

CONDEMNATION DAMAGES: A PROPERTY OWNER'S CONSTITUTIONAL RIGHT TO JUST COMPENSATION

by Rob Stefonowicz*

Minnesota's fifth unofficial season – road construction season – will soon be underway and you may be one of the many property owners who received notice from the state, county, city or another governmental agency that one of their impending projects is going to affect your property. Perhaps it is the widening of a roadway from two to four lanes, the removal and replacement of the highway interchange that provides access to your business, the construction of a light rail line, or some other public project that requires the taking of all or a portion of your property. The government is exercising its power as the sovereignty to condemn or take private property for a public purpose through the use of eminent domain.

The government's power to condemn land is not, however, an unlimited one. The United States Constitution (Fifth Amendment) and Minnesota Constitution (Art. I, § 13) require that the property taken by the government be necessary for a public use and that just compensation be paid to the property owner. What is just compensation? Just compensation is that sum of money necessary to fully compensate the property owner for all of the losses resulting from the taking. Just compensation is not only the fair market value of the property that is physically taken by the government, but it also includes the consequential damages to the remaining property (if the government is taking only part of your land), often called "severance dam-



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ages."

While the government is required to make a "good faith attempt" to negotiate with the property owner and is required to obtain and provide at least one appraisal to the owner prior to commencing a condemnation action, the government's opinion of just compensation may not take into consideration all of the impacts and damages resulting from the taking. Ultimately, if the government and the property owner cannot agree on the amount of just compensation due as a result of the taking, the court will appoint a panel of three condemnation commissioners (typically consisting of a mix of real estate professionals, appraisers and attorneys) to evaluate the evidence and determine just compensation. If dissatisfied with the commissioners' award, either party has

the right to appeal to the district court and have a jury determine the amount of just compensation due.

Depending on the nature and extent of the taking, the determination of just compensation may require the consideration of several and varying principles and laws. Below is a sampling of the principles and laws that may be employed in determining just compensation in a condemnation matter.

Valuation Methods.

The measure of damages or just compensation in a condemnation matter is the difference in the fair market value of the property before the taking and the fair market value after the taking (commonly referred to as the "before and after rule"). In determining the difference in fair market value, an appraiser will use one or more of the four appraisal valuation methods or approaches recognized by Minnesota courts, which include (a) the market approach – comparing the values of similarly-situated properties to the subject property; (b) the income approach – using a cash flow analysis from an income-producing property to estimate its fair market value; (c) the cost approach – estimating the value of the property based on its cost to construct; and (d) development cost approach – estimating the value of a development property based on the costs of development and the likely proceeds from its sale.

Highest and Best Use.

The land taken by the government must be assigned a fair market value at its "highest and best" use, which may or may not be current use of the property.

Highest and best use is an appraisal concept defined as the most profitable use which is legally permissible, physically possible, financially feasible and maximally productive.

Severance Damages in Partial Takings.

The government has to the power to take all or only a portion of private property in a condemnation action, depending on the needs of the public project. Often times the government fails to identify all of the impacts of the taking. When the government effects a partial taking of land, the property owner is entitled to be compensated not only for fair market value of the land actually taken, but also for the resulting damages – “severance damages” – to the remaining land not taken. Severance or consequential damages to the remaining property, which diminish the property’s fair market value, may include such items as (a) loss of access – a property owner is entitled to reasonably convenient and suitable access to a main roadway; (b) construction interference – the construction project itself may interfere with the use and enjoyment of the property, and, even if the interference is temporary, it is compensable under Minnesota law; (c) loss visibility – the remaining property may not have adequate visibility in its after condition following the taking; and (d) nonconforming use – the property in its after condition may no longer conform with local zoning ordinances and regulations.

Loss of Going Concern.

If a business is “destroyed” as a result of a taking, the property owner may be entitled to “loss of going concern” damages (Minn. Stat. § 117.186) unless the government establishes that the loss was not caused by the taking, the loss was avoidable by relocating the business, or the award will be duplicative of other compensation awarded in the taking.

Minimum Compensation.

Minnesota law (Minn. Stat. § 117.187) provides that when the property owner must relocate as a result of a government taking, the property owner is entitled to damages, at a minimum, sufficient for the owner to purchase a comparable property in the community.

Relocation Benefits.

Under federal law, incorporated into state law (Minn. Stat. ¶ 117.52), a property owner who is forced to move is entitled to relocation benefits – essentially moving costs.

Attorneys’ Fees.

Minnesota law now provides that the court must award attorney’s fees to the property owner if the final award of compensation is 40 percent greater than the government’s last written offer before commencement of the condemnation action. The court may award attorney’s fees if the final award of compensation is at least 20 percent, but less than 40 percent, greater than the final written offer. The purpose of this law is to create a greater incentive to the government to make good faith offers of just compensation to property owners.

Conclusion

A property owner’s right to just compensation in a condemnation action may, depending on the circumstances of the taking, be a relatively straight-forward process or it may require consideration of any number of factors. A property owner must be mindful that the government’s analysis of just compensation may not have considered all of the impacts and damages resulting from the exercise of its power of eminent domain. Consulting legal counsel when you receive a damages offer from the government can help a property owner determine whether all aspects of just compensation have been accounted for in the government’s offer.

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