



Eminent Domain - Part 3 of 4

Practical Strategies a Landowner Should Follow to Maximize Compensation

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The United States and Oklahoma Constitutions both require that the owner of private land taken for a public use receive just compensation. Because the United States Supreme Court takes a much more restrictive approach with respect to just compensation, Oklahoma landowners should look to the Oklahoma Constitution to maximize their compensation. Specifically, the Oklahoma Supreme Court has interpreted article 2, section 24 of the Oklahoma Constitution to require that the owner receive “full” compensation for the land subject to condemnation – that the owner “be placed as fully as possible in the same position as that before the government’s taking.” Under Oklahoma law, the condemning entity must compensate landowners for the fair market value of their land, as well as relocation expenses and certain consequential damages. While there is a general rule against allowing compensation for business losses, the Oklahoma Supreme Court has still shown willingness to allow a jury to hear evidence about the business conducted on the land as part of the jury’s determination of the fair market value of the property.

In *State ex. rel. Department of Transportation v. Little*, 2004 OK 74, 100 P.3d 707, the Oklahoma Supreme Court reiterated that “property” means *every valuable interest in the affected land* which can be enjoyed and recognized. The Court also held that any applicable relocation assistance acts do not affect the just compensation calculation of value and damages due an affected landowner. Regardless of any other benefits offered to landowners, just compensation still requires the landowner to “be placed as fully as possible in the same position as that occupied before the government’s taking.”

General Strategies

The great majority of landowners react in one of two ways when they first receive notice from a condemning entity. After an initial panic, some landowners choose to ignore the notice, hoping that the issue will go away if they do not take any action. Other landowners react with anger, declaring that “nobody will take my land!” While both of these reactions are perfectly

understandable, neither will result in a landowner receiving maximum compensation for the condemned land. Instead, landowners should be proactive when they receive notice from a condemnor. If the proposed taking affects multiple tracts of land (i.e. a highway project or new transmission line), it is important for the landowners to communicate regarding what the condemnor is telling them. Often times, a group of landowners can jointly retain counsel, appraisers and other experts in order to share the expenses. A consolidated group often gives the landowners more leverage to negotiate with the condemning authority and maximize the monetary recovery and non-monetary benefits. If a condemnor knows that landowners are communicating with each other or have joined together, the condemnor will usually give the group more attention and even authorize higher offers. There is definitely strength in numbers.

In addition to engaging in open communication with other affected landowners, a landowner should also immediately begin investigating his potential damages. Seek professional advice from real estate professionals such as brokers and appraisers. A good appraiser is essential. While most appraisers are capable of valuing a parcel of land, a good appraiser will also help a landowner assess any potential damages to the property left over (i.e. remainder) after the taking. A landowner may also need to hire other experts to assess the possibility of unique damages, such as engineers (who can assess the projects affect on drainage, hydrology, and other issues), development experts (to determine whether the remaining land will need a new entrance or different type of access), location experts (who can determine damages stemming from loss of a location's visibility, loss of frontage property and other more commercial concerns), and many others.

Of course, retaining counsel experienced in condemnation matters is important. Most attorneys who regularly handle condemnation cases have access to appraisers, real estate brokers, developers, engineers, and other experts. If retained early in the process, an attorney can greatly assist a landowner to ensure that all value and potential damages to the affected land are taken into consideration.

The Commissioners' Award – Two Different Strategies

If early negotiations fail and a condemnation action is filed, the Court will appoint three commissioners to assess the just compensation for the taking (see article 2). In *State ex. rel. Department of Transportation v. Watkins*, the Oklahoma Court of Civil Appeals held that both sides bear the burden of getting the proper instructions and issues framed for the commissioners. In other words, a landowner has an obligation to disclose the damages that he believes will be suffered as a result of the taking. If the information provided to the commissioners is insufficient, the court may allow a supplemental commissioners' appraisal "as right and justice may require on good cause shown."

On the other hand, *Watkins* places an equal burden on the condemning authority to disclose all interests affected by the condemnation in order to justly compensate the landowner. There is no law in Oklahoma that forces landowners to devote their best efforts towards receiving a high-end Commissioners' award. In fact, a low Commissioners' award can actually be beneficial, because it can result in an award of reasonable attorney, appraisal and engineering fees to the landowner that are incurred during the proceeding. Under Oklahoma law, the commissioners first determine the

amount of just compensation due. If the landowner objects to the commissioners' award and demands a jury trial, and the jury verdict exceeds the commissioners' award by at least 10%, the fee shifting provision applies. Thus, if a landowner receives an unreasonably low offer from the condemnor and the commissioners' award comes in low (usually as a result of pressure from the condemnor or as a result of a condemnor's unreasonably low appraisal), it is sometimes reasonably certain that a jury award will exceed the 10% threshold.

However, if the condemnor's initial offer is reasonably close to the actual value of the land and damages to the remainder are difficult to ascertain, it makes much more sense for the landowner to work closely with the commissioners and push hard for a high award and hopefully an early settlement or an acceptance of the commissioners' award. It is important to remember that other than setting the date of the taking and the basis for the 10% fee shifting mechanism, the commissioners' award is meaningless if the case goes to jury trial. The jury will not know what the commissioners awarded.

Conclusion

When a landowner receives notice of a proposed taking, the worst a landowner can do is ignore the problem. Instead, contact an experienced condemnation attorney. The landowner might also contact other affected landowners to determine what offers others have received and possibly structure an alliance that will have greater bargaining power with the condemnor. A landowner should also begin compiling a list of damages to the land by the proposed taking, and contact an expert that can assess the true value of less-obvious damages. From that point, a landowner can choose to work very closely with the commissioners to structure a just award. If the landowner believes that the gap between the commissioners' award and his own independent valuation of the property is too great, he can proceed to trial, hopefully beating the commissioners' award by 10%, so that the condemnor is forced to pay the landowner's attorney and expert fees. The more research the landowner performs and the more information the landowner seeks, the more likely it is that the landowner will maximize his compensation for the taking.

Links

[Eminent Domain - Part 1 of 4: Limits on the Power of Eminent Domain](#)

[Eminent Domain - Part 2 of 4: Step-By-Step Guide to the Condemnation Process](#)

[Eminent Domain - Part 4 of 4: Settlement or Trial?](#)

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