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Eminent Domain Just Compensation: Overview

by Practical Law Government Practice

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A Practice Note summarizing just compensation due landowners by governmental entities after the use of eminent domain. This Note discusses the general just compensation rule, determination of fair market value and accepted appraisal valuation methods, determination of highest and best use, economic loss recovery, consequential remainder damages, and recovery of interest and attorney's fees.

The Fifth Amendment's Takings Clause contains protections that are rooted in basic fairness: the government cannot appropriate private property for its own use without compensating the owner. State constitutions often have similar protections.

If the government takes private property by filing a formal eminent domain action, the decisionmaker will award the landowner what it decides is just compensation based on:

- The facts of the taking.
- The land involved.

For more information on eminent domain basics, see Practice Note, Eminent Domain Basics for Condemnors: Overview. For tips on planning for the use of eminent domain and due diligence practices before filing a petition, see Practice Notes, Eminent Domain: Preliminary Considerations for Local Governments and Eminent Domain: Municipal Condemnor's Initial Due Diligence Before Condemnation.

If, on the other hand, the government failed to file formal proceedings, the property owner can essentially force condemnation proceedings by filing an inverse condemnation action against the governmental entity. This action is called inverse because the affected owner brings it, not the government (also referred to in this Note as the condemnor). Courts and practitioners commonly use "takings" and "inverse condemnation" interchangeably when describing the cause of action. For further information on inverse condemnation, see Practice Note, Inverse Condemnation: Overview.

Determining Just Compensation

Determining just compensation involves using all relevant data to find an amount representing the value to any normally situated owner or purchaser of the interests taken (*Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 20 (1949)). The government must put the landowner in the same position monetarily as if it had not taken the property, making owners whole but not entitling them to more (*U.S. v. Reynolds*, 397 U.S. 14, 16 (1970)). The landowner does not generally receive a court award based on the tract's special value to the condemnor (*Enbridge Pipelines L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256 (Tex. 2012)).

The just compensation due to the landowner is the sum of:

- The value of the whole or partial property condemned at the time of taking.
- The reduction in value of the owner's remaining partial property (the remainder) after the taking.

In state courts, a jury usually determines the landowner's just compensation, not a judge.

Property Valuations Based on Fair Market Value

No method of valuation is universal, and different facts about specific properties require different methodologies. However, most courts base the just compensation due landowners on the fair market value (FMV) of their taken property.

FMV considerations in an eminent domain context include:

- **Monetary amounts in an open market.** FMV is the justified amount a well-informed buyer offers and pays, and which a well-informed seller accepts, for property in an open and competitive market.
- **Presence of duress.** Neither party in this hypothetical relationship is under pressure to buy or sell immediately. Both parties therefore exercise reasonable marketplace judgment to close the sale.
- **Other market conditions.** Other routine market conditions are also present, as reasonable time exposure of the property for sale.
- **FMV on the date of taking.** FMV relates to the date of the condemnor's taking (*Nashville Housing Auth. v. Cohen*, 541 S.W.2d 947 (Tenn. 1976)).
- **FMV cannot be less than just compensation.** State legislatures cannot define FMV as less than the just compensation due the landowner under the Takings Clause, but they may increase it for the landowner's benefit (see *Orono-Veazie Water Dist. v. Penobscot Cty. Water Co.*, 348 A.2d 249 (Me. 1975)).
- **Improvements.** FMV includes the value of the land and improvements together.

Various appraisal methods exist for determining FMV, including:

- **The market data approach.** This approach is the most common. It determines the property's value at the time of taking based on recent sales of comparable properties.
- **The cost approach.** This approach is based on the improvement reproduction cost for the property, less depreciation from the original time of new construction.
- **The income approach.** This approach is based on the capitalization of net income from the property at the time of taking.

A court may use the last two approaches in special cases when market sales data for comparable properties are inadequate for sufficient proof of FMV.

Highest and Best Use

Before proceeding to use an appraisal method for determining FMV, the condemnor must first determine the highest and best use of the taken parcel. The highest and best use method determines feasible uses for the parcel. The elements in this feasibility analysis are:

- **Suitability.** Physical suitability of the parcel for the use.
- **Availability.** Legal availability of the use at present or through possible modification of existing regulations. This could include rezoning. However, the landowner cannot collect for the value of the future rezoned and subdivided land (see *City of Lafayette v. Beeler*, 381 N.E.2d 1287 (Ind. App. 1978)).
- **Reality.** Economic reality for the use in the relevant market and location. This factor might be met by the landowner's integration of other parcels to establish the use (*Miller v. Preisser*, 284 P.3d 290 (Kan. 2012)). For more analysis of the single parcel or single economic unit concept, see Practice Note, Inverse Condemnation: Overview: Defining the Relevant Parcel in Regulatory Takings.

The landowner may introduce this use despite a different actual present use of the property (*Matter of Town of Hempstead*, 439 N.E.2d 357 (N.Y. 1982)).

Additional Types of Compensable Damages

The condemnor and landowner may hire expert witnesses to show highest and best use of the taken property and determine FMV under the correct value approach. These experts may also clash on other specialized types of damages possibly due the owner. For suggestions on examination of an appraisal witness in an eminent domain proceeding, see Eminent Domain: Handling Direct Witnesses Checklist Before and at Trial.

Business Damages

In most jurisdictions, several types of damages to a business conducted on the taken property caused by the take are not usually compensable. These items are only indirectly related to the taken real property. Their value is also speculative and difficult to measure adequately (see *State v. Bishop*, 800 N.E.2d 918 (Ind. 2003)). These generally include:

- Loss of good will or business reputation.
- Loss of profits. Profits accrue to the business itself, not the taken land. However, lost rents or income from the land itself are compensable.
- Inability to find a new business location.

Exceptions to this rule may exist when:

- The landowner shows unique properties of the taken location necessary to conduct a successful business at that location when no other location will work.

- The business cannot remove trade fixtures without causing substantial damage to them.
- The take eliminates adequate access to the remainder parcel when the business remains active after the take.
- Federal and state statutes allow the landowner to collect relocation expenses for displaced businesses located on the taken property (for example, 42 U.S.C. §§ 4621 to 4636 and 26 Pa.C.S.A. §§ 901 to 907).
- Evidence of business damages may be admissible to show FMV without establishing separate damages in addition to FMV.

Remainder Damages

When the condemnor takes only a portion of a single property for its project, it generally must also compensate the landowner for damages to the remaining portion of the property, less any benefit to this remainder conferred by the take.

Some jurisdictions may consider additional factors to determine remainder damages such as:

- Defining the relevant parcel considered damaged under the single economic unit doctrine (see Highest and Best Use; *Cty. of Kaua'i v. Hanalei River Holdings Ltd.*, 394 P.3d 741 (Haw. 2017)).
- Distinguishing between compensable special benefits to the remainder and uncompensable general benefits shared by other nearby parcels (but see *Los Angeles Cty. Metro. Transp. Auth. v. Cont'l Dev. Corp.*, 941 P.2d 809 (Cal. 1997) overruling that type of rule).
- Allowing damages which foreseeably result from the project.
- Allowing severance damages, such as when the condemnor takes an aerial easement.
- Compensating for material and substantial impairment of access.
- Disallowing recovery for the project merely creating a circuitous route to the property for customers.
- Recompensing the owner for loss of visibility of the parcel from the highway, if view is crucial to business success, such as an auto dealership.
- Using a cost-to-cure approach when the taking prevents the remainder from meeting government regulations such as zoning without significant expense to the landowner.

Interest

The taking process usually involves a long period of time, unless the condemnor uses a quick take (for more information on quick takes, see Practice Note, Eminent Domain Basics for Condemnors: Overview: Quick Take). The delay brings up the question of fully compensating the landowner with appropriate interest on the award value amount. Some rules governing the payment of interest for the delay include:

- The government usually pays interest on the damages for the time between the judgment, or the taking if earlier, and the payment of compensation.
- Payment occurs when the government deposits funds in an interest-paying escrow account with the court.
- The landowner may withdraw the condemnor's funds placed with the court or leave them on deposit to receive interest (see *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 151 P.3d 1166 (Cal. 2007)). However, withdrawal of funds may preclude a landowner challenge to the public interest, or lack thereof, for the taking itself. For more detail on public use and purpose for eminent domain, see Practice Note, Eminent Domain: Compliance with Public Use Requirement.

The interest rate may be set by:

- Statute. Courts might decide some state legal rates are too low to be constitutional (for example, *Arkansas State Hwy. Comm'n v. Vick*, 682 S.W.2d 731 (Ark. 1985) (6% is too low)).
- Court rules or individual decision.
- Prudent investor rule. This rule determines how a reasonably prudent person would invest the funds to produce a reasonable return while maintaining the principal's safety (see *Tulare Lake Basin Water Storage Dist. v. U. S.*, 61 Fed. Cl. 624, 627 (2004)).
- Application by a federal court of the Declaration of Taking Act (40 U.S.C. § 3116; *Plumb v. Salt Lake Cty.*, 2016 WL 2888981, *5 (D. Utah May 17, 2016)).

Costs and Attorneys' Fees

Courts generally award costs to make landowners whole as part of their just compensation (see *Barker v. Lannert*, 222 S.W.2d 659 (Ky. 1949)). These costs may include:

- Court filing fees.
- Expert witness fees, especially appraisers in the eminent domain context. The owner might recover

these when the government makes a very low offer based on questionable valuation methods.

Attorney's fees do not usually fall under the strict definition of just compensation. However, many states have statutory attorneys' fees and expert fees provisions (for example, Ga. Code Ann. § 9-15-14).

In some states, the trial court has discretion to award fees in certain circumstances (see, for example, *Mulligan v. Town of Henniker*, 2016 WL 7451419 (N.H. Nov. 28, 2016)). These might include:

- Large gaps between the final offer and awarded compensation.
- High percentage of differences between final offer and awarded compensation.
- Lack of good faith negotiations by the condemnor.

If the claims are against the federal government or other agencies receiving federal funding for a project (including local governments) for takings of property, the law allows for the award of costs, attorneys' fees, and expert witness fees under the fee-shifting provision of the Uniform Relocation Assistance and Real Property Acquisition Act (42 U.S.C. § 4654(c)).