

LAYING THE GROUNDWORK FOR CONDEMNATION APPRAISALS



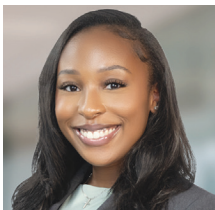
JUSTIN HODGE is a partner at Marrs Ellis & Hodge LLP. He represents landowners against the government and other condemning authorities in condemnation lawsuits. He teaches a course on eminent domain and land takings at the University of Houston School of Law and has testified before the Texas Legislature to promote eminent domain reform. Justin is recognized as a Super Lawyer in Eminent Domain by Thomson Reuters. He has co-chaired the CLE International's Houston Eminent Domain Conference (2016-2021) and has served on faculty at the national eminent domain conferences at ALI CLE (2015, 2016, and 2020) and the Brigham-Kanner Property Rights

Conference (2020). Justin represents landowners in condemnation proceedings, not the governmental authorities or private companies taking property. He has won cases for landowners at every level: administrative hearings, jury trials, and appeals in state and federal courts. His cases have involved takings of vacant land and ranches, as well as highly improved properties with office buildings, shopping centers, restaurants, motels, banks, churches, c-stores, mines, quarries, and residential subdivisions. He has testified on Texas condemnation and eminent domain reform on behalf of Texas landowners in front of both the Texas House of Representatives and the Texas Senate. He also writes a weekly blog at TexasCondemnation.com.



CHRISTIAN TORGRIMSON is a partner and member of the Board of Directors at Parker Poe Adams & Bernstein LLP. She represents a wide spectrum of businesses and property owners as well as governmental entities in the condemnation of private property for public projects, property disputes, and other real estate related matters. Her clients include real estate investors and trusts, large and small businesses, mixed-use and shopping center developers, restaurant franchisors and franchisees, and owners and operators of hotels and gas station/convenience stores. She is editor and author of the Georgia chapter of the American Bar Association's national eminent domain compendium. She is a past chair of the Eminent Domain Section of the State Bar of Georgia. She frequently writes and speaks on condemnation issues for various professional organizations, including the American Law Institute. In 2018, Christian was awarded the CRE designation by the Counselors of Real Estate. In 2019, she joined the Advisory Board of the Brigham-Kanner Property Rights Conference. Christian is a past president of the Georgia Association for Women Lawyers (GAWL), and she served on its executive board for more than 10 years. She was instrumental in creating the GAWL Foundation in 2003, serving as its founding president for two years. She was designated on the list of The Best Lawyers in America in Eminent Domain and Condemnation Law, 2019-2025 and Real Estate Litigation, 2020-2023, 2025.

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ERIKA LOVE is an attorney at Parker Poe Adams & Bernstein LLP. She concentrates her practice on construction, development, and condemnation. She earned her law degree from the University of Georgia, where she was president of the Black Law Students Association, served as the senior diversity, equity, and inclusion editor for the Georgia Journal of International and Comparative Law, and was a student attorney with the Community Health Law Partnership (HeLP) Clinic. She also served as a judicial intern for the Honorable Justice Verda Colvin of the Supreme Court of Georgia. Erika earned her undergraduate degree from Georgia Southern University, where she served as membership chair of the National Council of Negro Women as well as the event and programming chair of Restoring the Breach Inc. She also interned at the Public Defender's Office for the Ogeechee Judicial Circuit.



CHRISTINA THORESON is Executive Director of the Dispute Analysis & Litigation Support Team at Cushman & Wakefield. She has more than 35 years of experience as a trusted real estate valuation and consulting expert for litigation, eminent domain, and dispute resolution engagements. Her extensive background includes providing credible valuation analysis, appraisal review, litigation support, and authoritative expert witness testimony for various property types including residential, commercial, industrial, special purpose properties, and vacant land. Before joining Cushman & Wakefield, Christina operated Real Counsel, LLC since 1986. She also served as a Full-Time Reviewer for the Tennessee Department of Transportation from 2013 to 2016. Her personal

and direct real estate investment, brokerage, management, and assessor board experience enriches her litigation advisory perspective. She has delivered more than 1,000 hours of valuation and right-of-way education. Her professional certifications include the SR/WA and R/W-AC (International Right of Way Association), MAI, AI-GRS, SRA (Appraisal Institute), CRE (Counselors of Real Estate), and ASA (American Society of Appraisers) designation.

Most lawyers receive limited exposure to condemnation in law school. Unlike contracts, civil procedure, and torts, there usually is not an in-depth course wholly focused on condemnation. While every law school graduate knows the authority to condemn is constitutionally based, not many have an extensive understanding of condemnation laws, procedures, and unique concepts. Let's lay some foundation.

Eminent domain is the constitutional power conferred upon federal and state governments to take or acquire private property without the owner's consent for public projects, most commonly for local, state, or utility infrastructure. Eminent domain authority is delegated by constitutional amendments and enacting legislation to specific entities, such as state departments of transportation, cities, counties, schools, utilities, railroads, or housing development authorities. The term "condemnation," often used interchangeably with eminent domain, is the formal exercise of or procedure to carry out the power of eminent domain and transfer title from the private property owner to the government. The power of eminent domain is limited by the Fifth Amendment in two very important respects: just compensation must be paid, and the taking must be for a public use.

Just and Adequate Compensation

The payment of just and adequate compensation for the taking of property is a golden rule in condemnation. It is a fundamental necessity that provides some security to the landowner whose land is taken, to know that at the minimum, just and adequate compensation is required. The US Supreme Court holds that the purpose of paying just compensation is to make the payee "whole."¹ Value is often the term used to assess just and adequate compensation for the property taken and the consequential damages and benefits that derive from the taking.

However, the questions remain: (i) Who determines just how "whole" just and adequate compensation is? and (ii) How is wholeness measured? Of course, the condemnee landowner likely believes their property is extremely valuable and would prefer a payment amount that reflects that. On the other hand, the condemning authority would prefer a conservative determination of value and a payment that reflects that conservative valuation of the land. This reflects the balance of interests between private property rights and the taxpayer spending for public use.

Admittedly, the determination of value itself is subjective in that it is determined by human opinion. Both non-expert and expert opinions can be offered to a jury for purposes of determining value. Typically, non-expert opinion on the value of condemned land is presented through the landowner in the form of opinion testimony. The landowner may offer personal opinions on why the property should be valued at a specific amount so long as the opinion is deemed helpful to a jury. In some jurisdictions, like Virginia and Georgia, the landowner has almost an unfettered right to provide an opinion of value. However, in jurisdictions like Texas, the landowner must demonstrate specific knowledge of the history and market value of the property. Regardless, a landowner likely has a biased opinion about the value of the condemned land. Because jurors can pick up on the potential for bias, the primary opinions taken into consideration are usually those of qualified experts.

Experts that are qualified to offer their opinions of value include real estate appraisers, builders, architects, engineers, accountants, brokers, and business analysts. Their opinions are based on factors such as their professional judgment, their personal qualifications, their views about which facts are important, and the legal sufficiency of the route chosen to determine value. Personal qualifications include an

expert's education, training, certifications, scholastic achievements, experience, and credentials. Notably, and likely obviously, because of all the factors available to be considered, an expert opinion on determination of land value can and will differ depending on the choices made in forming the opinion.

The Guidepost: Fair Market Value

Though the determination of land value is subjective in nature in that it is determined and based on human findings, fair market value is the universal standard in all jurisdictions for determining value of condemned land. In simple terms, fair market value asks what a willing buyer would pay and what a willing seller would accept for the property with all information and bargaining power being equal. Fair market value being the universal standard acts as a guidepost of sorts for experts who attempt to value condemned land. We do note, varying jurisdictions have different definitions of the value that is required to be opined to the trier of fact.

The Appraisal Institute defines fair market value as:

1. In nontechnical usage, a term that is generally synonymous with the contemporary usage of market value.
2. As used in condemnation, litigation, income tax, and property tax situations, a term that is similar in concept to market value but may be defined explicitly by the relevant agency or interpreted differently by court precedent.²

In some situations, the interpretation of fair market value is more directly comparable to the concept of fair value than to market value in exchange.³

Commonly, fair market value is synonymous with just and adequate compensation, but not always. For example, fair market value for condemned land only concerns the land itself. It does not consider other potentially relevant factors. Only being paid fair market value for condemned land will not suffice as just and adequate compensation when there is an existing business on the land. Why? Because fair market value determines land value without any

consideration of that business operated on the land that brought additional value to the landowner.

Another example of fair market value not being just and adequate compensation is the condemnation of land that is operated for a particular purpose, such as a landfill. In a situation where the land itself is unique for the operation of a particular business, fair market value only values the land as if it was a "normal" piece of property and not a piece of land that generates revenue because of being a "type" of property. The competent expert here would consider the value as a landfill or the value at the property's highest and best use.

Along with the land, other items of recovery include building and improvements, signage, furniture, fixtures, and equipment that may be taken or damaged due to a condemnation.

Another note about valuation is that appraisers, as required by the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs (Uniform Act)⁴, must consider the market value of the condemned property without any impact from or influence on value by the project itself. Identified as "project influence," this idea promotes the consideration that the market value of the subject property should not be impacted positively or negatively when valued in the "before" situation to make sure the parties are treated fairly and that the owner is compensated for any value impact to their property by the project when valued in the after situation and compared to the property before situation.⁵

The Gurus: Appraisers and Their Methods

In condemnation, appraisers are typically the chosen experts that determine the value of a condemned piece of property. There are three generally accepted appraisal methods employed: the Sales Comparison Approach, the Income Approach, and the Cost Approach.

Each method involves appraising the fair market value of the subject property as a whole as of the date of taking, and appraisers are to adhere to the

Uniform Standards of Professional Appraisal Practice when determining fair market value.

With a partial taking, appraisals under the State Rule of valuation generally include: (i) the value of the “before” condition of the property in the market without any taking; (ii) the value of the rights or interests taken, typically based on a price per square foot or a price per acre; (iii) calculation of the remainder property or the actual amount of property after the taking without any consideration of damages or benefits; (iv) appraisal of the remainder property in the “after” condition; and (v) comparison of the calculated remainder before to the appraised remainder after to provide an estimate of impacts to value. Compensation is then determined based on the value of the parts acquired plus any impacts to the remainder.

In states requiring the “before and after” method or in acquisitions by federal entities, the Federal Rule is used. This requires the valuer to appraise the property before the acquisition and separately appraise the property after the acquisition, then compare the results to determine the amount due the property owner.

Depending on the jurisdiction, each of the appraisal methods may be used alone or in conjunction to arrive at just compensation:

- **Sales Comparison Approach:** Compares and contrasts sales of similar properties in the market area to the subject property, with adjustments made for differences.
- **Income Capitalization Approach:** Determines the present value of real property based on an income stream less the expenses of the property. Two methods are direct capitalization of one year’s income or discounted cash flow. The income approach should be used when appraising property that generates consistent income.
- **Cost Approach:** Determines value based upon the estimated replacement cost or value of the improvements, plus the value of the land as if vacant. The cost approach is often used to appraise newly improved or unique properties,

but it is rarely used as the sole basis for appraisal and is more typically used as a backup measurement.

However, of the three, the Sales Comparison Approach is by far the most utilized method for appraisals of condemned properties. Many courts have agreed that this is the most relevant method and most easily understood by non-appraisers.

The Game Plan: Sales Comparison Approach

Under the Sales Comparison Approach, an appraiser’s first step is to find properties that have been sold that are comparable to the condemned land. There are several factors that are analyzed that will make a piece of property more or less comparable to a condemned piece of land. One factor often examined is location. An appraiser will want to find a comparable property that is relatively close to or in the same area as the condemned property because different areas value land differently, which would cause the land to have similar or different fair market values. For example, a piece of land that is similar to a condemned piece of land in all other respects but is located in the country versus a city will be valued differently, likely based on faster versus slower economic activity.

Other factors often examined are size and zoning of the comparable property versus the condemned land. An appraiser will want to find a comparable property that is relatively similar in size as the condemned property because it is more likely that properties that are the same size would have similar fair market values. An appraiser will want to find a comparable property that is zoned for the same use as the condemned property, once again, because it is more likely that properties that are used for similar purposes would have similar fair market values. Other factors examined include, but are not limited to, condition of the property, marketing factors, view, and other features. Ideally, the appraiser is using properties for comparison to the subject that share the same or similar highest and best use.

After an appraiser has pulled comparable properties, the next step will be to analyze the data on

the sale price of those properties. The appraisers will look at the specific price numbers and analyze the timeframe in which the property was sold. The timeframe of the sale is important because the market for selling property is everchanging; therefore, an appraiser typically would want the comparable properties to have been sold within a few years of the condemned land. However, regardless of how similar a comparable property is to condemned property, no two properties are *exactly* alike. Additionally, if the market has limited activity and the economic drivers are not changing, the data search may span a longer period. If the market is highly active, then the comparable data may need to be within a few months to a year.

To make up for the difference in date of sale, i.e. economic market conditions, the next step for an appraiser after analyzing the sales data will be to make adjustments to the prices of the comparable sales. The adjustments made to the sale prices are done to account for any lack of true similarity between the comparable property and the condemned property. For example, if an appraiser identifies a comparable sale that is similar to the condemned land but was sold seven years earlier, then the appraiser may need to adjust the sale price to better reflect what the comparable property would have sold for in the same year as the condemned property. Another example could be an adjustment made for size. If an appraiser uses a comparable land sale that is similar to the condemned land in all other respects except size, then the appraiser may adjust the sales price to account for that difference.

Adjustments can be either quantitative or qualitative. But it is important to note, the more support for specific adjustments, the more credible the resulting value analysis. Lastly, after making the needed adjustments, the appraiser may use the data collected from the comparable sales to arrive at an estimated fair market value for the condemned land.

The Grand Finale: Conclusion

Understanding the idea of fair market value and how that value is determined is an essential part of

being able to truly understand eminent domain. By way of reminder, the Fifth Amendment tasks those who participate in the facilitation of the eminent domain process to adhere to the golden rule of ensuring that there is payment of just and adequate compensation for the taking of land. Appraisers play a critical role in ensuring that the “golden rule” is followed by providing accurate determinations of fair market value. But we, as condemnation lawyers or attorneys who have interest in condemnation, also play a significant role. Though we are not the appraisers performing the various appraisal methods, it would behoove of all of us to stay informed and have a general understanding of the practices to ensure that we are able and knowledgeable enough to do our part to protect the constitutionally provided golden rule of condemnation. ▀

Notes

- 1 United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).
- 2 The Dictionary of Real Estate Appraisal, The Appraisal Inst. (7th ed. 2022).
- 3 U.S. v. Miller, 317 U.S. 369, 374 1943 (noting the term “fair” adds little to the phrase “market value”). See also Dictionary of Real Estate Appraisal, *supra* note 2 (defining market value as “[t]he most probable price that a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus”).
- 4 42 U.S.C. § 4601 et seq. See also 49 C.F.R. pt. 24.
- 5 49 C.F.R. Section 24.101(b)(1)(i)(B).