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# Preparation and Trial of a Condemnation Case—The Property Owner

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# PREPARATION AND TRIAL OF A CONDEMNATION CASE—THE PROPERTY OWNER

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The following remarks on law, procedure, problems and preparation for trial of a condemnation case are not intended as a text for condemnation. I mention only some aspects of this highly diversified field; no set pattern can be applied to each and every condemnation trial. This discussion concerns state condemnation rather than condemnation by city or county. Highway design, right-of-way acquisition and construction require time. Because of the tremendous demand in our state for highway improvements, this field of condemnation is ever-expanding.

## Preliminary Negotiations

Generally your first contact with your condemnation client will be after the condemning party has entered into negotiations, has made an offer, and very possibly negotiations have ceased. Before the acquisition is discussed in any respect with the condemning agency, you should thoroughly familiarize yourself with the property under discussion. It is mandatory that you, as attorney, know every facet and capability of the owner's property before commencing active representation.

You then should ascertain the characteristics of the condemnor. Does the condemning agency have a history of negotiation whereby it purchases as inexpensively as possible until it reaches the point where resistance increases, and then, perhaps, hesitant to submit to actual trial, makes payments inconsistent with previous purchases? Does the condemning party tend to treat the acquisition as a poker game, intentionally submitting low offers in order to withhold ammunition for bargaining? These questions can usually be answered by members of your local Bar. The Washington State Highway Department's authority, to a great extent, is limited by its appraised value of the property; the appraisals are likewise subject to scrutiny by the Federal Bureau of Public Roads. It is expedient to know how far the agency with which you are dealing will compromise in order to avoid litigation.

Your negotiations may be on the basis that you secure the services of a competent appraiser, the condemning party does likewise, and you both reveal the appraisals and have a discussion of the entire

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problem. I advocate this method of negotiation; it is fair to both the owner and the condemning agency. It is advantageous to both parties to discover any errors in valuation at the conference table rather than in open court. There may be a multitude of comparable sales that the appraisers have overlooked. You may discover that the order is proper, under the circumstances.

The preliminary negotiations may be previous to a condemnation action, shortly after the condemnation action has been filed, before or after the order adjudicating public use, or, if it is with a city or town, it may be after the action has been filed, the order adjudicating public use secured, and a conference arranged in the corporation counsel's office. The procedure for negotiating depends on the particular agency involved. It may be that the condemning agency will not reveal the amount of the appraisals. This dictates a different approach on behalf of your client, which will not be discussed at this time.

### Order Adjudicating Public Use

Assuming, for the purpose of discussion of the present paper, that the condemnation action has been filed and that the matter has come on for hearing for an order adjudicating public use, briefly I will discuss what can be accomplished at this point.

Previous to the time set for the order adjudicating public use, your client will have been served with a notice setting forth the time and place for the hearing, a description of the property to be acquired, and the purpose for which the property is to be acquired by the petitioning agency. With the assistance of your client, you should immediately ascertain the accuracy of the description. I have found errors here. You should also ascertain if your client desires to prevent the taking, or whether he is satisfied with the necessity of the condemning agency and wants a jury valuation at an early date. Numerous factors will influence these decisions. It is ordinarily difficult to contest the taking. Assuming, however, you have reason to believe the petitioner is guilty of arbitrary and capricious action, the property owner is entitled to the following constitutional and statutory protection.

Amendment 9 to Article 1, Section 16 of our State Constitution provides in part:

> ... Whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

This constitutional protection is important, as the enabling legislation for numerous condemning agencies provides that the selection of the

particular property is conclusive in the absence of arbitrary or capricious action.[1] However, most statutes setting up the procedure for an order adjudicating public use (such as RCW 8.04.070) provide in part:

> ... and if the court ... is further satisfied by competent proof that the contemplated use for which the lands, real estate, premises, or other property are sought to be appropriated is really necessary for the public use of the State....

Check the statutes governing the condemning agency and administrative requirements to see if all necessary preliminary procedures have been complied with. Frequently haste by the condemnor will cause a by-pass of a necessary statutory requirement. As the order adjudicating public use is technically a separate step in the trial of a condemnation action, if no review from the court's decision is taken within five days, the determination is final for all intents and purposes. Ordinarily the order adjudicating public use will not be contested. However, in a situation indicating a legitimate contest, it is the court's responsibility to ascertain whether the use is actually public and determine whether the condemning agency has complied with necessary legislative requirements. The court should show no reluctance in complying with its constitutional duty.

Arbitrary and capricious action may be proved in a number of ways. Two of our supreme court cases denying orders adjudicating public use for such action are *State ex rel Postal Telegraph v. Superior Court,*[2] and *State v. Superior Court.*[3]

Assuming that your client concurs in the taking and it is advantageous to dispose of the order adjudicating public use and have the matter set for trial to determine value, then the following factors should be adduced at the hearing for the order adjudicating public use, particularly if it is a partial taking.

By examination of the engineers for the condemning party, if it is a partial taking, you should ascertain necessary engineering factors such as dimensions of cuts and fills, traffic pattern, elevation of structures to be constructed on the right-of-way, ultimate plans for the use of the property by the condemning agency, and access to and from the project if the taking is for highway purposes. Perhaps you will be involved in a drainage problem so that you should know the condemning party's drainage plans. Consider also the disposition of utilities; perhaps the

[1] See RCW 47.12.010, concerning the selection of a highway route.
[2] 64 Wash. 189, 116 Pac. 855 (1911).
[3] 128 Wash. 89, 222 Pac. 208 (1924).

highway runs through the center of a proposed subdivision or farm, leaving isolated the source of water and electricity. Does the condemning party intend to permit the owner to conduct utilities through the roadbed by means of a culvert or otherwise? If you are concerned with valuable farmlands, will there be cattle passes?

These are not the only construction and engineering features to be brought out at the time of the order adjudicating public use, as each case may dictate different factors which it will be necessary for your appraisers to have in order to make a comprehensive appraisal. I have set forth some of the factors that your appraiser will want to know before the appraisal is commenced. It is your responsibility to elicit all pertinent factors for use by your appraisers.

At the time the order adjudicating public use is signed by the court, the condemning agency will attempt to have the matter set for trial, probably within two or three months from the time of the order. It may be to your advantage to have the matter tried at that time, or it may be to your advantage to temporarily delay the setting. When trying cases for the state, I noticed that springtime seemed to accelerate the engineers' requirements for items in condemnation through fertile farmlands. The jury would be conducted to the scene of the acquisition at the time the strawberry plants were in full bloom, warm spring sunlight was playing on the beautiful farmland, birds would be singing, and a horrible picture of bulldozers tearing up this beautiful pastoral scene would be portrayed to the jury by opposing counsel. Perhaps a month previous, this beautiful farm had the appearance of drab isolation, and late in the fall snow would have proved a value-deterrent. As attorney for respondent, you, to a certain extent, can influence the time the action will be tried.

## Preparation for Trial

### *Selection of Witnesses*

Select your witnesses with care: they may be the key to the action. There are few top-flight condemnation witnesses in the state of Washington. The ideal condemnation witness is the man who can sell himself to the jury, who is thoroughly grounded in the principles of condemnation appraising, thoroughly familiar with sales in the area affected, can't be stampeded by cross-examination, and believes in the values to which he is testifying.

Members of the American Institute of Real Estate Appraisers are available in various cities throughout the state. This organization has

received more recognition by the various superior court judges throughout the state than any other appraisal organization. The Institute has for its purpose the specializing in property appraising to the end that the elements of speculation and difference can, to a great degree, be eliminated. The organization merits respect, but their goal has not been achieved to the extent that condemnation attorneys are unnecessary. A fundamental fact concerning condemnation appraising is that the appraisal of real estate is a matter of opinion and that differences thereof cannot be eliminated as long as the elements of human error and opinion are concerned. A case I am presently preparing for trial is an excellent example of opinion difference between experts. The condemning agency has offered approximately $100,000, based on independent appraisals. The property has been appraised by other independent appraisers in excess of $400,000.

One of your key witnesses will be the local realtor who is familiar with property in the area. Don't forget that property owners in the immediate area may likewise testify as to value. The matter of whom you secure as your witnesses will unfortunately also be dictated by money considerations. The value of the property, financial ability of the owner, and the availability of appraisers will all enter into this decision.

Whom you need as a witness will vary with each condemnation action and the type of property with which you are concerned. Assuming that a highway is going through farmlands with no buildings involved, your key witness might best be a farmer familiar with farming activities who can testify from personal experience as to how contour farming has been completely disrupted, as to how many acres are actually required to provide an economic unit for farming, and the many other factors which arise in this specialized field. The kind of property concerned will dictate the number and types of expert and nonexpert witnesses. Ordinarily you will desire an appraiser or appraisers and local realtors familiar with values in the area. Complex farm questions can be best answered by farmers with practical experience. Questions of building costs can be answered best by contractors with experience as to the type of building under consideration.

If you are fortunate enough to represent a number of owners you will find that your knowledge of every-day affairs will broaden considerably. In order to properly try an action concerning a strawberry-raspberry farm you will find it necessary to learn as much about marketing habits, expenses of bringing crops to production, productive

years and other factors affecting the economic growth of the referenced business as the farmer himself. Shortly thereafter you may be concerned with the effect that of the acquisition of one hole of a nine-hole golf course will have on the total value, or it may be necessary to learn the various facets of a sawmill under condemnation.

Do not sell your client short. Listen to everything he has to say about the property. He is the man who has lived with it and undoubtedly knows more about its capabilities than anyone who will be concerned with the action. There is no question about his bias as to value; however, he has a complete knowledge of the capabilities of the property and an ability to disclose the pitfalls you may encounter. It is as important to know the drawbacks as it is to know the favorable factors.

*Admissibility of Evidence*

Let's assume that you are familiar with the property, you have disposed of all preliminary proceedings, your trial date has been chosen and set, and you must now select and advise your witnesses. You must know the condemnation principles to be encountered, or your errors can be most expensive on behalf of your client. Perhaps you have under consideration acreage within the city of Bellevue which has not been subdivided and which is being severed by a limited access highway. Let's assume that the state's offer is $10,000 for property to be acquired together with damages to the remaining property, and your client has purchased the property for purposes of subdividing. He believes the property to be worth a minimum of $100,000. He contends that he can carve "x" number of lots from the acreage which will sell for "y" number of dollars; that it will only cost "z" dollars to put in the streets and to provide the utilities; that there is a ready market in the area; and that after deducting the purchase price of the land together with the expenses of development, he should have a minimum of $100,000. He wants a plat drawn by an engineer showing the number of lots that can be carved from the whole, for evidence. He also wants a large mock-up showing the present property together with insets showing the streets and other facilities together with lot lines, the total cost being approximately $1,500 plus appraisers' fees.

If you do comply, you have committed grave error, as at the present time the law is rather clear that the proposed plat is not admissible. Until such time as the property has been subdivided and recorded it is to be considered as acreage property. Your witnesses may definitely testify concerning availability of the property for platting and subdivisional purposes and its value at the time of the acquisition with its

highest and best use being its availability for these purposes. Your witnesses, however, may not mentally subdivide the property into the number of lots which can be carved from the whole and speculate as to the cost of developing the street, constructing the sewer, water, lights, expenses of advertising, interest on the indebtedness until the various lots are sold—and other speculative factors. Numerous property owners in condemnation actions have expended many hundreds of dollars in engineering expenses and other subdivisional expenses without being able to have these admitted in evidence. I say again, in order to properly represent your property owner, after you have familiarized yourself with the plans, all aspects of the taking, the property itself, and the property owner's thinking, you must brief every element of condemnation law to be considered in the action, as error committed at any stage of the proceeding can follow through the entire case.

With respect to texts which will be of assistance in providing a starting point for an attorney briefing condemnation law, *Am. Jur.* is easy reference and quite extensive. *Corpus Juris Secundum* is more extensive and is likewise a good source. *Orgel* is a two-volume text which is excellent. For valuation purposes, a most complete text is *Nichols Eminent Domain* which is being widely used in this state. Lewis' two-volume work on eminent domain is one of the old standbys and is often cited in condemnation matters. The American Institute has various publications available which are excellent texts and handbooks.

If the appraiser has based his appraisal upon improper legal elements, a motion to strike will probably be allowed by the court and $500 to $1000 in appraisal fees will have been lost when the witness for the owner steps down with the jury being instructed that his testimony may not be considered. This has happened too often.

An old trap used in cross-examination, which unfortunately is often successful, is a demand that the witness define market value in condemnation. Condemnation is a creature unto itself in the eyes of the law, and the valuation of property for condemnation may vary considerably from the valuation for estate or other purposes.

For approximately every "don't" that you will discover with respect to the admissibility of evidence, there is a practical and legal way to accomplish the purpose desired. In the case to which we are presently referring, your witnesses can very definitely testify as to increased difficulties experienced because of the nature of the facility to be constructed on the property. Perhaps you will be unable to extend

your electrical connections across the freeway, or beneath the freeway. Perhaps it will no longer be economically feasible to subdivide because of the nature and extent of damages to the remaining property. Perhaps the remaining property will be too small to interest a speculative purchaser for subdivisional purposes. These and many other considerations may properly be considered by your witnesses. Your witnesses for this case might well be (1) a realtor in the area who has subdivisional experience and is a man of good reputation. Perhaps (2) there is a member of the American Institute available in that area, and perhaps you have been fortunate enough to find (3) a local contractor of excellent reputation and appearance who has purchased many acres for the purpose of developing into subdivisions. He will have reasons why "y" number of dollars would be paid for the particular property under discussion, as well as all other practical answers that may arise during the trial.

You may limit your witnesses to these three and the property owner himself.

*Jury View of the Premises*

Ordinarily it is advantageous to both the state and the property owner to have the jury conducted to view the premises. This of course is discretionary with the trial court. However, a view of the premises in this state is considered as evidence.[4]

It is desirable to have the bus which is to transport the jury to and from the premises select a route which is most favorable to the property. The Court undoubtedly will decide whether the jury is to be conducted to the property, before or after the giving of testimony, and the route to be used. Occasionally, but not very often, attorneys will request that the jury have a double view of the property, both before and after the trial, and of comparable sales testified to during the action. Ordinarily the court will permit only one view and will not allow attorneys to conduct the jury on a sightseeing tour around the countryside. A view can be more important to the case than all the testimony of the witnesses. In an extremely important condemnation case in the city of Spokane (wherein valuable commercial property in the downtown sector was being considered) jurors viewing the property, which had the appearance of being an abandoned rockpile, were heard to state in loud whispers that they doubted if anything could be grown thereon! As far as the state was concerned, this view

[4] Seattle and Montana Ry. v. Roeder, 30 Wash. 244 at 259, 70 Pac. 498 (1902).

was more important than any witness that had testified, and had much to do with the winning of the action.

As to what should be seen once the jury is on the ground, that is determined by the individual action and the individual property concerned. In some instances, the property is so run down that it is much to the advantage of the property owner that the jury never personally view the premises.

*Measurement of Damages—"What Is the Larger Parcel"*

As has been stated, just compensation is measured by subtracting the fair cash market value of the owner's property remaining after the acquisition, from the fair cash market value of the entire tract before the acquisition. One of the attorney's most difficult decisions in condemnation is whether all of the owner's property can be considered in arriving at the value before the taking. This is known in condemnation as a determination of the question of "what is the larger parcel." Logically it may seem that the entire ownership located in the area of the property acquired should be considered. However, this is not always the case. For example, if the property under consideration consists of fifty acres owned by John Jones, all devoted to one use, that being a dairy, the entire fifty acres fenced, with no intersecting roads or highways, when a portion of the tract is acquired for a public use it may be unequivocally stated that the entire tract must be considered as the basis for before-and-after valuation. However, the situation becomes more complicated if Farmer Jones also owns fifty acres in addition to his main ranch, situated across a county road, and on which exists his only source of water. Let us assume that the right-of-way for a new highway bisects the acreage on which the water is situated. It would normally be assumed that although the 100 acres is presently separated by a county road, damages would be assessed to the entire 100 acres. And, it is very apparent that if damages are legally restricted to the one 50-acre tract, Farmer Jones has suffered damages to his main farm which will not be compensable.

In determining the question whether the appraisers may properly consider the entire ownership as a basis for determining damages, the courts have evolved a three-point test, and require that the following three elements must be present before the taking of a portion of the owner's property will involve the entire ownership: (a) unity of ownership, (b) unity of use, and (c) contiguity. Ordinarily, all three elements must be present in order for damages to a portion to affect

the whole. *Unity of ownership* is the legal requirement that all of the property to be considered be in one ownership. *Unity of use* is the legal requirement that the property to be considered is all susceptible to the same use. *Contiguity* technically means that the property must all lie together. The question of contiguity has been the subject of many varying judicial opinions. Some courts have required that all of the land to be affected be immediately adjacent. Other courts have considered damages to one tract as affecting numerous tracts even though severed by highways, railroads, streams and so forth.

If the property is to be valued for its mineral content, the appraisers will ask if it is proper to multiply yardage times royalty, and without proper legal advice may use this element as a method of valuing raw land. Land which has not been developed and which has for its highest and best use the extraction of its mineral content must be valued as it exists, and not by taking an assumed number of yards times royalty.

The field of condemnation in this state is in its inception, although in the last few years many aspects of highway condemnation law have been pioneered here. *State ex rel Eastvold v. Superior Court*[5] concerned the restriction of certain types of access (i.e., for farming purposes only, for single-type farm residences), and was the first case in this country pertaining thereto. *State v. Walker*[6] is a well-written opinion concerning the police power and medium strips. *State v. Calkins*[7] pertains to loss of access to a new highway location as distinguished from the common law right of access appurtenant to an existing highway.

A property owner is entitled to ethical and equitable treatment and compensation by a public body requiring his property for a public use. May you serve him well!

[5] 47 Wn.2d 335, 287 P.2d 494 (1955).
[6] 48 Wn.2d 587, 295 P.2d 328 (1956).
[7] 150 Wash. Dec. 682, 314 P.2d 449 (1957).