

Preventing A Down Real Estate Market From Affecting Valuation In Condemnation Cases



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thus starting the only law firm in Virginia dedicated to representing only property owners in condemnation proceedings. Joe has tried over 100 cases on behalf of property owners facing an eminent domain condemnation. Believing that public education is as valuable to protecting property rights as succeeding in the courtroom, Joe lectures nationally, writes, and frequently makes media appearances to advocate for the defense of individual property rights. He can be reached at jtw@emdomain.com.



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Journal, where his appreciation for the fundamental right of private property ownership grew. Following law school, Steve completed a two-year term as law clerk to the Honorable Jerome B. Friedman of the U.S. District Court for the Eastern District of Virginia, Norfolk Division. Steve joined Waldo & Lyle after completing his clerkship in the fall of 2008. This article is based on a paper the authors prepared for a seminar sponsored by the ABA's Section Real Property, Probate and Trust Law. He can be reached at sjc@emdomain.com.

Joseph T. Waldo and Stephen J. Clarke

Even if it's a tough market, you can minimize the fear factor.

WHATEVER THE economic circumstances, everyone knows the basis for just compensation in eminent domain cases, from the Fifth Amendment of the U.S. Constitution: "nor shall private property be taken for public use, without just compensation." State Constitutions echo the U.S. Constitution. Here are some examples:

- Virginia, Article I, Section 11 — "That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass...any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly";
- Maryland, Article 3, Section 40 — "The General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation";
- Florida, Article X, Section 6 — "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

This outline will overview the basics of how just compensation works, and how to make the best of it in a tough real estate market.

1. Just Compensation Defined By Fair Market Value

- a. “The guiding principle of just compensation is reimbursement to the owner for the property interest taken.... He must be made whole but is not entitled to more.” *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961).
- b. “[Just] compensation means the full and perfect equivalent in money of the property taken.” *United States v. Miller*, 317 U.S. 369, 373 (1943).
- c. “The word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity.’” *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).
- d. “The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness...as it does from technical concepts of property law.” *United States v. Fuller*, 409 U.S. 488, 490 (1973).
- e. The role of just compensation is to put the landowner in the same pecuniary position as he or she would be had the taking not occurred. See *Almota Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Virginia Elec. & Power Co.*, supra, 365 U.S. at 633.
- f. Payment of just compensation is based on the equitable notion that an individual should not be forced to bear a cost that should be borne by society in general. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005); *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535, U.S. 302, 336 (2002).

2. Courts Have Determined That Fair Market Value Is The Typical Measurement Of Just Compensation, But Not The Exclusive Measure

- a. “In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry...must be what is the property worth in the market.” *Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1879).
- b. The Supreme Court later explained that “[i]t is conceivable that an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value [as the normal measure for just compensation.]” *United States v. Miller*, 317 U.S. 369, 373-74 (1943).
- c. Fair Market Value is “the amount a willing buyer would have paid a willing seller in an arms-length transaction with both parties being fully informed concerning all of the advantages and disadvantages of the property, and with neither acting under any compulsion to buy or sell.” See 3A Kevin O’Malley, Jay Grenig & William Lee, *Federal Jury Practice and Instructions* §154.31 (5th ed.). The Court has defined it as “what a willing buyer would pay in cash to a willing seller at the time of the taking.” *United States v. 564.54*

Acres of Land, 441 U.S. 506, 511 (1979). Every state has a similar definition. See, e.g., *Fruit Growers Express Co. v. City of Alexandria*, 216 Va. 602, 606 (Va. 1976) (defining fair market value as the price the property would bring if it were offered for sale by one who wanted to sell but was under no necessity and was bought by one who wanted to buy but was under no necessity).

d. Fair market value cannot be the standard of valuation when it produces less than the constitutional guarantee or when the market value cannot be ascertained. Fair market value is generally not used to value special purpose properties or public service facilities because properties of this type are not typically bought and sold on the open market. See *State Road Comm'n v. Bd. of Park Comm'rs*, 173 S.E.2d 919, 925 (W.Va. 1970) (use of other valuation methods for public service facilities). But see *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (fair market value should still be used when market value is ascertainable).

3. Date Of Valuation

a. Most states have laws governing the date on which property taken by eminent domain is to be valued, and often this is the date the case is filed, the date the condemnor takes possession or title of the property, or the date of the trial on just compensation.

b. Frequently, a state statute will point to the property's value as of the time when the condemnor files its initial pleadings to take the property. However, an actual taking does not occur until the condemnor has taken additional steps; usually this requires the posting with the court for the benefit of the property owner a sum of money at least equal to the condemnor's own estimate of just compensation. Often the condemnor will take these additional steps at or near the statutory date of valuation, but that is not always the case. Condemnors may delay for months or even years the tender or posting of the deposit required to take title — this may be because the condemnor is speculating on the outcome of the case. In fact, many states permit the condemning authority to abandon the condemnation within a short period after its liability for the taking has been established.

c. Whenever there is a delay between the date of valuation and the date on which just compensation is actually determined, there is a potential for a declining or rising real estate market to affect the value of the property being acquired and the ability of the property owner to reinvest the proceeds of the condemnation in equivalent property.

d. Thus, the attorneys involved must know the date of valuation that is applicable in their jurisdiction, and be focused on determining fair market value of the property on the date of valuation. The longer the delay between the date of valuation and the date on which just compensation is actually determined, the more difficult it may be to demonstrate to a judge or jury what just compensation actually is.

e. In particular where real estate prices have fallen since the date of valuation, the property owner's attorney must be able to convince jurors to understand that fair market values might have been established on an earlier date, especially when some jurors may perceive that they have lost value in their own properties in recent times.