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Eminent Domain: Condemnor's Initial Due Diligence Before Condemnation

by Practical Law Government Practice

Status: **Maintained** | Jurisdiction: **United States**

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A Practice Note for government attorneys assembling and working with the professional team that conducts due diligence for property acquisition for a public works project before a condemnor first files eminent domain proceedings. This Note discusses choosing property interests, analyzing the parcel through surveys, assessing environmental conditions, researching title, and valuing the needed property interest before offering to purchase the interest or proceeding to eminent domain administrative proceedings and possibly to judicial trials and appeals.

Eminent domain proceedings taking property from landowners are often necessary to complete important public projects. The eminent domain process for a public works project can be difficult and costly. If the condemnor does not take the appropriate steps before filing an eminent domain proceeding, this might cause unnecessary litigation or drive up the purchase price and professional expert costs. This Note discusses a thorough due diligence process for condemnors that if followed avoids missing any key steps in the process.

Preliminary Eminent Domain Considerations

The condemnor should first:

- Decide if the condemnor has the authority to use eminent domain.
- Consider whether other alternatives to eminent domain are desirable, such as economic development incentives.
- Study the cost and political realities while planning the project and its best route and timing.

For more information on these steps, see:

- Practice Note, Eminent Domain: Preliminary Considerations for Local Government.
- Eminent Domain: Initial Planning Checklist.

After these considerations, a condemnor will seek the most efficient means of property acquisition for the public works project. Counsel should suggest settling with most property owners before a judicial trial. The condemnor should suggest a reasonable price within the acquisition budget to reduce antagonism and keep long, drawn-out actions at a minimum.

The condemnor should make reasonable and diligent efforts to acquire property by negotiation. Before negotiation, the condemnor must obtain an appraisal of the property's value and typically must provide the appraisal to the property owner (see Appraisals). The appraisal is the basis of the condemnor's legally required offer as it initiates negotiations with the owner. The condemnor should conduct good faith negotiations based on an offer clearly related to the appraisal's findings.

Before hiring a value professional and making this offer, a condemnor must:

- Determine the necessary property right for each parcel it will acquire (see Determining the Appropriate Property Rights for the Project).
- Survey the parcel and review the results (see Surveys).
- Conduct a Phase 1 environmental assessment and follow-up studies if needed (see Environmental Assessments and Other Studies).
- Determine the owners of the parcel (see Title Issues).

For a related checklist of these steps, see Eminent Domain: Due Diligence Checklist.

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Determining the Appropriate Property Rights for the Project

Counsel for the condemning authority must ensure the correct property interests are included in a project before hiring the real estate professional team needed for the anticipated filing of an eminent domain action. These interests can take the form of:

- **A fee simple estate.** Some condemnors seek absolute certainty in ownership and prefer this route. Sometimes, property owners may prefer deeding over property over which they will have few rights of use to granting an easement, such as in a road project. However, this choice of a fee simple option may cause:
  - higher prices for the purchased interests not easily justifiable to taxpayers;
  - greater resistance from the property owner to giving up fee interest where some use remains after the taking; and
  - taking property off the tax rolls and losing this income.
- **An easement.** This interest costs less than fee ownership and has the added benefit of keeping the parcel on the tax rolls. This interest usually suffices for the needs for both the pavement and shoulder areas on road projects and the line or ditch areas on utility projects. However, the parcel needs to be wide enough for fences and walls. This interest can cover a variety of needs beyond those normally required for road or utility projects, such as:
  - temporary access to the remainder parcel for construction of the project that prevents accidental liability or takings claims;
  - permanent grading changes to the remainder to support the new road;
  - drainage channels, gutters, and collection basins for the extra runoff from additional impermeable surfaces;
  - sidewalks and hike-bike paths to add safety and recreational resources; and
  - non-exclusive access for maintenance, where access by others is restricted during maintenance work.

  For more information on easements, see Practice Note, Easement Fundamentals.
- **An environmental buffer.** Buffers can restrict use of adjacent parcels or the remainder of the purchased parcel. They ban uses such as residential housing, excessive noise, or nuisance activities. They often are created by deed restrictions.
- **Access restrictions.** Adjoining property owners might be unsafe directly accessing a new heavily travelled road. Instead, a collector or residential street can serve as their less direct but safer access route.
- **Water use and riparian rights.** Water from a stream or lake might assist road maintenance and drainage or utility line maintenance.

Surveys

For each parcel or property right in the public works project, obtaining a survey is the first step in due diligence by professionals, possibly at the same time as ordering title information. Condemnors must hire survey professionals or direct their own surveying crew to describe the properties and interests that the condemnor must acquire for the project. Each survey consists of a legal description with field notes using metes and bounds or subdivision descriptions and a map or plat. The survey must also accurately describe the interest needed for acquisition (see Determine the Appropriate Property Rights for the Project). This information is crucial as the survey may be attached, depending on jurisdiction, as an exhibit to:

- The governing body's condemnation resolution.
- The initial offer letter. For a sample offer letter, see Standard Document, Eminent Domain Offer of Purchase Letter for Public Works Project.
- The condemnation petition.

Selection of Surveyor

If the condemnor hires a professional surveyor, the selection process should ensure they have experience with:

- Work under the stressful conditions of an eminent domain project.
- Use of clear language, free of ancient jargon, in the survey and, if necessary, administrative and judicial proceeedings.
- Teamwork with other professionals such as the attorney, the project engineer, environmental consultants, and the appraiser.

Counsel should work with the surveyor, making sure they have necessary documents such as title information. The attorney should ensure that the survey work is limited in scope to the parcels and interests needed for the project.

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Initial Entry

The first step for employees or contracted agents of the condemnor to produce a property survey for the project is to access the property itself for measurements, pictures, and inspection. This is often a daunting task when the property owner is hostile before the condemnation process commences.

Right to Entry Granted by Statute

Many state statutes authorize condemnors to enter on land to conduct preliminary surveys and related studies before proceedings to acquire the property begin (for example, see N.J.S.A. 20:3-16). Courts have usually upheld these statutes (for example, see *I.P. Farms v. Exxon Pipeline Co.*, 646 S.W.2d 544, 545 (Tex. Ct. App. 1982)). These statutes allow physical, non-invasive examination that does not impair the owner's rights to the use and enjoyment of the property, while permitting a condemnor's agents to enter onto land sought under the power of eminent domain without incurring damages except those that are incidental.

In addition to or instead of a statute, a municipality may be granted eminent domain authority and related preliminary entry power by the state constitution or its local charter. A legislature cannot, however, constitutionally authorize an entry that amounts to an uncompensated taking or damaging of private property.

A resolution by the municipal governing body stating a public purpose for any eminent domain action to carry out the pertinent public works project and take the parcel is usually a prerequisite to a right of entry to a particular parcel.

Minority of Jurisdictions Consider Any Non-Permissive Entry Is a Taking

Some states' courts hold that entering on land to perform activities in preparation for condemnation is a taking, even where the use of the land is slight and for a relatively short period of time, if the use is inconsistent with the landowners' right to control and enjoy the property in fee simple absolute (see *Cty. of San Luis Obispo v. Ranchita Cattle Co.*, 16 Cal. App. 3d 383, 388 (1971)).

Uniform Law Commissioners' Model Eminent Domain Code

Under the Uniform Law Commissioners' Model Eminent Domain Code, a condemnor's hired agents and employees may enter on real property to produce surveys and photographs. The Code also allows examinations, tests, soundings, borings, and samplings (see Environmental Assessments and Other Studies).

These activities must further the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use. However, the Uniform Law has not been fully adopted in most states, and counsel should carefully review their own relevant statutes and case law.

Procedures for Entry

Counsel should take an active role in assembling the professional team before the condemnors' agents' initial entry onto the needed parcel, after the decision that the project should proceed and the choice of the project's route and property interests. Crucial procedures include:

- Preceding entry by reasonable efforts to notify the owner or occupier of the property. For example of a letter requesting entry for surveying, see Standard Document, Eminent Domain Property Access Request Letter for Public Works Project. For a sample right of entry, see Standard Document, Eminent Domain Property Temporary Right of Entry Agreement for Government Project.
- Undertaking entry during reasonable daylight hours.
- Being peaceful and avoiding inflicting substantial injury.
- Not violating any other statute.

The condemnor may apply for a court order permitting entry if reasonable efforts to accomplish a lawful entry or to perform authorized activities on the property have been obstructed, denied, or would be futile (see, for example, *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-inch Gas Transmission Line*, 2018 WL 1004745 (D. W. Va. Feb. 21, 2018)). These orders should include a provision for a deposit by the condemnor of probable compensation for any damages for injury or interference. The condemnor is probably liable for physical injury to, and for substantial interference with possession or use of, property caused by its entry and activities on the property.

Condemnors should use or hire an agent to contact property owners, before the survey is conducted, who has personal ties to the community or has good interpersonal skills. Agents with these characteristics may often obtain a right of entry for no fee or a minimal fee. However, counsel should instruct the agents, in their documented communications to property owners, to detail every possible reason the condemnor may have to conduct studies on the property, although the fee may increase or the owner may refuse. The right of entry might contain additional terms including notifications requirements to the owner.

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Contents of Survey

The attorney or other agent conducting a thorough survey review may want to consult the revised Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys. In particular, the reviewer should confirm that:

- The survey matches the subdivision or, usually, metes and bounds property specifics. Moreover, the boundary lines must close. The legal description closes if the point of beginning (sometimes called the point of commencement) on the survey connects with the last metes and bounds description in the legal description. Additionally, each boundary line around the perimeter of the property should connect to the next boundary line. The survey shows adjoining parcels with no gaps and identifies owners of adjacent parcels when possible.
- The survey has no undedicated roads. These may create a third-party claim of access across the property that the condemnor must acquire.
- The survey identifies physical encroachments not contained in the title report (see Title Issues). Any fences located on the property should belong to the property owner. Fences on the property can be evidence of:
  - adverse third-party claims;
  - boundary line issues; or
  - a third-party agreement that is not of record.
- The survey contains description details including:
  - the vesting deed with recording information;
  - the street address, the tax block, and the lot identification number, if available;
  - bearings with the north arrow clearly identified;
  - a vicinity map showing the surrounding area;
  - a ratio scale;
  - the property's acreage;
  - flood zone information;
  - a legend showing the symbols and abbreviations the surveyor uses in the survey; and
  - a surveyor's notes section, which counsel should review for any unusual conditions on the property or any unauthorized uses of the property. For example, there may be an agricultural lease that affects a portion of the property that has no recorded memorandum of lease.
- The surveyor's certification is stamped and contains representations and warranties (for additional detail, see Practice Note, Title Insurance and Surveys in Real Estate Transactions: Surveyor's Certificate).
- The survey is dated, signed, and sealed, if required.
- The survey contains relevant zoning information, including:
  - square footage and types of buildings located on the real property;
  - height of buildings; and
  - clearly plotted zoning setback requirements.
- The survey includes utility locations, including sanitary sewer, water, gas, electric, storm sewer, phone, cable, and internet.
- The survey notes off-site utilities without proper easement agreements.
- The survey notes any historical sites, archeological sites, cemeteries, or wetlands, as they might severely affect the public works project.

For more information on reading a survey connected with a subdivision plat, see Practice Note, Understanding a Residential Subdivision Plat: Basics.

Environmental Assessments and Other Studies

One of the most important steps before starting condemnation of a parcel or interest is to investigate potential environmental contamination. Condemnor liability and project slowdown are both possibilities with contaminated parcels. Dry cleaners, factories using strychnine, and older buildings with lead and asbestos are examples of places to avoid unless absolutely necessary and with the available help of environmental agencies and resources.

Phase 1 Environmental Assessment

The condemnor should usually use or hire, especially if required by federal or state law or if suggested by the project engineers, an environmental consultant to produce a Phase I Environmental Site Assessment Report (Phase I Report). Case law allowing surveyors' initial entry to the property also usually allows the condemnor's environmental consultant legal access to conduct non-invasive research to complete a Phase I report, after the condemnors' governing body or properly authorized power issues an official resolution or statement supporting the project's plan to take the

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parcel (for example, *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1984)).

However, the condemnor's agent should request entry beforehand to avoid conflict and possibly reduce the final negotiated parcel value. For example of a letter requesting access for an environmental assessment, see Standard Document, Eminent Domain Property Access Request Letter for Public Works Project.

Phase 2 Environmental Assessment and Other Invasive Studies

The Phase I report may advise the condemnor obtain a Phase II Environmental Site Assessment Report (Phase II Report), after finding potential contamination. In this case, physical examination of the property (such as soil borings and testing) may require the landowner's permission, which may be problematic with a contentious project. Otherwise, the condemnation resolution alone is often insufficient for this more intrusive entry (see, for example, *Missouri Highway & Transp. Comm'n v. Eilers*, 729 S.W.2d 471, 474 (Mo. Ct. App. 1987); however, see N.J.S.A. 20:3-16 (borings allowed with ultimate compensation to owner through purchase or damages)).

The condemnor may need to obtain a temporary easement first through eminent domain proceedings for the assessment. Ultimately, the condemnor might re-route the project, if possible, to:

- Reduce consulting expenses.
- Keep from incurring potential liability from both accessing contaminated property and ultimately purchasing an interest.

The same legal analysis may apply to other investigations, such as geologic studies, geotechnical borings, civil engineering tests, and wetland delineation studies. Condemnors usually will not obtain an automatic right of entry from the eminent domain resolution for any subsurface investigation (see, for example, *Kane Cty. v. Elmhurst Nat'l Bank*, 443 N.E.2d 1149, 1152-54 (Ill. Ct. App. 1982)). The landowners' federal Fifth Amendment right against uncompensated takings underlies this ban on substantial physical intrusion (see *Loretto v. Teleprompter*, 458 U.S. 419, 426 (1982)).

Title Issues

Establishing ownership to the parcels the condemnor needs for the public works project is crucial to prevent delays in the acquisition and condemnation process. Unexpected claimants can also increase project costs substantially.

Means of Determining Title

Public condemnors should take as much care as large commercial buyers when investigating a property's true ownership for a public works project. For professional assistance to establish ownership, after completing the survey, they can choose to:

- Pay a title insurance company.
- Hire a real estate broker.
- Use their own agents to examine title run sheets provided by a title company.

The last two alternatives will be much less expensive, but the broker or agents must have the expertise to make these feasible. For any of these methods, counsel must provide the title searcher correct information including:

- The record property owner's name.
- The physical address.
- The legal description.
- The surveyor's name and address.

Inspecting Title Information

After obtaining the title insurance policy draft or run sheet for examination, counsel should, at a minimum, look for:

- Fully named parties with addresses and appropriate legal interests named.
- Mortgages.
- Encumbrances, including:
  - mechanics' liens;
  - judgment liens;
  - environmental and code enforcement liens;
  - leases;
  - deed covenants and restrictions, such as reversionary clauses, possibly related to a homeowners' association;
  - tax liens, which can be federal, state, or local;
  - unpaid property taxes; and
  - water, timber, or mineral rights.
- Family history, such as divorce records, which affect title.
- Probate records indicating the death of the alleged owner.
- Lis pendens notices for other, possibly conflicting, ongoing eminent domain actions. For an example of

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a lis pendens notice by a condemnor, see Standard Document, Eminent Domain Notice of Lis Pendens.

Further Issues Involving Title

Inspecting Property Site

Besides reviewing the title documents, counsel or the right of way agent should inspect the site of the project for:

- **Any obvious adverse possession by the public or individuals.** The former situation can affect appraisal value; the latter persons may be defendants in the eminent domain proceedings.
- **Physical encumbrances such as fences, buildings, culverts, ponds, and floodplain areas.** These may affect the project itself through obstruction and may also affect the parcel's value.
- **Unrecorded mechanics' and materialmens' liens.** Renovation projects on the site may add potential claimants to the property.
- **Claims to the property as part of a marital estate.** Property owned in some states may be considered community property even if a spouse if not a record title owner.

Following Up on Title Information

Counsel's involvement (or that of the right of way agent) increases after reviewing the written report and visual inspection. This may include:

- **Securing releases of the property for the project from lien holders.** The condemnor hopes to avoid paying additional compensation but, if it must pay, it can seek a right of entry from the lien holders and advise them the total compensation it will pay will not increase because of additional claimants.
- **Deciding to negotiate solely with the property's fee owners if the condemnor only seeks a temporary easement.** Counsel may recommend this course of action if the project must get under way quickly and settlement short of trial appears likely. However, the best practice is to obtain the mortgagees' consent.
- **Dealing with divorced spouses of the property owner.** Releases for the project are best but may be difficult to obtain. Clear divestment of title in the property records may avoid the clear need for a release.

Appraisals

Once the survey and title work are complete, assuming the environmental assessments do not rule the parcel out, the condemnor is ready to value the parcel or interest, a necessary step before:

- Its first offer letter. For a sample offer letter, see Standard Document, Eminent Domain Offer of Purchase Letter for Public Works Project.
- Negotiations with the owner.
- Its final offer.
- Initiation of eminent domain proceedings.

For a checklist of appraisal and negotiation steps, see Eminent Domain: Appraisal and Negotiation Checklist.

For an overview of the eminent domain process, see Practice Note, Eminent Domain Basics for Condemnors: Overview.

For a discussion of the just compensation due the owner, see Practice Note, Eminent Domain Just Compensation: Overview.

Selection of Property Value Professional

In some states, a condemnor may hire a real estate broker to produce an opinion of value before the initial offer of purchase of the project parcel. This choice is desirable and possible when the project's scope is limited and uncontroversial. The broker uses research on comparable sales and listings and usually visually examines the property.

Another advantage of using a broker's opinion of value during the project's initial stages is that it may avoid statutory requirements for the condemnor to send a copy of its appraisals in its possession to the property owner. The requirement may not always be imposed on opinions of value. Settling the purchase of a few or many parcels, before eminent domain proceedings, with this less expensive method saves the project's purchase budget for more difficult and expensive parcel negotiations.

Condemnors may be tempted to avoid hiring any professional by preparing offers based on the listed appraisal value by local or state property tax authorities as the least expensive method for obtaining a value. However, these values are often significantly higher than the value a broker or appraiser would recommend if hired, limiting this method's usefulness in controlling costs.

Many states require appraisals for any project once eminent domain proceedings are authorized by the local governing body, ruling out other methods. The condemnor must also hire a professional appraiser if:

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- Proceedings occur to produce proper expert testimony.
- There are special types of easements and other interests with complex valuation issues.

Effective government counsel will work well with the appraiser. They should give the appraiser title information, the survey and environmental assessments, and important governmental information such as the comprehensive plan and zoning classifications and regulations to which counsel has easy access. Details of the project may affect the value of the taken part and remainder and are generally helpful to the appraiser.

For more information on comprehensive plans, see:

- Practice Note, Comprehensive Plans: Overview.
- Comprehensive Plans State Laws Chart.
- Adopting or Amending a Comprehensive Plan Checklist.

For an overview of local zoning considerations, see Practice Note, Local Government Zoning and Land Use Regulation: Overview.

Scope of Appraisal

A limited scope appraisal, or a restricted or summary appraisal report, may reduce the condemnor's costs if it needs or desires an appraiser.

The initial appraisal completed for negotiations is not the final appraisal for condemnation. The appraiser must at least update the date of valuation. If a more experienced appraiser is more appropriate for a valuable parcel or a difficult issue of severance damages, counsel may seek one out. For more detail on severance damages, see Practice Note, Eminent Domain Just Compensation: Overview: Remainder Damages.

Limited Scope Appraisal

A limited scope appraisal may ignore certain types of valuation in its analysis. For example, the appraiser may focus on the market sales approach but not the cost and income approach. In commercial transactions, an appraiser must use all relevant approaches. Appraisers may initially balk at the condemnor's suggestion of a limited scope appraisal, but they generally will follow the client's wishes for the unusual circumstance of a forced taking by eminent domain.

Restricted and Summary Reports

A restricted report contains only the value of the interest needed for the condemnor's project and the appraiser's brief conclusions needed to support this value, with little explanation on the detailed professional opinions and relevant facts behind them. A summary report contains summaries of opinions and facts without rigorous details, whereas a full appraisal contains all relevant details behind the value analysis.

The cost per parcel may be lower for these reduced-detail types of appraisals. Moreover, the report that the condemnor must send the property owner, if required by statute, will lack detailed information that would give the owner an advantage at a quick-take administrative proceeding. While discovery for a judicial trial requires their release, a settlement before trial due to a favorable administrative proceeding for the condemnor is a preferred outcome made possible by this strategy.

Appraiser's Role

For all types of appraisals, the appraiser keeps the necessary backup detail in his own file, possibly needed by the condemnor for proceedings and trials.

The condemnor needs an appraiser to testify in court, but administrative proceedings with looser evidentiary rules may not require this testimony if other agents introduce the written appraisal and explain it adequately to the decisionmaker. However, the condemnor should present an appraiser witness to counter a similar expert hired by the owner, which is rare due to the cost.

Counsel should set up a selection process that ensures the condemnor will hire appraisers that have been witnesses in eminent domain proceedings in the past. In the selection process, experience with complicated valuation questions should be considered, such as:

- Business loss and economic damages, if allowed by law. For more details on business loss, see Practice Note, Eminent Domain Just Compensation: Overview: Business Damages.
- Offsetting increases to the remainder's value because of benefits from the project, including:
  - new public transportation options to the parcel;
  - recreation opportunities if, for example, the project is a park or recreation center; or
  - economic development enhancement of any type by the project specific to the immediate area of the parcel.
- Severance damages for partial takings that reduce the remainder's value from:
  - traffic visibility reduction for customers to a business site;

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  - circuity of travel to the parcel, especially with complicated feeder road interchanges next to a highway; and
  - material and substantial denial of access to the remainder.

For suggestions on how to handle an appraisal witness during eminent domain proceedings, see Eminent Domain: Handling Direct Witnesses Checklist Before and at Trial.

Content of Appraisals

Although a reduced-detail appraisal may not contain all of these details, counsel must review more detailed appraisals for:

- A site description of the parcel. This includes:
  - the acreage;
  - soil types;
  - septic tank presence and limitations;
  - topography;
  - timber;
  - availability of utilities;
  - fixtures and personal property;
  - floodplain information;
  - road frontage and water frontage, if applicable; and
  - aerial imagery, which is helpful.

  For an example of a letter requesting entry for appraisals to assist with an accurate site description, see Standard Document, Eminent Domain Property Access Request Letter for Public Works Project.
- Any improvements. Relevant details are:
  - size and dimensions;
  - number and type of rooms;
  - age; and
  - condition.
- Possible environmental, health, or safety problems. The appraiser should carefully consider the Phase I and, if applicable, Phase 2 Reports (see Environmental Assessments and Other Studies).
- Zoning issues, including:
  - the zoning classification, along with permitted and prohibited uses;
  - the present use of the property and whether it conforms to existing zoning and the comprehensive plan. If the use does not conform, review whether there is a nonconformity allowance;
  - the impact a taking will have on a remainder's zoning conformity if losing proper setbacks and minimum lot size; and
  - zoning changes needed to produce the parcel's highest and best use.
- Setbacks or other development limitations.
- Tax information and ownership history used in assessing value.
- Analysis and conclusion of highest and best use, the common use standard decisionmakers expect. This use is defined as physically possible, legally permissible, financially feasible, and resulting in the highest value. For more details on highest and best use, see Practice Note, Eminent Domain Just Compensation: Overview: Highest and Best Use.
- Severance damages (see Appraiser's Role).
- Different approaches for determining fair market value through market data or sales, cost, and income capitalization approaches (see *Sahalee Country Club, Inc. v. State Bd. Of Tax Appeals*, 735 P.2d 1320, 1324 (Wash. 1987)). The market data approach is the most common and presumes a willing and reasonably knowledgeable buyer and seller, both under no compulsion. For more information on the market data approach, see Practice Note, Eminent Domain Just Compensation: Overview: Property Valuations Based on Fair Market Value.
- Analysis of easement value as a percentage of the fee cost. Different easements can value from 25 to 90 percent of the fee depending on the reduction in the owner's use.
- Maps, photos from site visit, surveys and maps, and floor plans of primary buildings.
- The appraiser's qualifications and past clients. Opposing counsel will attack poor qualifications and may try to paint the appraiser as a municipal lackey if he has always represented only condemnors, so a balanced client roster reduces this argument's effectiveness.

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