

# Condemnation for the Transigator: A Transactional and Litigation Overview

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## **I. Introduction**

- A. The Acquisition/Condemnation Project [McCarthy]
- B. Your Client’s Property/Business During the Project [Levine]
- C. The Condemnation Case; Appraisal; Relocation; Business Interruption; Litigation. [Berry]

## **II. The Acquisition/Condemnation Project [McCarthy]**

- A. Government’s Determination of the Project
  - 1. Announcement and Publicity
  - 2. Fits and Starts
  - 3. Delineating the Project Limits
  - 4. Commencing the Property Acquisition Activities

B. The Property Acquisition Process

1. Agency Appraisal Prior to Making a Good Faith Written Offer Under MCL 213.55; MSA 8.265(5)
  - a. Interview of the Client
  - b. Requests for Information: tax returns, financial statements, other financial information (Exhibit A)
  - c. Confidentiality Agreement (Exhibit B)
  - d. The Appraisal Problem (Exhibit C)
  - e. The Appraisal [Table of Contents] (Exhibit D)
  - f. The Appraisal Review
2. The Good Faith Written Offer (Exhibit E)
  - a. Opportunity to Review the Written Appraisal
  - b. Negotiating with the Government
    - i. Is Your Client's Property Essential for the Project?
    - ii. Identifying Client's Goals and Objectives in Light of the Property Taking

C. Acquisition Without Condemnation

1. Pigs Get Fed—Hogs Get Slaughtered
  - a. Most Public Agencies Willing to Negotiate to Avoid Condemnation Litigation
  - b. What to Ask For:
    - i. Does the Offer Reflect Highest Market Value Price of the Property?
    - ii. Fixtures—Value in Place (Exhibit F)
    - iii. Fixtures—Detach/Reattach Cost
    - iv. Tenant Improvements—Value in Place
    - v. Personal Property & Inventory Relocation Costs
    - vi. Relocation Costs; 49 CFR 24
    - vii. Business Interruption Avoidance Costs (Exhibit G)
    - viii. Going Concern Value (Exhibit H)
2. The Purchase Agreement (Exhibit I)
  - a. Tax Considerations, 28 U.S.C. 1033
  - b. Agency Approval
  - c. The Closing and Money—Be Careful

- d. The Move
- D. Taking By Condemnation
  - 1. Resolution of Necessity/Declaration of Taking (Exhibit J)
  - 2. Pre-filing Right of Entry (Exhibit K)
  - 3. The Condemnation Complaint (Exhibit L)
    - a. Parties in Interest—Co-Defendants
    - b. Motions to Review Necessity (Exhibit M)
    - c. Vesting of Title and Payment of Estimated Just Compensation (Exhibit N)
    - d. Surrender of Possession
    - e. Contesting Just Compensation and Notification to Agency of Items of Compensable Property Damage
    - f. Jury Demand
- E. Property Owner Response.
  - 1. Second Bite at the Apple for the Condemnor.
  - 2. Practical Value and Utility of the Remainder.

### **III. Determination of Just Compensation**

- A. Definition: “The amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred.” SJI2d 90.05.
- B. In a total taking, payment of the market value of the property theoretically fully compensates the owner for the loss.
- C. In the context of a partial taking, just compensation represents the difference between a market value of the entire property before the taking less the market value of what remains after the taking, inclusive of damage to the remainder. In valuing the property after the taking, you must account for reduced size, altered shape, reduced access, any change in utility or desirability, the effect of regulation such as zoning ordinances on the remaining property and the use to which the condemning authority intends to make of the property acquired. SJI2d 90.12. These factors are illustrative, not exhaustive.

### **IV. Highest and Best Use**

- A. Definition: “The most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.” SJI2d 90.09.
  - 1. Legal.
  - 2. Reasonably probable.
  - 3. Physically possible.
  - 4. Financially feasible.
- B. “Reasonable possibility” of rezoning absent the threat of condemnation should be considered in arriving at the value of the property on the date of taking. SJI2d 90.10. You must “ignore a refusal to rezone unless you believe that the request to rezone would also have been denied even if the absence of the condemnation . . .” SJI2d 90.11.

## **V. Market Value**

- A. Market Value in condemnation is defined as:
  - 1. The highest price estimated in terms of money if exposed for sale on the open market.
  - 2. Reasonable time to find a purchaser.
  - 3. Purchaser buying with knowledge of all uses for which the property is adapted and is capable of being used. (fully informed).
  - 4. Being purchased by one who desires but is not obligated to buy and sold by one who is willing but not obligated to sell.
  - 5. Prudent seller at liberty to fix time and conditions of sale. (fully informed).

SJI2d 90.06.

## **VI. Appraisal Theory and the Search for Market Value**

- A. Factors that determine value.
  - 1. Utility which deals with size, location, uses allowed and the like.
  - 2. Supply and demand which involves competition between buyers, availability of similar property which includes social forces, economic forces, government forces and the like.
  - 3. Principle of substitution reflects market behavior and the proposition that when several similar or commensurate commodities, goods, or services are available, the one with the lowest price attracts the greatest demand and widest distribution. This principle assumes rationale, prudent market

behavior with no undue costs due to delay. In other words, a buyer will not pay more for one property than he would for another that is equally desirable.

## **VII. Approaches to Value**

- A. Cost approach.
  - 1. Reproduction cost—exact replica.
  - 2. Replacement cost—functional equivalent.
  - 3. Upper limit of value.
  - 4. Affect of regulations and “grandfathered” status.
  - 5. Depreciation.
    - a. Physical deterioration.
    - b. Functional obsolescence.
    - c. External obsolescence.
- B. Sale comparison approach.
  - 1. Comparable sales or market transactions.
    - a. Free will and good faith.
    - b. Case or credit.
    - c. Date of sale versus date of valuation.
    - d. Comparison of size and shape.
    - e. Comparison of physical features.
    - f. Existing uses and potential uses.
    - g. Demographics (traffic versus disposable income).
  - 2. Adjustments (market based versus “experience”).
- C. Income capitalization.
  - 1. Property’s capacity to generate future income and benefits.
  - 2. Net income from operations.
  - 3. Risk and return.
  - 4. Cap rates reflect both risk and return on capital and payment of debt.

## **VIII. Valuation Problems**

- A. Hospital.
- B. Apartment Complex.
- C. Industrial and Commercial Uses.

**Exhibit A  
Information Request**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exa.pdf>.

**Exhibit B  
Confidential Disclosure Agreement**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exb.pdf>.

**Exhibit C  
Service Assignment Proposal and Fee Estimate**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exc.pdf>.

**Exhibit D  
Complete Appraisal, Summary Appraisal Report**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exd.pdf>.

**Exhibit E  
Good Faith Written Offer**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exe.pdf>.

**Exhibit F  
Fixture Appraisal & Personal Property and Inventory Relocation Cost Estimate**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exf.pdf>.

**Exhibit G  
Business Interruption and Business Destruction/Good Will**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exg.pdf>.

**Exhibit H**  
**Business Claims for Going Concern Value in Condemnation Cases**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exh.pdf>.

**Exhibit I**  
**Purchase Agreement**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exi.pdf>.

**Exhibit J**  
**Resolution**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exj.pdf>.

**Exhibit K**  
**Right of Entry**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exk.pdf>.

**Exhibit L**  
**Complaint for Condemnation**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exl.pdf>.

**Exhibit M**  
**Motion to Review Necessity**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exm.pdf>.

**Exhibit N**  
**Order of Confirmation and Transfer of Title and Dismissal**  
View online at <http://www.icle.org/partners/materials/2001CP7191/20012A7191-exn.pdf>.

**Exhibit O**  
**Lease Clause Between Oil Company Owner and Operator of Gas Station**  
View online at  
<http://www.icle.org/partners/materials/2001CP7191/20012A7191-exo.pdf>.

**Appendix**

*Homeward Bound: Condemnation for the Transigator: A Transactional and Litigation Overview,  
October 18, 2001*

**Environmental Reports and Planned Unit Development Agreement**

View online at

<http://www.icle.org/partners/materials/2001CP7191/20012A7191-apa.pdf>.