

How to Attack or Defend Comparable Sales: Condemnee's Perspective

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The Comparable Sales approach requires an appraiser to search for similar properties sold in the marketplace within a reasonable time period preceding the date of taking, and then adjusting the sales price of those comparable properties to reflect differences between the comparables and the subject property. The Comparable Sales approach is considered the preferred method of ascertaining the fair market value of the land taken by eminent domain.¹

The best comparable sales are those that are most similar to the subject property and that require the fewest adjustments to equalize them to the subject property. The more an appraiser adjusts a comparable the more unreliable the comparable data becomes². An attorney will have two key opportunities to attack or defend an expert's comparable sale: at a deposition and during cross examination. The areas of an expert's opinion to attack or defend are very similar in both a deposition and cross examination; however the technique and practice of doing so differ and relate to the purpose of the deposition or cross examination.

Preparing for Deposition and Cross-Examination

There are several things an attorney can do to prepare for the deposition or cross-examination of an expert who plans on testifying about comparable sales used for the appraisal of the subject property. First, if possible, ask for the expert's comparable sale locations in advance of the deposition. Not only will this help you prepare, but it will also allow the deposition to move more efficiently. Upon receiving the comparable sale sites, check to see if there are common sales between the condemning authority's expert and your expert. If there are common sales, do the experts have the same numbers and make the same adjustments for those sales? Note any differences the experts may have in the common sales, as this might be a place to clarify in a deposition, and attack on a cross-examination.

Before taking the expert's deposition or cross-examining the expert, the attorney should do extensive research on the comparable properties and ultimately know more about the properties than the expert does. The attorney should pull tax parcel information, deed records, and pictures/aerials of the property. After researching the comparables, identify the ways in which the comparable sales can be attacked:

¹ 60 Am. Jur. Trials 447 (Originally published in 1996).

² See 9 Nichols on Eminent Domain § G31.05[2][a]

- Is the comparable property in the same location or market area as the subject property?
- Is the comparable property vacant or developed land?
 - o If the comparable property was developed, how similar are the improvements to the subject property?
 - o If the comparable property was developed, were the improvements maintained or demolished after the sale?
 - o What was the cost of the demolition and was that amount deducted from the sales price?
- Does the deed for the sale exclude any of the improvements on the comparable?
 - o Does the deed include any other restrictions on the property?
- Was the comparable property purchased or leased?
- Does the comparable property share similar physical characteristics of the subject property, such as access, size, shape, topography?
 - o Does the comparable property contain similar infrastructure, i.e. utilities, driveways, curbing, paving?
- Does the comparable property have any environmental concerns or issues that were considered as part of the sale?
- How do the street frontage and road grades compare between the comparable property and the subject property?
- Is the comparable property's date of sale close to the date of taking?
- Is the comparable property in a similarly situated zoning/use area as the subject property?
- Is the comparable property similarly situated within the same competitive market?
- Was the comparable sale a willing seller/willing buyer?

- Or was the comparable sale the result of a foreclosure or a bankruptcy?
- Was the comparable sale included in an assemblage of sites for a new or different future development?
- If a business is operated on the subject property, is the comparable property suitable for operation of the same business?

Likewise, the comparable properties can be defended by identifying ways the properties are similar to the subject property. Take the list above and flip the questions to the positive:

- Is the comparable property in the same market area/location as the subject property?
- Does the comparable property have a similar use as the subject property? (i.e. both properties are gas stations)
- Does it share the same characteristics as the subject property of size, shape, topography, access, zoning, traffic counts?
- Do the comparable property and the subject property have similar infrastructure?

Deposing an Expert on Comparable Sales

When taking the deposition of an expert, it is important to ask broad based questions to get a general sense of how much the expert appraiser knows about the comparable sale and about the subject property. A deposition is not the time to directly attack the expert's opinion. That attack should be saved for cross examination. Instead, in a deposition, the attorney should get answers to why the expert used certain comparable sales for his or her appraisal and how the adjustments were made on the record. If the proper research is done on the comparable sales, the attorney can and should assume that the appraiser does not know the properties as well as the attorney.

Review of the appraiser's file is critical to understanding the basis for selection of certain sites, rejection of others, and adjustments made. Thus, you should serve in advance a notice of deposition and request for the appraiser to bring his or her file to the deposition. During the deposition, focus on questions designed to elicit just how much due diligence was done by the appraiser to understand the comparables and the subject property. For example, did the appraiser review and compare traffic counts? Did he talk to the seller or buyer for any of his sales? Did he pull the sales specifically for this appraisal of this subject property? Or did he pull from an existing database of sales used for other appraisals? Did he inspect the subject property or the comparable sales? Who else worked on the appraisal with him? Did someone else pull the information?

Cross Examination of an Expert on Comparable Sales

Having prepared for the deposition, cross examination and knowing how to attack an expert's comparable sales, it may be hard for an attorney to keep from getting involved in a battle of the wits with an expert. However, battling an expert on his or her specialty rarely works in an attorney's favor. Instead, during cross examination, an attorney should carefully create questions and doubt about the appraiser's opinions in the minds of the jurors. These can be created by asking questions from the list above that distinguish the comparable sale from the subject property. Though it would be convenient for the expert to agree that these distinctions make a difference and would no longer consider the property a comparable sale, an attorney should not assume that the expert will give in so easily. The appraiser will fight tooth and nail to maintain his or her credibility and opinions. He may also seek to educate the jury given the opportunity to expand on those opinions. Instead, the attorney should ask the limited yes or no questions that create cracks in the credibility of both the appraisal and the appraiser and limit as much as possible the appraiser's explanations. Later, during closing argument, the attorney can draw the questions and doubts together for the jury, discrediting the expert witness.

For example, on cross examination, ask the expert to confirm that he adjusted comparable sale #1 by 15%, no more no less and that such adjustment was based on his experience or judgment. In closing, show the jury how arbitrary the 15% adjustment is -- why wasn't it 20% or 50% or 3%? Does that random 15% make the comparable identical to the subject? The fact that the appraiser had to make adjustments to all or most of his sales show either that he didn't do a very good job in finding comparable sales or that the subject property truly is unique or valuable.

As a good practice point, it is important to have a partner, associate, or client at counsel's table taking notes during the cross examination so that the questions and doubts are not forgotten and can be incorporated into the closing argument.

An attorney can also attack or defend an expert's comparable sales by addressing the expert's credentials, educational background, and experience. All of these things can serve as easy tools to either help discredit and attack an expert's opinion or bolster and defend an expert's opinion. Note that when choosing an expert to testify as a witness, it is important to keep the expert's credentials, educational background, and experience in mind so that the expert's opinion can only be bolstered and defended. For example, if your appraiser is has an MAI and the opposing counsel's appraiser does not, establish that absence on cross examination. Then on direct examination of your appraiser, establish why the MAI designation is so prestigious, makes an appraiser more credible, etc. If the court is located in a small jurisdiction, have your appraiser confirm the total number of appraisers versus the total number who are MAI appraisers. This will further bolster that designation as the true expert.

Along with questioning the comparable sales and credentials, the attorney should question the expert's potential bias. How often does the appraiser work for the other side? Has

he ever testified for the other side? Condemning authorities frequently hire the same expert for several parcels in the same project. If the expert used some or all of the same comparable sales for each parcel, the expert's opinion can be weakened and show a bias in favor of the condemning authority. In a closing, the attorney can argue that the expert's comparable sales are not comparable to the subject property since they have been applied to all types of different parcels on the same project.

Once the appraiser leaves the stand, his credibility and his opinions remain open to further attack through other witnesses. Employ your client representative or witness to establish just how incomparable the subject property truly is to the appraiser's comparable sales. This is especially useful if the appraiser does not have knowledge of practical details, such as traffic counts in front of the subject, topography, or the importance of certain elements on the property, such as being located at a lighted intersection. Introduce photographs to help show the substantial differences. Jurors love demonstrative exhibits and things they can see directly rather than visualizing in their heads.