

Preparation for an Order of Taking: Condemnee Viewpoint

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Introduction

Pursuant to a state's particular statute, a condemnor may obtain title to, and possession of, the subject property by filing a declaration of taking and depositing the estimated value of the property. By allowing the Condemnor to immediately take possession of the property before a final judgment is entered on the compensation award, public projects are expedited and the property owner's rights to just and adequate compensation are still preserved. *Department of Conservation v. Jones*, 389 N.E.2d 1197 (Ill. 1979); *State Department of Transportation v. Stumpf*, 519 So.2d 279 (La. Ct. App. 1988).

Typically during the acquisition time period, the condemning authority will attempt to negotiate directly with the property owners to avoid formal condemnation procedure, including litigation.¹ The time period before the condemnation is filed is a critical time to receive important information about the property and project. By following the steps listed below, an attorney can better understand the client's issues in a particular matter and advise the client whether settling with the condemning authority is appropriate, and therefore ending the case before an order of taking is filed; or advising the client to proceed with the condemnation process.

Making Client Contact and Understanding The Case

Before a declaration of taking is filed, it is important to speak to the client and examine all of the documents that the condemning authority may have provided to the client. Typically a condemning authority will provide right of way or construction plans, cost to cure plan, and an offer letter. The right of way or construction plans can change, but the initial plans can give the attorney a good indication of what potential damages may occur to the property and business. The condemning authority may include a cost to cure or mitigation plan when a business is involved in the taking and will be directly affected. This kind of plan demonstrates engineering changes that can be made to the property to "cure" or reduce the impact to the remainder property caused by the taking. It is important to go through the items listed in the cost to cure and the plan with the client, as it is not uncommon that items listed and the cost assigned to each are not realistic and the plan is not practical. Finally, the offer letter listing the condemning

¹ In Georgia, the Landowner's Bill of Rights and Private Property Protection Act requires a condemning authority to make every reasonable effort to acquire property by negotiation, similar to the practices set forth in the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

authority's final value for the subject property is a quick indicator of whether settlement will be possible.

In short, upon first receiving the case, it is important to check off the following:

Interview client

- Concerns
- Desired results
- Fee arrangement: are attorney's fees recoverable in your jurisdiction?

Examine documents provided by condemning authority, or at the very least request the following:

- Right of Way or Construction Plans
 - What are the potential damages to the property and the business if one exists on site?
 - Fee taking, easement, consequential damages/benefit?
- Cost to Cure Report
 - What damages if any can be cured?
 - What other issues raised by the plans need to be addressed in the mitigation plan?
- Offer Letter from Condemnor
- Relocation benefits

Check history and background of property

- Legal rights and deeds
- Tax assessments and tax bills
- Current zoning
- Lease Agreement/tenants and leasehold issues
- Security deeds/lenders
- Easement holders
- Any operating agreement for the business, i.e. fuel delivery, franchise, etc.

Client Standing

Depending on the jurisdiction, several parties may have legal standing in a condemnation action. In Georgia, for example, all persons who own an interest in the property to be acquired are proper parties to a condemnation action, including the fee owner, lessees, and holders of any security interests. O.C.G.A. §22-2-20. A condemnor cannot take clear title to the subject property until all parties claiming an interest have been named. In Georgia, all interested parties have the

right to appeal the condemnor's valuation of just and adequate compensation and can request separate verdicts. *DOT v. Olshan*, 237 Ga. 213, 227 S.E.2d 349 (1976).²

Before an order of taking is entered, an attorney should be familiar with the client's standing and the standing of the other interested parties, as this will ultimately affect how the compensation is distributed. It also may reveal rights and obligations of other parties in a formal litigation, such as a lender's right to participate in or even assume control of the case and resolve it for the value of the note.

Fee Simple Interest

A fee simple interest standing alone is generally the simplest interest to recover in a condemnation action. As the fee simple owner of the subject property, the client is entitled to the full amount of just and adequate compensation, unless another party claims a valid interest by operation of law or by contract.

Leasehold Interest

Although leasehold interests are treated differently depending on the jurisdiction, a leasehold interest is recognized claim that can be recovered. In Georgia, a lessee is entitled to recover the value of the lease, including any options to renew that are exercised timely after the date of taking. *Ellis v. DOT*, 175 Ga. App. 123, 333 S.E.2d 6 (1985). A leasehold claim does not exist if the landlord terminates the lease before the condemnation, or the lessee abandons the property prior to the date of taking due to the pending condemnation. *Norris v. Downtown LaGrange Development Authority*, 151 Ga. App. 343, 259 S.E.2d 729 (1979); *Josh Cabaret, Inc. v. DOT*, 256 Ga. 749, 353 S.E.2d 346 (1987). In West Virginia, a tenant has a right to the a reduction in rent consistent with the taking and is entitled to a leasehold value if the lease value still exceeds the value of the reduction in rent. W. Va. Code § 37-6-29. In Colorado, leasehold interests are not valued separately, but a lessee may make a claim in the apportionment hearing after the valuation trial. Similarly, in Mississippi, a leasehold interest is only recoverable after the value of the property as a whole is determined. *Lenep v. Mississippi State Highway Commission*, 347 So.2d 341 (Miss. 1977).

When examining leasehold interests, the attorney should carefully read the language of the lease agreement. Some states allow the leasehold interest to be waived in the lease, therefore leaving the tenant with no claim to the condemnation funds.³

² Alabama, Colorado, Florida, Indiana, Missouri, South Carolina, Texas, Virginia, and Washington, among others, follow some general form of the Undivided Fee/Single Unit Rule requiring the fact finder to determine market value of the entire property as though it belongs to one person. Then, the market value is apportioned between the lessee and owner of the fee. Compare to Nebraska, which requires a separate award be given for each owner of an interest.

³ Georgia, *McGregor v. Board of Regents of the University of Georgia*, 249 Ga. App. 612, 548 S.E.2d 116 (2001); Minnesota, *Metro. Airports Commission v. Noble*, 763 N.W.2d 639 (Minn. 2009);

Client has both fee simple and leasehold interest

In some jurisdictions, if the taking is not a total take and the same party owns the fee simple interest and leasehold interest, the party may not recover for business loss damages. In a partial taking condemnation case, when the business belongs to the landowner, total destruction of business at the location must be proven before business losses may be recovered as separate element of compensation. On the other hand, when the business belongs to separate lessee, the lessee may recover for business losses as an element of compensation separate from value of land whether destruction of his business is total or merely partial, provided only that loss is not remote or speculative. In either event, the business losses are recoverable as a separate item only if property is “unique.” *DOT v. Dixie Hwy. Bottle Shop, Inc.*, 245 Ga. 314, 265 S.E.2d 10 (1980).

Therefore, when evaluating a client’s claims, the attorney may need to suggest separating the fee simple interest and leasehold interest, to allow recovery for both.

Holder of a secured interest

The holder of a mortgage, deed to secure debt, lien, or other secured interest is typically necessary parties to a condemnation action before clear title can be acquired. Depending on the damage to the property and the financial standing of the properties involved, holders with a secured interest can take priority in claiming all just and adequate compensation received for a taking in order to pay down or pay off the existing note in full. A lender also may have rights to control or participate in the litigation.

Holder of an easement

The holder of an easement typically has a property interest for which the holder is entitled to compensation. Georgia recognizes the rights of the holder of an easement, and the easement may be condemned separately or simply added to the value of the property acquired. *Lee v. City of Atlanta*, 236 Ga. 396, 223 S.E.2d 819 (1976); *City of Atlanta v. Gore*, 47 Ga. App. 70, 179 S.E. 776 (1933); *Cincinnati & Georgia R.R. v. Mims*, 71 Ga. 240 (1883). In Colorado, permanent easements are valued as a percentage of the fee and temporary easements are valued on the reasonable rental value during the time of condemnor’s use. *State Department of Highways v. Wooley*, 696 P.2d 828 (Colo. App. 1984).

Finally, in condemnation cases, it is not unusual to represent several different parcel owners and business owners. After interests are determined, it is important for the attorney to determine whether there would be any conflict of interest in representing several parties in a single condemnation project.

Evaluate any Business Damage Claim

Before an order of taking is filed, it is important for the attorney to determine what if any business damages are permitted in the jurisdiction, and evaluate the type of damage that might

result from the condemnation project. Only a handful of states permit the recovery of business damages by statute, including Florida, Georgia, Pennsylvania, New York and Vermont. Some jurisdictions allow evidence of business damages to show compensation owed for damage to the real estate.

Business damages can be difficult to determine before project construction has been completed. However, collecting financial information from the client to begin tracking the effect of the project on the business is beneficial.

Preparation Steps

There are several other ways an attorney should prepare before an order of taking is filed to better understand a client's potential damages.

Request Full Size Plans

Full size Right of Way plans, drive way profiles, and cross sections can show:

- Road grade changes
- Access issues (medians, driveway slopes and grades)
- Visibility issues (barriers, retaining walls)
- Drainage issues
- Utilities affected
- Signs affected
- Parking issues
- Other affects on property/business

Visit the Property

Visiting the property gives the attorney a chance to examine the property first hand. Though photographs, aerials and full size plans are beneficial, a physical inspection of the property can make an attorney aware of issues that would be hard to see in a photograph or plan. When visiting the property, the following should be noted:

- Sewer/Utilities
- Signage/Lighting
- Grade change effect

Parking spaces/Maneuverability of parking lot

Accessibility

Visibility

Check Zoning Requirements

The existing zoning classification of the subject property is pertinent to an assessment of its fair market value because the available uses of the property are limited by the owner's ability to accomplish such uses under the zoning ordinance. *DOT v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980). A property owner is typically not limited to recover for the subject property's current use. In fact, when the proposed use is the property's highest and best use but zoning ordinances limit that use, the Condemnee can show the probability of a zoning change and how it will impact the market value.

New zoning ordinances may affect what may be built on the property after the taking. Once a taking requires a sign to be removed from the right of way or easement area acquired, the business may lose the right to reinstall the sign at the same height, location and size, potentially affecting the business' visibility to passing traffic. An existing business sign may be grandfathered in under a new more restrictive zoning ordinance that is passed during the condemnation.

Internet Searches

There are several sources online that can help an attorney prepare for a taking and give the attorney a better understanding of the property involved. For example, through the county tax assessor's website, an attorney can find the tax plat which gives important legal information and shows the shape of the property. Google Maps and Google Earth are beneficial for researching the surrounding area of the property, especially if the property is not located close by. Google Earth can also show past aerial shots showing how the area developed over time.

Consult with Experts

In order to determine an amount to compensate your client for the taking of the property, it is often necessary to consult and/or hire an expert. Though getting an actual appraisal completed before the order of taking is filed is unlikely, consulting with an expert on the basic damages to the property and business can still give you a sense of the amount of money that might be involved. Possible experts to consult:

Engineer

Real Estate Appraiser

Business Valuation Expert

Though consulting experts typically do not have to be disclosed during the discovery process, it is important to choose the right expert for a particular case. It is important to look at their educational background, past experience with the particular type of project, their familiarity with the location, and experience as a trial witness.