

## SPECIAL ISSUES FROM CONDEMNATION DISPUTES IN A WEAK MARKET: EVIDENTIARY AND VALUATION ISSUES

### Timing of the Take

- Falling real estate prices vs. climbing construction and material prices

### Condemnation of Property in Development Process

- Developers do not usually sell property just while they are getting permits — if possession is during the development process, agency will neither give credit for value to be created, nor credit for value accrued but rather will value as raw land on account of disbelief in the development process. How do you appraise a property with a 50% completed MUP, when all you have are sales of MUP properties and raw land? (Lack of similar comparables.) Can a property owner be penalized by cooperating and holding off on continuing to develop his property?

### Getting the Money and Commitment

1. Use & Possession
  - The Hotel One story
2. Abandonment of public project; abuse of property owner
  - The sinking ship parking lot or Ballard Denny's
3. Getting the condemnation ordinance passed to establish a taking and avoid "condemnation blight" argument
  - lack of judicial support for "condemnation blight"
  - For development property, actual taking in terms of value may occur at point of contact on account of:
    - a. Lack of ability to raise capital (either debt or equity) with shadow of take hanging over property;
    - b. Lack of ability to sell (except at impacted value) and keep condemnation award (to make up for loss in sale).
4. *Lange v. State*, 547 P.2d 282, 288 (Wash. 1976) *en banc*
  - Add quote (copy attached) [**it wasn't**]

### Valuation

- Comparable sales
  - timeliness of sales in changing market; market activity decreases in poor market. In a good market, more sales, values driven by highest price paid —

becomes difficult to find the highest price someone would pay, in a very weak market, only those financially stressed will sell — if they are creating a market, would a knowledgeable prudent unmotivated person sell then? What is definition of “typiucal” motivation?

- partnership land donation sales
- purchase offers admissible?
- bona fide purchase offer of \$10,000,000. Highest closed was much less. Settled for \$8.25m on account of agency contention that property only worth \$7m and no comparables like it.
- Offers to sell admissible (generally as impeachment — WSDOT case in Sequim — listings were used to show property owner appraisal too high.)
- Income approach
  - Lease up time
  - Stabilized vacancy
  - Vacancy at time of valuation; can we assume vacant space is leased? What about agency-induced blight since acquisition and at time of jury viewing?
- Replacement cost
  - Falling market vs. rising replacement costs
- Highest & Best use
  - Definition
  - How far into the future before development is economically feasible?
- The risk of “updated” appraisals in falling market
- Condition of Property at time of taking
  - Vacancy Rates
  - Below market rents
  - Deferred maintenance

#### Damage to Development Project

- Business loss not compensable; but real estate is a business — key is to reflect that part of the business that is real estate
  - Relocation assistance for businesses, but not business of developing vacant real estate
  - Relocation Assistance
    - “Fair and equitable treatment for displaced persons and minimize hardship as a result of government taking” — *Union Elevator Co. v. State of WA*

- where is analog in interruption of real estate development project?
- *Union Elevator Co. v. State of Washington* (Div. III 05/15/08 #26806-1)
  - Property included in real estate appraisal by State as fixture
  - Property owner argued personal property to get replacement/relocation costs
  - Double dip?

#### Posturing Your Case at Trial or Mediation In Down Market

- What property owner lost instead of what government gained
- Taking home in down market
  - Property owner may get less than paid for home or the amount of indebtedness
    - Forced sale in down market
    - No redemption rights like in foreclosure

#### Condemnation Blight

- Hard money, unconventional financing because of condemnation blight?
  - Not generally compensable

#### Excluding the Junk

- 68% of financial expert witness testimony challenged under *Daubert* between 2000 and 2006 was excluded in whole or in part in the 9th Circuit (2000-2006 Financial Expert Witness *Daubert* Challenge Study by PriceWaterhouseCooper)