown as low on a construction plan, only to grow to eight feet in the field during construction. Determining impacts from a partial take may be an ongoing issue, making it advisable to delay a final settlement until construction is completed.

Rule 2 — Consider Damage to Future Use: It's the End of the World as We Know It

*"It's the end of the world as we know it; It's the end of the world as we know it;
It's the end of the world as we know it, and I feel fine." ~ R.E.M.*

An intended future use of the property whether development, expansion or renovation can be significantly damaged or even full extinguished by a partial taking. It may prevent the property owner from expanding business operations or result in a loss of grandfathering under new zoning ordinances, leading to a change in the highest and best use of the property. Though not a separate item of compensation, such a change in future use can and should be considered in the total amount of compensation.³

² In Missouri, actual loss of access is compensable, but decrease of access, amount of traffic, and circuitry of traffic can be used as factors in determining compensation because they affect the highest and best use of the property. See State ex rel. Mo Hwy. & Transp. Comm'n v. Jim Lynch Toyota, Inc., 830 S.W.2d 481 (Mo. Ct. App. 1992). In Texas, to the extent visibility damages arise from condemnor's use of the owner's property, visibility damages can be considered. See Butler v. State, 973 S.W.2d 749 (Tex. App. 1998).

³ See K.S.A. 26-513(d).

If a partial taking prevents a future expansion, some states will allow the property taken to be valued as that future potential use, if it is reasonably adaptable.⁴ This can include physical expansion of a business on the property or an entirely new development. For example, if a tract of land is vacant on the date of taking, the proposed development plans may be considered to the extent such plans impact fair market value. However, the property cannot be appraised as if the proposed development or other potential use or rezoning were an accomplished fact.⁵

Zoning may not be used as a tool to devalue property in anticipation of condemnation, but it can be considered in calculating a higher value in the future.⁶ States vary in how potential zoning changes impact current property value. In Arizona and California, where there is a “reasonable probability” of the removal of a zoning restriction in the near future, the effect of the change on the mind of a purchaser can play a role in determining fair market value.⁷ Condemning authorities will argue that considering a property’s future use or expansion capability can be vague and speculative. Tennessee draws the line at allowing evidence of future value predicated on the owner’s undeveloped lot becoming a subdivision.⁸

Partial takings also can result in a loss of “grandfathered” status under a new zoning ordinance. For example, if the partial taking requires removal of signage that was grandfathered in under a new zoning ordinance, any new sign installed will have to meet the new zoning requirements. Losing grandfather status becomes a problem particularly in the case of businesses that use tall pole signs, as many cities are following a development trend to require shorter monument signs. Losing a legal nonconforming use can be another factor considered in determining the total amount of compensation.⁹

Rule 3 — Relocation: Should I Stay or Should I Go?

"Should I stay or should I go now? Should I stay or should I go now?"

If I go there will be trouble; and if I stay it will be double. So come on and let me know." ~ The Clash

A partial taking can rise to the level of shutting down an operating business on the subject property, forcing it to relocate to a new site. An owner’s decision to stay or go as a result of a partial taking is a difficult one, and can become a contentious issue with the

⁴ For example, see Georgia (DOT v. Kanavage, 358 S.E.2d 464 (Ga. App. 1987)); Massachusetts (Skyline Homes, Inc. v. Commonwealth, 290 N.E.2d 160 (Mass. 1972)); Oklahoma (Arkansas Louisiana Gas Co. v. Maggi, 409 P.2d 369 (Okla. 1965)); Tennessee (Alloway v. City of Nashville, 13 S.W. 123 (Tenn. 1890).

⁵ See DOT v. Pilgrim, 333 S.E.2d 866 (1985); Woodland Partners Ltd. Partnership v. DOT, 650 S.E.2d 277 (2007).

⁶ City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (Law Div. 1961) (City’s actions were illegal where one month prior to condemning but after negotiations over purchase price stalled, the City rezoned property owner’s land for parks, playgrounds and schools).

⁷ Town of Paradise Valley v. Young Financial Services, Inc., 177 Ariz. 388, 868 P.2d 971, 974 (Ct. App. Div. 1, 1993); People By and Through Dept. of Public Works v. Dunn, 46 Cal. 2d 639, 297 P.2d 964 (1956).

⁸ Barnes v. N.C. State Highway Com., 250 N.C. 378, 109 S.E.2d 219 (1959).

⁹ See K.S.A. 26-513(d).

condemning authority. Not only does a potential relocation damage the value of the dirt, it also may result in substantial impairment to the business that cannot be recovered. In those few jurisdictions that permit the separate recovery of business damages, it is not uncommon to see business damage claims many times larger than the value of the real estate alone.¹⁰ In such cases, the condemnation case becomes more of a business litigation matter rather than a real estate evaluation problem. The litigation often centers around the conflict between the total destruction of the business on the subject property vs. the cost to relocate and set up operations on a new site. If the cost to relocate and set up exceeds the value of the business, a whole host of issues can arise – (i) what if the cost to relocate exceeds the current value of the business or even the real estate? (ii) is an owner entitled to recover compensation based on the actual costs to save the business, or can the condemnor force an owner to go out of business simply because it is cheaper than paying the cost to save it? (iii) is there a constitutional right to continue operating a business?

Regardless of the ability to recover business damages as an element of compensation, the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) of 1970 provides a method for persons displaced by federal projects. All states have adopted legislation extending these policies and benefits to state and local projects that are financed in whole or in part by federal funds.¹¹ The Federal Relocation provisions provide payment for the actual reasonable expenses in moving, the direct losses of tangible personal property as a result of moving or discontinuing the business, actual reasonable expenses in searching for a replacement business, and actual reasonable expenses to reestablish business at the new site, up to \$40,000.00. 42 U.S.C. §§ 4622 (a)(1)-(4) and (c). To obtain business payments, aka “average annual net earnings”, a business must show 1) it cannot be relocated without a substantial loss of existing customers; and 2) is not part of a chain (unless somehow all of the locations are taken!).¹² These relocation expenses are recovered through a separate administrative procedure.¹³

State acts may be broader than federal law. For example, in California, the state relocation law has been applied to losses from inverse condemnation.¹⁴ In Connecticut, up to ten thousand dollars of a person’s annual net income can be claimed as a “substantial loss of patronage”.¹⁵ In all cases, the intent of the program is to compensate people actually displaced as a result of federal programs or expenditures. Eligibility for relocation expenses requires active occupancy when the taking occurs, meaning timelines for claims under the URA are important. A person who rents property after ownership has transferred to the government will not qualify as a displaced person.¹⁶ If negotiations are ongoing when a tenant begins

¹⁰ See Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966)

¹¹ See O.C.G.A. § 22-4-5; 735 ILCS 30/10-5-62

¹² 42 U.S.C. §4622(c)

¹³ See O.C.G.A. § 22-4-1

¹⁴ Beaty v. Imperial Irrigation Dist., 186 Cal. App. 3d 897, 231 Cal. Rptr. 128 (4th Dis. 1986)

¹⁵ Conn. Gen. Stat. Ann. § 8-268

¹⁶ Lewis v. Brinegar, 372 F. Supp. 424 (W.D.Mo. 1974)

occupancy, they will be eligible for compensation. Relocation expenses can be voluntarily abandoned where a lease is abandoned prior to the condemnation.¹⁷ If the business is seeking relocation, confirm the state's timing requirement for tenant compensation under eminent domain. A successful tenant claim must include an allegation that the owner disclaims any and all interests in the improvements, machinery, or equipment for which the tenant seeks recovery. A disclaimer is meant to assure there is no duplication of payments.¹⁸

It is important for owners to thoroughly weigh the financial impacts of a relocation versus any opportunity remain on the subject property. The downside to the federal Act is the cap on benefits, which are often far below the actual costs to relocate and restart operations on a new site. The prohibition on double recovery would prevent owners from seeking both administrative claim for benefits under the Act and damages or the value of the business under state laws in a condemnation case.

Rule 4 — Assist Client in Dealing With Construction: I Will Survive

*"But then I spent so many nights thinking how you did me wrong, and I grew strong.
And I learned how to get along." ~ Gloria Gaynor*

Where a partial taking allows a property owner or business owner to remain on the property during construction of the project, surviving construction can be difficult. Orange cones and the general hassle that comes with new road construction directly impact a property and the business. However the damages caused by these inconveniences are typically noncompensable.¹⁹ To help the owner survive, there are certain steps that can ease the pain of construction and also assist with future litigation. If necessary, an inverse condemnation claim can provide a legal alternative to recover for negligent construction or other unforeseen construction issues.²⁰

It may be necessary for a property owner or business owner to temporarily replace items that were taken as part of the condemnation. For instance, adequate signage and lighting are vital for businesses that rely on impulse customers. Unfortunately, partial takings frequently involve the taking of that signage and lighting. Permanent replacement of these items can be delayed several years due to long construction schedules. Owners can hang a temporary sign and install temporary lighting to minimize damage caused by the removal of the permanent items and reach out to those impulse customers. Typically, temporary signs will be subject to the jurisdiction's sign ordinance. It may be necessary to apply for a special consideration if the

¹⁷ Josh Caberet, Inc. v. Department of Transportation, 256 Ga. 749, 353 S.E.2d 346 (1987)

¹⁸ Will-Tex Plastics Mfg., Inc. v. Department of Housing and Urban Development, 346 F.Supp. 654 (E.D. Pa. 1972)

¹⁹ MARTA v. Datry, 220 S.E.2d 905 (Ga. 1975) (where damages occur only during construction of the project and cease upon completion of the project, it is error to allow evidence of such damages).

²⁰ Woodside vs. Fulton County, 155 S.E.2d 404 (Ga. 1968).

sign ordinance does not provide a temporary sign to remain for the length of time required for the construction period.

Property owners or business owners who are present on-site can be vital to monitoring the construction progress. It can be helpful in future litigation if the owner can keep a construction journal and record activity and issues that occur on the property during or after construction. The journal creates a timeline that, following the length of construction and the additional years of litigation, can be an important resource for a pending trial.

Another helpful tip to help ease the pain of construction is to provide the property owner or business owner with contact information for the condemning authority's project manager. If any construction issues arise or an emergency needs to be addressed, the owner can be in direct contact with the manager at the construction site. Maintaining a good relationship with the project manager is important, as the project manager can sometimes make minor "in the field" changes to plans that do not impact the project as a whole, but can be beneficial to the property owner or business owner.

Rule 5 — Identify and Tackle the Uncontrollable: Livin' on a Prayer

"We've gotta hold on ready or not; you live for the fight when it's all that you've got. Whoa, we're half way there, whoa, livin' on a prayer. Take my hand and we'll make it -- I swear." ~ Bon Jovi

Regardless of preparation and experience, a partial taking can present some unknown surprises that a property owner may have to address. It might just be a "livin' on a prayer" moment, but these uncontrollable factors can be identified and tackled early to at least give the property owner reasonable expectations of what type of recovery is to come.

If there is a security deed on the property, review the deed to determine if the lending institution has any authority to make decisions in the condemnation action or has the right to collect compensation ahead of the property owner. Ideally, the lender and property owner have a good relationship and can come to an agreement on how the proceeds of the condemnation are allocated. In a partial taking, if the compensation is being paid to the property owner which will keep the property operating at its present use, a lender may allow compensation to be paid to the property owner, so as not to disturb the future payments towards the note. However, if the lender has the right to step in and pursue compensation in the condemnation action, the property owner may have little say in what constitutes just and adequate compensation for the taking. In that instance, there is a risk of the lender accepting just enough to cover the cost of the note, leaving substantial damages on the table and no recovery for the owner.

A property also can be impacted by the uncontrollable in the form of claims of environmental contaminations such as soil contaminations or asbestos. These contaminations can reduce the value of the property or the future use of the property.²¹ For example, in condemnation actions involving gas stations, it is not highly unusual for an environmental report

²¹ See Silver Creek Drain Cmmn. v. Extrusions Div., Inc., 663 N.W.2d 436 (Mich. 2003).

to show contamination on the property. Condemning authorities may argue that the contamination drastically reduces the value of the property and impacts the future use of the property. The cleanup is expensive and thus, the compensation paid for the taking must be reduced accordingly, so goes the condemnor's theory. An owner should be prepared to respond with market data and support showing that properties of this nature are regularly bought and sold in the market and sales prices are not affected. Some types of contamination such as asbestos never see the light of day until the condemning authority comes and knocks down a building or impacts the property that results in the issue coming forward. It is important for an owner to know the property and be prepared to address these potential claims.