

The Five “C”s of a Condemnation Case Prior to the Filing of A Declaration of Taking

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Whether you are jumping into a condemnation case for the first time or you have been swimming deep in condemnation cases for the last 30 years, it is easy to become swallowed up by the nuances of the law and forget the basic principles that should be established before a condemnation case ever darkens the courthouse door. Thankful for any mnemonic device, and reaching back to bar review study days, we have found that there are really only five C's that one must remember before a condemnation case is filed or moves forward. If you can check off the following five C's, you should be confident in moving forward with the condemnation matter.

To save you the hassle of flipping to the end of the article (though we do recommend reading to the end!), the C's are as follows: Contact, Check, Calculate, Classify, and Consult.

1. Contact Client and Condemning Authority

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. Interview the client to determine what the client's concerns and desired results are. The client, whether they are the land owner, business owner, or both, will typically know the property better than anyone else and know what impacts a condemnation might potentially have on the property. During the initial client contact it is also important to discuss your fee arrangement and explain to the client whether those fees are recoverable in your jurisdiction.

Typically, if you are having contact with a client, the condemning authority has already made initial contact with that client. Condemning authorities will usually provide a right of way or construction plan, cost to cure plan, and an offer letter. These three documents can give an attorney a good indication of what potential damages may occur to the property and business.

2. Check History

As an attorney, it is important to do your own due diligence on the property before the filing of a declaration of taking. Check the history and background of the property in order to determine client standing and how the proceeds of the case may be divided. Important questions to ask:

- Who is the land deeded to?
- Who has the legal rights to the land and/or business?
- What is the tax assessment and tax bill history of the property?
- What is the current zoning?
- Are there tenants with lease agreements granting leasehold interest rights?
- Are there any lenders with security deeds who might have a claim to the proceeds?

- Are there neighboring property owners with easement rights?
- Are there operating agreements for a business?

By answering these questions you can determine who has the fee simple interest, leasehold interest (if any) and who the holder of a secured interest or easement may be (if any). Once this is determined, you should inform your client of how these interests could affect the proceeds in the case. It is important to manage client expectations from the very beginning.

3. Calculate Damages

It is never too early in a condemnation to begin calculating damages and assessing claims. The first step in calculating is to determine the physical impacts to the property and understand the property both before and after the taking. An attorney should review the full size right of way plans, drive way profiles and cross sections to determine impacts to grade, access, visibility, drainage, signs, buildings and other improvements and parking. In addition, an attorney should visit the property and examine the property first hand as well as research the surrounding market area to gain a complete understanding of the property.

The impact on a business from the project, and therefore the business damages claim, may be more difficult to calculate early, however it is important to collect information from the beginning of the project. The client should collect financial information to begin tracking the effect of the project on the business in order to determine the impact the taking has on the business. Many jurisdictions do not permit business damages, so double check that business damages are recoverable in your state or at least constitute support for real estate damages.

4. Classify Zoning Issues

It is imperative for an attorney to be aware of the existing zoning classification of the property and how any new or future zoning may affect the property post-condemnation. Oftentimes, a taking may seem minor, but can prove detrimental to the property and business due to a recent zoning change and a resulting loss of grandfathering on the property. For example, if a commercial property has a large 40-foot pole sign that has to be removed due to the taking and zoning has changed to only allow brick monument signs, the commercial property has suffered a significant loss in losing the ability to maintain its 40-foot pole sign.

5. Consult the Experts

In order to make a specific determination of compensation for your client, it likely will be necessary to consult and/or hire an expert—engineer, real estate appraiser, and business valuation expert. If obtaining an appraisal before a condemnation case is not feasible, consulting with an expert on basic damages to the property and business can be beneficial in negotiations with the condemning authority to understand the potential of compensation at stake. Typically, consulting experts and their opinions are not discoverable. However, it is important to choose a consulting expert that has the requisite education, experience, familiarity with the market area, and experience as a trial witness.