

**ALI-ABA Course of Study
Eminent Domain and Land Valuation Litigation**

January 6-8, 2005
Miami, Florida
(Mandarin Oriental Hotel)

**ESTABLISHING JUST COMPENSATION
FOR
UNIQUE AND SPECIAL PURPOSE PROPERTIES**

By

Andrew Prince Brigham
D. Mark Natirboff



Jacksonville, Florida

Introduction

Recently, I received a call from a prospective client. She related that she had a particular item of private property that was sought for acquisition by the state in which she resides. The condemnor apparently sought the item for historic preservation as part of “an arts and artifacts program.” The property was unique in that it was gift from a doting godmother, made from a rare, exquisite glass, and had additional intangible value in that, with it, my client was to be conferred a dignitary position in the ruling class. The special artifact was, oddly enough, a pair of glass slippers. The pair were to be worn exclusively by my prospective client; the slippers had no market for the property outside of my prospective client’s use. Apparently, the slippers were not made as one-size-fits-all. It seemed to me that her property was a unique, special purpose property. Thus, began my research into the subject matter at hand.

No Comparison

A special-purpose property has been defined as “[a] property devoted to or available for utilization for a special purpose . . .”¹

Related terms of art include “special design,”² “special use,”³ or “specialty.”⁴ However, these terms may have distinction between one another within, or among, jurisdictions.

Perhaps the most apt description for special purpose properties are “*properties without compare*.”⁵ Such description identifies the most intriguing characteristic of special purpose properties for eminent domain practitioners. Because of their unique or peculiar status, there is no market, or a limited market, from which value may be derived. In regards to a special purpose property, the market or sales comparison approach to value has little, or no, application. Utilization of such approach is argued either as an impossibility or an injustice.

Nichols’ The Law of Eminent Domain

further elucidates on such predicament for the condemnor and condemnee alike as follows:

“It occasionally happens that a parcel of real estate taken by eminent domain is of such a nature, or is held or has been improved in such a manner, that, while it serves a useful purpose to its owner, if he desired to dispose of it he would be unable to sell it at anything like its real value.”⁶

Nichols’ The Law of Eminent Domain
adds:

“The measure of compensation may be what another religious society, club, school, public service corporation or abutting owner, if they were at hand, would pay. But such proof may not be available. Hence, some other measure is sought and different means must be resorted to. So it is its value to the owners for their special purposes. This valuation approach, developed by the courts to ensure that the condemnee is compensated fully for his property, has been called “value to the owner,” “intrinsic value,” and a variety of other names.”⁷

Without default to market value, other value concepts or valuation methods surface which may assist the determination of just compensation. Whatever the nomenclature is that accompanies these alternative value concepts or valuation methods, their applicability to eminent domain is often the central debate in the condemnation of special purpose properties.

The Measure and the Measurement

Properties without ready comparison, or where there is a lack of comparable sales within the marketplace, invite judicial opinions that explore the theory and spirit of the constitutional guarantee of just compensation. Because market value is inapplicable, these judicial opinions allow practitioners to enjoy a unique vantage point from which to peer into the heart eminent domain jurisprudence. Making the owner whole, leaving the owner in the same position after the taking as the owner was before the taking, is the work of both

condemnor and condemnee alike.

It is almost axiomatic to say that the measure of *just compensation* is that it should be *just*. However, what is just is not always easily agreed upon. As such, market value has long been held to be the tool that best assists in making a true measurement. Nevertheless, it is in the condemnation of special purpose property that we most clearly find that market value is not the measure itself. Without the quick and easy logarithm to define just compensation, the reasoning utilized by the courts to adopt some other measuring stick to define just compensation provides additional revelation as to the level of indemnification the courts consider the owner is due when private property is taken for public use.

Because the Fifth Amendment to the United States Constitution sets the minimum threshold for just compensation by which federal or state jurisdictions must not fall below, the United States Supreme Court's interpretation of just compensation as it relates to special purpose properties is the proper place from which the practitioner should start in determining how to establish just compensation for unique and special purpose properties proceed in such cases.

- ***United States v. Miller*, 317 U.S. 369, 374 (1943).**

In its opinion upholding the federal scope of the project in *United States v. Miller*, 317 U.S. 369, 374 (1943), the Supreme Court stated the following with regard to the Fifth Amendment's guarantee of just compensation:

“The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”⁸

However, it is in *United States v. Miller*, that the Supreme Court elaborates on the principle of indemnity in explaining why a departure from market value is deemed appropriate in application of the federal scope of the project rule. In this regard, the opinion reads as follows:

“It is conceivable that an owner's

w
a
y
s

d
e
p
e
n
d
i
n
g

u
p
o
n

t
h
e

c
i
r
c
u
m
s
t
a
n
c
e
s

o
f

e
a
c
h

c
a

r
t
h
e
p
u
r
p
o
s
e
.
I
n
a
n
e
f
f
o
r
t
,
h
o
w
e
v
e
r
,
t
o
f
i
n
d
s
o

a
n
d
The Court goes on to explain instances in which the
assumption of market value as the measure of just
compensation requires an adjustment or a
departure:

v
e

r
e
t
a
i
n
e
d
,

t
h
e

c
o
n
c
e
p
t

o
f

m
a
r
k
e
t

v
a
l
u
e
.

a
r
k
e
t

v
a
l
u
e
,

r
e
s
o
r
t

m
u
t

b
e

h
a
d

t
o

o
t
h
e
r

d
a
t
a

t
o

a
s
e
,
a
s
s
e
s
s
m
e
n
t
o
f
m
a
r
k
e
t
v
a
l
u
e
i
n
v
o
l
v
e
s
t
h
e
u
s
e

a
p
p
r
a
i
s
a
l

w
i
l
l

r
e
f
l
e
c
t

t
r
u
e

v
a
l
u
e

w
i
t
h

n
i
c
e
t
y
.

i
l
l
i
n
g

b
u
y
e
r

w
o
u
l
d

p
a
y

i
n

c
a
s
h

t
o

a

w
i
l
l
i
n
g

s
e
l
l

c
i
n
i
t
y
,
h
a
s
n
o
t
i
n
f
a
c
t
b
e
e
n
s
o
l
d
w
i
t
h
i
n
r
e
c
e
n
t

n

o
f

t
h
i
s

c
o
n
c
e
p
t

i

With regards to application of the federal scope of the project rule, the Supreme Court found an instance to depart from certain evidence of market value in what it deemed fairness to the condemnor.

v
e
s
,

a
t

b
e
s
t
,

a

g
u
e
s
s

b
y

t
o

t
h
e

c
r
i
t
e
r
i
o
n

o
f

m
a
r
k
e
t

v
a
l
u
e

m
a
y

i
n
v
o
l
v
e

i
n

c
h

v
a
l
u
e
,

m
u
s
t

i
n

f
a
i
r
n
e
s
s

b
e

e
l
i
m
i
n
a
t
e
d

i
n

a
c
o

e
d

t
o

b
e

a
p
p
l
i
e
d

a
s

b
e
t
w
e
e
n

a
n

o
w
n
e
r

w
h
o

m
a
y

n
o
t

a
l

a
d
a
p
t
a
b
i
l
i
t
y

t
o

h
i
s

o
w
n

u
s
e
,

a
n
d

a
t
t
a
k
e
r

w
h
o

o
r

t
h
e

t
a
k
e
r
,
s

p
u
r
p
o
s
e
s
.

T
h
e
s
e

e
l
e
m
e
n
t
s

m
u
s
t

b
e

with the federal scope of the project rule, the Supreme Court recognizes a different reason in which departure from market value: the measure of just compensation for special purpose properties. From each of the three cases, a further illustration of indefnity is given wherein the Supreme Court must establish just compensation without the standard of market value.

- ***United States v. Toronto, Hamilton & Buffalo Navigation Co.***

In *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1950), the Supreme Court recognized that market value standard was either unavailable or unjust. As such, the Court avoided the comparable sales approach to value when its application would have awarded less than indemnification of the owner's loss because of a lack of truly comparable transactions. However, the Court is as equally concerned that any alternative value concept or valuation methodology derived from the particular facts and circumstances of a case avoids speculation. Thus, it is apparent that the particular facts and circumstances of a case involving special purpose property not only assist in explaining why the typical standard of market value fails to indemnify the owner, but also provide the fabric from which the condemnor and condemnee alike must fashion a tailor-made valuation standard from which to measure just compensation.

“Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.”¹⁰

Thus, the Court uses the principle of indemnity to explain why any increase in market value resulting from the condemned property's inclusion into the expanded project was to be disregarded by the trier of fact under the federal scope of the project rule.

The Supreme Court elaborates on this principle of indemnity in three decisions involving unique or special purpose properties subsequent to *United States v. Miller*. The cases arise from wartime expediency in the early 1940's. In contrast

To see this at work, one need only give attention to the Supreme Court's opinion in detail. In *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, the United States acquired a fresh-water ferry, the *Maitland No. 1*, which had been used in private industry to transport railroad cars on Lake Erie. This use preceded the construction of an “outer belt” of railroad transport for the Great Lakes region that made ferry passage obsolete. The lack of a competitive market for such vessels as of the date of taking, required the Supreme Court to elaborate on how to measure constitutional just compensation without the usual yardstick.

The Supreme Court cites back to it

reasoning in *United States v. Miller*, 317 U.S. 369, 374 (1943) with regard to market value being a practical standard of the “full and perfect equivalent in money of the property taken,” but not measure of compensation itself:

“
P
e
r
h
a
p
s

n
o

w
a
r
n
i
n
g

h
a
s

b
e
e
n

m
o
r
e

r
e
p
e
a
t
e
d

r
e
d
u
c
e
d

t
o

i
n
e
x
o
r
a
b
l
e

r
u
l
e
s
.

S
u
f
f
i
c
e

t
o

s
a
y

t
h
a
t

l
a
i
m
a
n
t
,

s

l
o
s
s

h
a
s

b
e
e
n

s
t
r
u
c
k
,

i
n

m
o
s
t

c
a
s
e
s
,

b

u
e
”

o
f

t
h
e

p
r
o
p
e
r
t
y

t
a
k
e
n
.

*S
e
e*
,

*U
n
i
t
e
d*

*S
t
a
t
e
s*

v
.

i
s

a

p
r
a
c
t
i
c
a
l

s
t
a
n
d
a
r
d
;

u
s
u
a
l
l
y

t
h
a
t

a
p
p
r
o
a
c
h
e
s

that the prospective use may be considered “only so far as the public would have considered it”; the price was not to be “what a tribunal at a later date may think a purchaser would have been wise to give.” *New York v. Sage*, 239 U.S. 57, 61 (1915).¹³

t

What “the public will pay” relates to the need for fact-specific, persuasive argument when the standard¹¹ of market value is unavailable. The Court’s application of its reasoning to the facts in regards to *Maitland No. 1* demonstrates that, where it is impossible to determine market value as a basis for just compensation, other measures of value may be relevant. Thus, it remains for the condemnor and condemnee to argue which other concept of value or valuation method best measures what is just. Both parties must fashion the proper concept and method from the particular facts and circumstances of the case. Recognizing the level of detail with which the Supreme Court analyzes the case best illustrates this point.

The Supreme Court clearly recognized the predicament of the Court of Claims in not being able to rely on comparable sales approach to value for the *Maitland No. 1* from the transactions occurring in the Great Lakes region. As referenced above, the Court refers to the patch-work of sales occurring in the region as being “scattered.”¹⁴ Specifically, the Court found “no market” when three of the five sales were converted from railroad car to automobile ferries. These sales were suspect because of their conversion and repair costs.¹⁵ Further, the Court found “no market” when the two other sales from the region were converted from railroad car to pulpwood transport. These sales were even more suspect in regards to their state of repair at the time of sale when compared to *Maitland No. 1*.¹⁶ The value range of all of these sales was from \$25,000 to \$65,000, but it seems the Court was not persuaded by the condemnor’s counsel that *Maitland No. 1* would have otherwise been destined for a “secondary use” market if her course were not altered by an involuntary taking.¹⁷

In identifying the property condemned as a special purpose property, the Supreme Court explains what they mean by finding there is “no market” for property such as the *Maitland No. 1*:

“At times, however, peculiar circumstances may make it impossible to determine a “market value.” There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is “no market” for the property in question. But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant’s property. We simply must be wary that we give these sparse sales less weight than we accord “market” price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer. And it is here that other means of measuring value may have relevance – but only, of course, as bearing on what a prospective purchaser would have paid.”¹²

Quoting former Justice Holmes, the Supreme Court further emphasizes that the appropriate measurement in a given case is more about the perspective of what “the public would pay” for a prospective use and less about what a court may consider expedient at the time of trial:

“Mr. Justice Holmes had earlier warned

With the lack of truly comparable sale

transactions in the Great Lakes region, the Supreme Court expressly agreed with the finding of Court of Claims that there was “no market.”¹⁸ Additionally, there appears to be an accord between the higher and lower courts in rejecting the original cost of *Maitland No. 1*, built in 1916 for \$362,800, as a just measure of compensation. The Court refers to the original cost as a “standard of the past” and, therefore, not applicable to the date of taking.¹⁹ As well, the reproduction cost of *Maitland No. 1* was rejected in that the Court reasoned that no one would consider reproducing a fresh water railroad car ferry of similar nature in the Great Lakes due to the competitive market for transport introduced by the railroads.²⁰ Insured value was \$100,000; scrap value was \$13,500; book value was approximately \$75,510.²¹ None of these values hit the mark either as far as the findings of both the Court of Claims and the Supreme Court.²²

Without a market for vessels similar to *Maitland No. 1* in the Great Lakes, the condemnee’s counsel must have felt as if his ship was sinking. This resourceful advocate, however, found a more optimistic valuation in the Florida Straits. Five sale transactions, one involving a vessel which sold while on the Great Lakes, were considered by the Court of Claims for transport ferries operating on the Atlantic Coast, most particularly between Florida and Cuba. The sale prices more favorably ranged from a low of \$50,000 to a high of \$332,500 than the range of sales from the Great Lakes region.²³ The Supreme Court, however, found this measure of just compensation to be lacking as well. All but one of these sales were vessels originally designed for ocean travel.²⁴ The one sale of the vessel on the Great Lakes was of a smaller and faster transport, lowering the degree of comparability with the *Maitland No. 1*.²⁵ Likewise, the cost of conversion from fresh to salt water was unknown for the sale vessel while the only evidence of the cost to float the boat down the Mississippi River was that it was of “considerable expense.”²⁶

Hoping to make adjustment for the lack of comparability, the condemnee’s counsel submitted independent evidence as to the cost to both equip

the *Maitland No. 1* for salt water and move her to Florida would be not less than \$115,000.²⁷ However, such cost were without any consideration of additional costs for strengthening the *Maitland No. 1* for ocean service or without a finding that there was any probability that respondent-owner would have been able to sell the vessel if transported to Florida or that successful operation would then be possible.²⁸

As a further alternative, it appears the condemnee’s counsel also submitted a valuation based upon a capitalization of earnings premised upon actual income earned by *Maitland No. 1* for the sixteen years preceding 1932 before the “outer belt” of railroad transport.²⁹ Although preceding the taking by ten years, this was the best evidence available to the respondent-owner’s counsel as of the date of taking in 1942. Considering profit at its highest level and accounting for progressively bad years, a figure of approximately \$42,816 was found to be the average yearly income with a return rate of 10.41% per annum.³⁰ While it may have been the best, or only evidence available, the Supreme Court eventually found this valuation speculative as well.

From the opinion, it seems that the Court of Claims fashioned its own alternative valuation from the facts at bar. The Court of Claims found indeed that *Maitland No. 1* was “unique and peculiar situated.”³¹ Without comparison on the Great Lakes, the Court of Claims concluded that the vessel was worth more than the residual value of an obsolete car ferry and resorted to a modified capitalization of earnings of the sixteen year period prior to 1932 before the “outer belt” of railroad transport. The Court of Claims then deduced 20% for the difference in life expectancy between fresh and salt water, the cost of conversion from fresh to salt water and moving the vessel to Florida, and needed repairs.³² This was the basis of the award of approximately \$161,834.³³

Nevertheless, after what appears to be pains-taking consideration by the Court of Claims, the Supreme Court reversed.³⁴ Capitalization of earnings was found by the Supreme Court to be

inappropriate in light of the fact that such approach was premised upon income received for the sixteen years preceding 1932 and not contemporaneous or proximate to the date of taking in 1942.³⁵ The Court found such earnings from 1916 to 1932 had no relevance on the issue of *Maitland No. 1's* capacity to earn after 1942.³⁶ Upon review, the Supreme Court did not overlook the fact that from 1932 up to the time of the government's requisition in 1942, *Maitland No. 1* had been laid up at dock for all but two years.³⁷ In simple terms, the vessel seems to have been in near-moth ball status as of the date of taking.

Rejecting the valuation methodologies of the two parties and the lower court, it seems that the Supreme Court was not ready to give up on a valuation based upon "Florida demand" finding that there should be no geographic restriction when considering the lack of a market in the Great Lakes region.³⁸ Instead, the Supreme Court remanded the case back to the Court of Claims and advised that weight not be given to Florida values unless the condemnee carries his burden in showing what the ordinary businessman in the trade would do, not what he the owner would do, dependent on whether there was demand in Florida for a vessel located in the Great Lakes for which the trouble and expense necessary to send the ship to Florida was considered in the price set for such a hypothetical purchase and sale.³⁹

Justice Frankfurter, is often cited for his concurring opinion in *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, which provided further caution to trial courts that attempt to establish an even keel in determining just compensation for special purpose properties as follows:

"Resort to the conventional formulas for ascertaining just compensation for the taking of property rarely bought and sold, and having therefore no recognized market value, does not yield fruitful results. The variables are too many to permit of anything except an informed judgment. Everything, therefore, turns on the process

of judgment to the end that judgment be not based on standards too difficult of application of evidence too tenuous for solid inference." ⁴⁰

- ***Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)***

A few months before its decision in *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, the Supreme Court deliberated on another wartime requisition of special purpose property in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). In the case, the United States condemned the plant of the Kimball Laundry Company from November of 1942 to March of 1946 to provide for laundry services to the Army.⁴¹ The Army retained one of the three Kimball brothers together with 180 of the company's employees to operate the condemned plant during the period of requisition.⁴² Having no other means to service its customers, the company suspended its business and ceased serving its long-standing trade routes during this time.⁴³ In the case, the rare circumstance was presented wherein the Supreme Court reversed the decision of the courts below so as to award going-concern value as part of just compensation entitled the owners of property taken.

The case best illustrates the reluctance of courts to award going-concern or business value outside of facts and circumstances in a case that make clear that such intangible property is taken and cannot be otherwise recaptured. This caution with regard to future profits that are more closely associated with the business enterprise, and less than a reflection of a return on the real estate, runs strong in cases involving unique or special purpose properties, particularly those cases in which either the condemnor or condemnee advocates that the income approach to value, or capitalized earnings, should be used rather than the sales comparison approach to value. If heeding such caution, it is up to the practitioner to distinguish why going-concern should be paid as part of the measure of just compensation, or account for how a valuation method excludes going-concern value or business value from its measure.

Justice Frankfurter, while on this occasion writing for the majority, reasoned at great length why a value for intangible going-concern was to be paid in the condemnation of the special purpose property in *Kimball Laundry Co.* but not in most other instances of condemnation under the Fifth Amendment's guarantee of just compensation:

“
T
h
e

v
a
l
u
e

o
f

p
r
o
p
e
r
t
y

s
p
r
i
n
g
s

f
r
o
m

s
u
b

n
e
r

m
a
y

t
h
e
r
e
f
o
r
e

d
i
f
f
e
r

w
i
d
e
l
y

f
o
r
m

i
t
s

v
a
l
u
e

t

l
d
e
m
a
n
d
w
h
i
c
h
g
i
v
e
s
t
h
e
m
a
v
a
l
u
e
t
r
a
n
s
f
e
r
a
b
l
e
f

r
s
o
n
a
l

a
n
d

v
a
r
i
a
n
t

s
t
a
n
d
a
r
d
s

a
s

v
a
l
u
e

t
o

t
h
e

p
a
r

s

t
r
a
n
s
f
e
r
a
b
l
e

v
a
l
u
e

h
a
s

a
n

e
x
t
e
r
n
a
l

v
a
l
i
d
i
t
y

w
h

t
o

c
o
m
p
e
n
s
a
t
e

t
h
e

l
o
s
s

i
n
c
u
r
r
e
d

b
y

a
n

o
w
n
e
r

a
s

c
u
s
e
.
I
n
v
i
e
w
,
h
o
w
e
v
e
r
,
o
f
t
h
e
l
i
a
b
i
l
i
t
y
o
f
a
l
l

o
s
s

t
o

t
h
e

o
w
n
e
r

o
f

n
o
n
t
r
a
n
s
f
e
r
a
b
l
e

v
a
l
u
e
s

d
e
r
i
v

c
r
a
t
i
c

a
t
t
a
c
h
m
e
n
t

t
o

i
t
,

l
i
k
e

l
o
s
s

d
u
e

t
o

a
n

e
x
e

above, the question arises whether the intangible character of such value alone precludes compensation for it. The answer is not far to seek. The value of all property, as we have already observed, is dependent upon and inseparable from individual needs and attitudes, and these, obviously, are intangible. As fixed by the market, value is no more than a summary expression of forecasts that the needs and attitudes which made up demand in the past will have their counterparts in the future. *Citation omitted.* The only distinction to be made, therefore, between the attitudes which generate going-concern value and those of which tangible property is compounded is as to the tenacity of the past's hold upon the future: in the case of the latter a forecast of future demand can usually be made with greater certainty, for it is more probable on the whole that people will continue to want particular goods or services than that they will continue to look to a particular supplier of them. It is more likely, in other words, that people will persist in wanting to have their laundry done than that they will keep on sending it to a particular laundry. But as the probability of continued patronage gains strength, this distinction becomes obliterated, and the intangible acquires a value to a potential purchase no different from the value of the business' physical property. Since the Fifth Amendment requires compensation for the latter, the former, if shown to be present and to have been "taken," should also be compensable."⁴⁵

n
s
h
i
p
.
”
44

“Assuming, then, that petitioner’s business may have going-concern value as defined

n
d
e
m
n
o
r

h
a
s

t
a
k
e
n

f
e
e

t
i
t
l
e

t
o

b
u
s
i
n
e
s
s

p
r
o
p
e
r
t
y

o
n

d
u
e

s
h
o
u
l
d

n
o
t

v
a
r
y

w
i
t
h

t
h
e

o
w
n
e
r
,

s
g
o
o
d

f
o
r

f
o
r

t
h
e

t
r
a
n
s
f
e
r
e
n
c
e

o
f

g
o
i
n
g
-
c
o
n
c
e
r
n

v
a
l
u
e
.

I
n

t
h
e

r
e
m
a
i
n
d
e
r

t
h
e

a
m
o
u
n
t

o
f

l
o
s
s

i
s

s
o

s
p
e
c
u
l
a
t

.
C
i
t
a
t
i
o
n

o
m
i
t
t
e
d

.
B
y

a
n

e
x
t
e
n
s
i
o
n

o
f

t
h
a
t

r
e
a
s

t
h
e

a
s
s
u
m
p
t
i
o
n

t
h
a
t

n
o

o
t
h
e
r

p
r
e
m
i
s
e
s

w
h
a
t
e
v
e
r

s
o
t
h
e
r
w
i
s
e
,
h
o
w
e
v
e
r
,
w
h
e
n
t
h
e
G
o
v
e
r
n
m
e
n
t
h
a
s
c
o

c
a
r
r
y
i
n
g

o
n

t
h
e

b
u
s
i
n
e
s
s
,

a
s

w
h
e
r
e

p
u
b
l
i
c
-
u
t
i
l
i
t

r
a
t
i
o
n

b
y

a

g
o
v
e
r
n
m
e
n
t
a
l

a
u
t
h
o
r
i
t
y
·

I
f
,

i
n

s
u
c
h

than it did on whether to pay for it as part of just compensation. In the end, it stands to reason that the Court could hardly have concluded that the owners should be left out on the line to dry, when it was without dispute that both their plant and business put the starch in the Army's whites.

t
● ***United States v. Commodities Trading***

p
a
y

f
o
r

i
t
.

C
i
t
a
t
i
o
n

o
m
i
t
t
e
d

;

47

In *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950), the beacon or precedent that stands at the forefront is that, with the lack of evidence of market value, the alternative measure of just compensation must not tip the scales which balance indemnity. The measure must not be a windfall to the condemnee, nor result in a discount for the condemnor. Stated another way, without market value striking the balance, courts

Although including intangible business value in the measure of just compensation under the facts and circumstances of the case, the Court qualified its decision. Having taken over the operations of the business with employees and managers in place and, then, turning the operation back over after the requisition period, the decision of the Court turned more on how to measure the value of the intangible

will look to protect both the individual citizen who is entitled to receive just compensation, and the public which must pay just compensation, in review of any alternative value concept or valuation methodology proposed by the parties to a condemnation.

The unique and peculiar subject of the condemnation was “whole black pepper” in the amount of 17,000,000 pounds.⁴⁸ The owner contended that just compensation should preclude the consideration of those ceiling prices that were forced on the sales of black pepper as of the date of taking. The ceiling prices were due to “wartime needs” that the government argued required a stabilized economy that limited both inflation and profiteering that, without ceiling prices in place, provided incentives for owners to hold back their pepper on assumptions that the stringency in available supply would prompt condemnation at more favorable price than the ceiling.⁴⁹ The owners argued to the contrary for a theory of “retention value” that would premise value not on the market as of the date of taken controlled by ceiling price, but would assume that the owners would have otherwise been able to retain pepper until such time as the ceiling price was subsequently removed.

In rejecting the owners’ premise of retention value, Justice Black delivered an opinion that again distinguishes the measure of just compensation from its measurement by market value:

“The questions presented are controlled by the clause of the Fifth Amendment providing that private property shall not be “taken for public use, without just compensation.” This Court has never attempted to prescribe a rigid rule for determining what is “just compensation” under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public,

courts have fashioned and applied other standards. Since the market value standard was developed in the context of a market largely free from government controls, prices rigidly fixed by law raise questions concerning whether a “market value” so fixed can be a measure of “just compensation.” *Citation omitted.* Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is “just” both to an owner whose property is taken and to the public that must pay the bill?”⁵⁰

Thus, in the context of the unusual facts and circumstances of the case, the Court found that a departure from “market value” was appropriate not with concern for “manifest injustice” to the owner, but with concern for a “manifest injustice” to the public.

Examples of Special Purpose Properties

A. Characteristics of a Special Purpose

While ready examples of special purpose properties come to mind and include schools, places of worship, hospitals, clubhouses, or industrial properties, such as an abnormally sized warehouses or a specialized factories, the law is replete with examples of special purpose properties that meet analytical criteria set forth in a fairly abundant number of judicial opinions. For instance, Nichols’ The Law of Eminent Domain lists, with citations, characteristics of a special purpose properties that evidence one or more of the following:

1. the unique value to the particular owner involved and not to others;
2. the special attributes inherent in the property itself and not improvements that, while unusual, are not unique;
3. the special attributes inherent in the property itself; or
4. the conversion to a peculiar use.⁵¹

Public properties, when condemned by another governmental authority with a superior condemnation right, also qualify as special purpose properties. Such properties include public roads, public museums, municipal landfills, or water and sewer plants. In some instances, special purpose may be applied to unimproved properties with special attributes for particularized uses such as geologic formations or natural or man-made features that promote storage of resources.

B. Specific Case Citations

Cases involving special purpose properties are as unique and peculiar as the properties condemned. All together, they comprise a collection of the exquisite and eclectic in both federal and state jurisdictions.

Often, historic properties are found to be special purpose properties. For example, in *Scott v. State*, 326 S.W.2d 812 (Ark. 1959) the court found that the Elkhorn Tavern, a tavern that doubled as a civil war hospital in the battle at Pea Ridge, was a special purpose property. In *Fusegni v. Portsmouth Housing Authority*, 317 A.2d 580 (N.H. 1974), the court found that the Sherburne House, an 18th century colonial house, was a special purpose property. However, not every historic property makes the grade. In *Fordyce v. United States*, 7 Cl. Ct. 591 (1985), the court held that the Fordyce Bathhouse, an Italian-Spanish Revival style bathhouse, built in 1914, located on “Bathhouse Row” in downtown Hot Springs, was not a special

purpose property.⁵²

Special purpose properties may reflect the peculiarities of the owner, more so than the property condemned. It may be a peculiar owner with a peculiar improvement to real estate falls into the category of special purpose property such as in *State Department of Highways v. Crossland*, 207 So.2d 898 (La. 2nd Cir. 1968) wherein the taking included a residential bomb, or fallout, shelter. Another peculiar improvement, a building 60% below ground, with a three-story vault, heliport, and firing range was found to be a special purpose property in *Fed. Reserve Bank v. State*, 313 N.W.2d 619 (Minn. 1981). At some point, the subjective peculiarities of the owner may exceed the level of indemnification provided by the constitutional guarantee.

As stated before, clubhouses or other meeting places also have their place in the roll call of cases involving special purpose properties. *Club St. Agnello Abate of Amsterdam, New York, Inc. v. State*, 68 A.D.2d 264, 417 N.Y.S.2d 21 (N.Y. App. Div. 1979) involved the taking of a social club found to be a specialty. However, *Matter of the County of Nassau (Town of Hempstead)*, 67 Misc.2d 1065, 325 N.Y.S.2d 555 (N.Y. Supreme Ct. Nassau Co. 1971) involved a private beach and cabana club that fell short of the same jurisdiction’s definition of a specialty. As such, the reviewing court rejected a summation method of value that would have valued the underlying land at a highest and best use other than the existing use of improvements not found to be a specialty.⁵³ *Benevolent & Protective Order of the Elks, Lodge No. 65 v. Lawrence Redevelopment Authority*, 604 N.E.2d 715 (Mass. App. Ct. Essex 1992) favored an Elk’s Lodge as a unique or special purpose property. Compensation included the “depreciated reproduction cost” of improvements and damages to the underlying land caused by a land use restriction imposed at the time of taking as part of the condemnor’s urban renewal plan.⁵⁴ *N.W. Racquet Swim & Health Clubs v. County of Dakota*, 557, N.W.2d 582 (1997) involved a 174,551 square foot building with nine tennis courts, 22 racquetball courts, basketball courts, and an indoor pool, all

held to comprise a special purpose property.

Churches, or other places of worship, also are considered special purpose properties. For example, both *Assembly of God Church of Pawtucket v. Vallone*, 150 A.2d 11 (R.I. 1959)⁵⁵ and *Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* 140 Cal. App. 3d 690, 189 Cal. Rptr. 749 (Cal. 2nd DCA 1983)⁵⁶ involve the taking of church properties wherein reproduction or replacement cost, less depreciation, was utilized to measure just compensation. In *First Baptist Church of Maxwell v. State, Dept. of Roads*, 135 N.W.2d 756 (Neb. 1965), however, the reviewing appellate court reversed the trial court for utilizing reproduction or replacement cost, less depreciation, when the testimony of two unqualified lay witnesses was determined to be incompetent.⁵⁷ Schools, too, may be special purpose properties as in *City of Wichita v. Unified School District No. 259*, 439 P.2d 162 (Ka. 1968), *County of Cook v. City of Chicago*, 228 N.E.2d 183 (Ill. 1st DCA 1967),⁵⁸ *State v. Waco Independent School Dist. (Tex)*, 364 S.W.2d 263 (1963),⁵⁹ and *State ex rel. Dept. of Highways v. Quachita Parish School Board*, 162 So.2d 397 (La. 1964).⁶⁰

There are whole industries that exist that are made almost entirely of special purpose properties. These may involve utilities, manufacturing plants, special storage warehouses, or transportation facilities. In *Dade County v. General Waterworks Corporation*, 267 So.2d 633 (Fla. 1972),⁶¹ *South Bay Irrigation District v. California-American Water Company*, 133 Cal. Rptr. 166 (Cal. 4th DCA 1976), and *Town of Oxford v. Oxford Water Co.*, 463 N.E.2d 330 (Mass. 1984), the takings were all of water utilities. In *Chicago v. Farwell*, 121 N.E. 795 (Ill. 1918), the taking was of a soap plant. In *re McCannel*, 301 N.W.2d 910 (Minn. 1980) involved the taking of a holding facility used for a main base and cargo handling with hangars to house large jet airplanes and specialized repair equipment. In *Housing Authority of Atlanta v. South Recycling Co.*, 264 S.E.2d 174 (Ga. 1980) the taking was a warehouse. In *Sanitary District of Chicago v. Pittsburgh, Ft. Wayne and*

Chicago Railroad Co., 75 N.E. 248 (Ill. 1905) the taking was of a passenger and freight railroad station for the deepening and widening of the Chicago River.⁶² In *Gray Line Bus Company v. Greater Bridgeport Transit District*, 449 A.2d 1036 (Conn. 1982), the taking was of a bus terminal which serviced eight bus routes.⁶³ Landfills or “dumps” are also frequent industrial properties that appear in cases involving special purpose properties such as in *City of St. Louis v. Union Quarry & Construction Company*, 394 S.W.2d 300 (Mo. 1965).

The taking of special purpose properties may involve unique, or peculiar, vacant lands, optimal for a specific use. *Central Illinois Light Co. v. Porter*, 239 N.E.2d 298 (Ill. 3rd DCA 1968) involved a taking wherein the condemned property was land suitable for duck hunting. In *Colorado Midland R. Co. v. Brown*, 25 P. 87 (Colo. 1890) the taking was for a water-powered mill site. In *United States v. 43.42 Acres*, 520 F. Supp. 1042 (La. West. Dist. 1981) an apportionment of a condemnation award was disputed between the fee and mineral rights owners regarding property suitable for construction of an underground storage cavern for oil reserves.

Among these odds and ends, it seems that special purpose property valuation is an area of eminent domain law where old cases may have as much to say as new cases. In *Producers' Wood Preserving Company v. Commissioners of Sewerage of Louisville*, 227 Ky. 159, 12 S.W.2d 292, (Ky. 1928), the taking by the commissioners of sewerage was a partial taking from a creosote plant at a time before environmental consciousness was yet awakened. In this vintage case, the court found that the property had a value as a manufacturing plant “just as a farm has a value as a farm, a ball park as a ball park, a freight yard as a freight yard, a church as a church, and a college campus as a college campus.”⁶⁴ Thus, it is the plain and simple truths that usually predominate in the valuation of special purpose properties.

Some Practical Applications in

Establishing Just Compensation for Unique or Special Purpose Properties

A. Jurisdictional Differences

Apart from any listing of examples of special purpose properties, not every property *declared* by a party to be special purpose has been *held* to be that by the court presiding over the taking. Some jurisdictions have set forth specific requirements of proof of special purpose, or special use, before admitting a particular valuation methodology other than a sales comparison approach to value. Knowing the law of the jurisdiction regarding unique or special purpose properties is, of course, critical.

Certain jurisdictions proceed under more relaxed rules of admissibility with regard to alternative value concepts or valuation methodologies than others, not only in the instance of unique or special purpose properties, but in condemnation in general. In these jurisdictions, there is little hesitation or evidentiary predicate required before the trier of fact considers any one of the three traditional approaches to value: sales comparison approach, income approach, or cost approach.⁶⁵ It may be that market value, or the sales comparison approach, is referred to as the “preferred” method of valuation.⁶⁶ Only in the instance of a motion in limine does the trial judge become involved in whether or not an approach is proper or is properly applied.

In contrast, there are some jurisdictions that hold unique or special purpose properties as one of only a few instances where a departure from sales comparison approach to value is permissible. It is in these jurisdictions that meeting the specific requirements of proof of special purpose, or special use, before admitting a particular valuation methodology other than a sales comparison approach to value is more critical. Often, such threshold requirement is referred in case law as a “rule of necessity” from which to depart from the sales comparison approach to value. Jurisdictions split on whether such a determination is to be

decided as a question of law by the trial judge or a question of fact by the jury.

For example, Rhode Island has a particularly strong bias against the use of value concepts or valuation methodology other than market value through comparable sales to measure just compensation. In *Capital Properties, Inc. v. State*, 636 A.2d 319 (R.I. 1994) a trial court was reversed for finding vacant land to be unique and special purpose property due to the influence of a surrounding development project. The trial court found severance damages through a before and after approach applied to vacant land in a partial taking. The state supreme court held that the trial court misapplied the law when departing from comparable-sales method for what it found to be vacant, unimproved land that was not being utilized in any specific or designated fashion or for a special purpose. Such determination is for the trial justice sitting without a jury. A recent case in *Sweet v. Town of West Warwick*, 844 A.2d 94 (R.I. 2004) echoes this strong penchant in an expressed rule favoring evidence of comparable sales to the exclusion of other methods of valuation.

New York, while less emphatic with regard to exclusive use of the sales comparison approach, has a particularly detailed set of requirements for property to be valued as a specialty. In *County of Suffolk v. Van Bourgondien*, 47 N.Y. 2d 507, 419 N.Y.S. 52, 392 N.E.2d 1236 (1979), the court relies on a four-part definition and a further qualification to determine whether or not improvements to property constituted a specialty. The four parts to the definition are: [1] the improvement must be unique and must be specially built for the specific purpose for which it is designed; [2] there must be a special use for which the improvement is designed and the improvement must be so specially used; [3] there must be no market for the type of property and no sales of property for such use; and [4] the improvement must be an appropriate improvement at the time of the taking and its use must be economically feasible and reasonably expected to be replaced. The further qualification was that the specialty must be a structure that is uniquely adapted to the business conducted upon it or use

made of it and cannot be converted to other uses without the expenditure of a substantial sum of money. Once meeting the four-part test and further qualification, the court held that the replacement cost of the improvements, less depreciation, added to the land value, could be admitted as the measure of compensation for the specialty. Such determination is all for the trial judge who decides both law and fact in New York.

Georgia, in regards to compensability of business damage losses, one of three criteria must be met proving the “uniqueness” of property in order for losses to be compensable upon the exercise of eminent domain. The issue is one for the jury to determine. In *Dept. Of Transp. v. 2.734 Acres of Land*, 309 S.E.2d 816 (Ga. 1983), the court made sense of what it considered a maze of prior irreconcilable decisions identifying the three criteria: [1] the property must be duplicated for a business to survive, and no comparable property exists within the area (“locality rule”); [2] the property has particular advantages only associated with its location; [3] the property is generally of the type not bought or sold on the open market, and market value is both indeterminable and inadequate.⁶⁷ A more recent case in *Department of Transportation v. Livingston*, 413 S.E.2d 249 (Ga. 1991) found a family-owned, full-service gas station to be unique and, thus, the owner was entitled to business damage losses. (*family-owned, full service gas station*). The findings of the court that supported the property being unique were that the property was located on a heavily trafficked arterial, that the owner was unable to purchase a comparable relocation site in the area, that there was a lack of comparable sales in the area, and that the market trends were replacing “Mom and Pop” stations by convenience-store-type filling stations.⁶⁸ The case shows a virtue to not allowing customers to pump their own gas!

While these cases serve to illustrate differences between jurisdictions in regards to any required predicate to proving a unique or special purpose property, other jurisdictional law differences emphasize to a greater or lesser degree the importance of securing a favorable ruling on

whether or not a property qualifies as a special purpose property. Consider the compensability of business damages; in a jurisdiction that either by constitution or legislative grace entitles an owner to business damages, the determination of whether a property is or is not a special purpose property is not as important to the condemnee than in jurisdictions where going concern may only be considered with the real estate, if at all. In most every jurisdiction, proving partial taking severance damages or cost to cure damages is an endeavor less dependent upon a showing that the condemned property is a unique or special purpose property than in the case of a whole taking where the dispute is more poignantly centered on whether the existing improvements, because they are unique or special purpose, are compensable although perhaps inconsistent with the highest and best use of the underlying land.

B. Fairness is Fact-Driven

The challenge, in each case and in every jurisdiction, is to make the owner whole or find the measure of what is just. Indemnity works both ways. Neither is the condemnee entitled to a windfall nor the condemnor entitled to a discount. The measure of compensation must be just and adequate. When market value is unavailable, unjust, or inadequate, the particular facts and circumstances of a case will establish just compensation for unique or special purpose properties.

If contending that the property is a unique or special purpose property, the condemnee must attempt to demonstrate that what is treasured is valuable. It cannot be a completely subjective value, or value divorced from market principles. While unique or special purpose properties are not typically traded or transacted, the fiction inside the courtroom must mirror what the realities between a hypothetical buyer and seller would be outside the courtroom. The particular facts and circumstances must fill in the gaps of what is not certain in the marketplace. The condemnee has a better probability at receiving a just measure of

compensation if such measure can be circumstantially proven. If the unique or special use of property is profitable, then it is much easier for the condemnee to prevail.

If contending that the property is not unique or a special purpose property, the condemnor must attempt to show that either there is, in fact, a market that establishes a fair and adequate measure through sales that are truly comparable. The condemnor should attempt to show the condemnee's claim of uniqueness is essentially a fake. Government cannot be guarantor of a return on speculative investment. The constitutional measure of compensation is to make the owner whole in so far as is possible and practicable, but not make the owner better off.

In *United States v. 564.54 Acres of Land ("Lutheran Synod")*, 441 U.S. 506 (1979), the Supreme Court rejected the "substitute facilities" valuation for a private, non-profit summer camp, holding that such property was not a special purpose property and market value shown by comparable sales was a fair and adequate measure of compensation. In its opinion, the Court found that there was a market for summer camps, albeit not an extremely active one; however, the evidence detailed in the opinion included eleven sales.⁶⁹ The condemnee claimed that substitution of old facilities with new facilities would require the construction of the camps to meet the new regulation to which the owners were not previously subjected. The measure advocated under this valuation methodology was \$5.8 million while the government's contention of value based on comparable sales was at \$485,400.⁷⁰ In upholding the jury verdict of \$740,000,⁷¹ the Supreme Court held the summer camps not to be special purpose property and, further, explained its holding that nontransferable values arising from the owner's unique need for the property were not compensable.⁷² The Court reasoned that a windfall may accrue to the condemnee who might replace the old facility with a new facility which would cost more than the value of the old, but in itself be more valuable.⁷³

In *United States v. 50 Acres of Land ("Ducanville")* 469 U.S. 24 (1984), the Supreme Court rejected the "substitute facilities" valuation, but in this instance for a public condemnee which operated a sanitary landfill taken as part of a federal flood control project.⁷⁴ Again, there was a large discrepancy in value between the condemnee's estimate of \$1,276,000 and the condemnor's estimate of \$199,950.⁷⁵ The facts and circumstances of the proposed substitution merit even closer examination. The new landfill site was larger in acreage than the fifty acres taken, had superior soil and water table conditions that allowed a greater depth of excavation, both of which provided a greater capacity to the new facility of 2,100,00 cubic yards for expected service of 41.6 years compared to the old facility with a remaining capacity of 650,000 cubic yards for expected service of 12.8 years.⁷⁶ The Court dismissed arguments that the condemnee made with regard to its responsibility for municipal garbage disposal as a justification to depart from market value; likewise, the Court rejected the prior appellate holding which remanded the case with instructions to discount the cost of the substitute facility to account for its superior quality.⁷⁷

Other cases which show courts finding that a property was not a special purpose property or finding that market value to be an adequate measure of just compensation are as follows: *Amoskeag-Lawrence Mills, Inc. v. State*, 144 A.2d 221 (N.H. 1958) (*river warehouse and top mill not special purpose*); *United States v. 84.4 Acres of Land*, 224 F. Supp. 1017 (W. D. Penn. 1963) (*nine-hole golf course*); *The People ex rel. Director of Finance v. YMCA of Springfield*, 387 N.E.2d 305 (Ill. 1979) (*a YMCA facility that included kitchens, swimming pool, gymnasium, locker rooms, and meeting room*); *Westgate Recreation Association v. Papio-Missouri River Natural Resources District*, 547 N.W.2d 484 (Neb. 1996) (*swimming pool complex*); and *State v. KQRS*, 2004 Minn. App. LEXIS 84 (Minn. 2004)(*radio station*)⁷⁸. All of these citations show questionable facts and circumstances that provide uncertainty as to whether condemnee wasn't attempting to obtain more than a just measure of compensation. The owner's contention

of unique or special purpose in these cases exceeded, or went beyond, fairness.

C. Related Doctrine

Assembled Economic Unit Doctrine (“AEUD”) goes hand in hand with unique or special purpose properties. Some example cases worth noting are as follows:

Gottus v. Allegheny County Redevelopment Authority, 229 A.2d 869 (Pa. 1967) involved a retail cleaning business wherein the court found that machinery was vital to the business operation and was a permanent installation.

State of New Jersey, State Highway Commissioner v. Gallant et al., 202 A.2d 401 (N.J. 1964) involved industrial looms. The court held the test for compensation is not based on removability but should rather consider that, apart from an involuntary taking, the owner was under no duress to sell the looms and value should consider the looms and other improvements as part of the same functional unit.

In Re: Condemnation by the Penn. Turnpike Comm. of 14.38 Acres, 698 A.2d 39 (Pa. 1997) involved a dairy barn and farm. The court held that it is the jury to decide whether the dairy barn and farm constituted a single functional unit requiring the property to be valued under reproduction cost, less depreciation, as a unique or special purpose property.

Special purpose properties invoking AEUD are also among the more memorable of cases because it is up to the practitioner to find the diamond in the rough. As is often the case with special purpose properties, the practitioner may find that the lawyer must proceed where no one else has ever gone before and where no one else will likely ever follow. For instance, in *Malone v. Div. of Admin, State of Florida Dept. of Transportation*, 438 So.2d 857 (Fla. 3rd DCA 1983), the property condemned was a grease processing plant that took in unwanted

waste cooking grease and converted into desirable ingredient used in animal feed. The practitioner should never forget that beyond the trial judge’s ruling at law, there is a jury to determine just compensation. It takes a victory-motivated trial lawyer to prepare jurors for an enlightened view of property that may appear at first blush to be a nightmarish distortion of Willy Wonka’s Chocolate Factory.

D. Distinguishing Special Purpose Properties From Limited Market Properties

There are other instances in eminent domain where a predicate issue involves whether or not comparable sales exist for the condemned property apart from the condemnation of a special purpose property. In most instances, special purpose properties involve improved properties. However, real estate, when under a particular plan of development, may take on some of the characteristics of a unique or special purpose property, particularly when condemnation is seen to interrupt plans that are actually in the process of implementation. While these properties are not special purpose properties, *per se*, the issue of fact and law becomes the proper valuation of such properties when evidence of genuinely comparable sales in the process of development is scant.

Returning to an earlier cited case, in *Producers’ Wood Preserving Company v. Commissioners of Sewerage of Louisville*, 227 Ky. 159, 12 S.W.2d 292, (Ky. 1928) the court awarded severance damages in a partial taking involving a vacant area of the special use property planned for expansion. This vintage case described the court’s finding at great length that partially executed plans must be considered, while wholly unexecuted plans must not be considered.⁷⁹

Similar cases have become more frequent as technological advances in the real estate industry have been more available to market participants and the valuation method relied by buyers and sellers in determining price in voluntary negotiations has trended toward the income approach using the

discounted cash flow methodology. Cases which example the courts grappling with the issues that arise in the context of such proceedings are as follows:

Div. of Bond Finance, Dept. of Rev. v. Bartow Rainey, 275 So.2d 551 (Fla. 1st DCA 1973).

County of Ramsey v. Miller, 316 N.W.2d 917 (Minn. 1982).

Board of County Commissioners of Sedgwick County v. Willard J. Kiser Living Trust, 825 P.2d 130 (Kan. 1992).

Capital Properties, Inc. v. State, 636 A.2d 319 (R.I. 1994).

City of Harlingen v. Estate of Sharboneau, 48 S.W.3rd 177 (Tex. 2001).

While it is important for the practitioner to distinguish unique or special purpose property cases from those wherein the highest and best use of real estate may be contested and the dispute centers on applicability of discounted cash flow methodology in light of limited comparable sales, the rationale of unique or special purpose property cases can be helpful in arguments for either condemnee or condemnor.

E. Lawyer and Appraiser

Special purpose properties also call for a renaissance between lawyer and appraiser. The lawyer's contribution to the measure of compensation is to make certain the appraiser is aware of any jurisdictional predicate that may be required for the valuation of special purpose properties. So too, the lawyer should challenge the appraiser on whether any particular valuation methodology falls below or exceeds the theory and spirit of the constitutional guarantee.

A valuation methodology that brings market reality outside the courtroom to the fiction of a voluntary transaction inside the courtroom is

what likely be determined the best alternative to market value. Such valuation methodology must meet any jurisdictional predicate that may be required for the valuation of special purpose properties apart from the sales comparison approach to value.

The appraiser's contribution is to make certain the lawyer is aware and open to methods of valuation that may not be typical, but rather are a custom fit for a unique, or peculiar, special purpose property. It may be that the approach most suitable to estimate value is a non-standard, or a modified approach, derived from one of the three standard approaches to value. It may be that the method is as unique as the property itself, but has a firm foundation in the theory and practice of appraising. Recent articles within appraisal literature are advancing the appraisal of unique or special purpose properties in response to legal issues that have emerged in eminent domain.⁸⁰

Too often, even in non-specialized cases like the appraisal of a special purpose property, the lawyer and appraiser segregate their roles. The two fail to develop a valuation that integrates both of their respective disciplines. Neither professional should assume that they know completely, or fully grasp, the discipline of the other. Particularly in the condemnation of a special purpose property, it is what the other does not know about law or appraising that may thwart discovery of the appropriate valuation method that utilizes an evidentiary predicate that is both admissible under just compensation.

This renaissance is just as important for condemnors as it is for condemnees in the condemnation of special purpose properties. Caselaw is replete with examples wherein jurisdictional acceptance of the valuation method employed, or the particular evidentiary model utilized, is highly disputed. Both the lawyer and appraiser must be prepared to persuade judge and jury as to their position. It is a rare instance wherein one can succeed without the other; both the law and facts must be persuasive.

Closing Remarks

It is the hope of the author of this article, that some of the practical applications provided as to unique or special purpose properties have encouraged the eminent domain practitioner in readying that unique or peculiar case for trial.

I should also report back to you that my prospective client with the glass slippers returned the following week. She has some sort of anxiety over a potential statute of limitation or laches problem. I am back to my legal research to figure it out.

As I complete this article, I should add that my research is rewarding me with additional dividends. A gentleman has appeared in my foyer with another rather unique property. I have been advised by my staff that within his family there is property that involves some sort of international title dispute with some probability of potential condemnation. On a mountainside somewhere near modern Turkey, there appears to have been a large ocean-going vessel, built to exact specifications, and designed for primarily animal transport in a double-stall configuration . . .

-
1. Eaton, J.D., Real Estate Valuation in Litigation, 2nd Edition, [Appraisal Institute] (1995) Chapter 11, *Special-Purpose Properties*, p. 227-244.
 2. The Appraisal of Real Estate, 12th Edition, [Appraisal Institute] (2001) Chapter 10, *Improvement Analysis*, p. 262-263.
 3. Nichols' The Law of Eminent Domain, (New York: Matthew Bender Co., Inc., 2004) Vol. 4, Part 4 §12C.01[1] *Special Use Property Defined*.
 4. *Ibid*.
 5. Duvall, Richard O. & Black, David S., "Methods of Valuing Properties Without Compare:

Special Use Properties in Condemnation Proceedings," *The Appraisal Journal*, [Appraisal Institute] (January, 2000).

6. Nichols' The Law of Eminent Domain, (New York: Matthew Bender Co., Inc., 2004) Vol. 4, Part 4 §12C.01 *Special Use Property Defined*.
7. *Ibid*.
8. *United States v. Miller*, 317 U.S. 369 (1943) at 373-374.
9. *Ibid*. at 374-375.
10. *Ibid*.
11. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1950) at 402. *Citing, United States v. Miller*, 317 U.S. 369 (1943), *rehearing denied*, 318 U.S. 798.
12. *United States v. Toronto, Hamilton & Buffalo Navigation Co.* at 402.
13. *Ibid* at 405.
14. *Ibid* at 402.
15. *Ibid* at 399, 400.
16. *Ibid*.
17. *Ibid* at 400.
18. *Ibid*.
19. *Ibid* at 403.
20. *Ibid*.
21. *Ibid* at 399.
22. *Ibid* at 402.

23. *Ibid* at 400, 401.

24. *Ibid.*

25. *Ibid.*

26. *Ibid.*

27. *Ibid* at 399.

28. *Ibid.*

29. *Ibid.*

30. *Ibid.*

31. *Ibid* at 401.

32. *Ibid* at 401, 402.

33. *Ibid.*

34. *Ibid* at 406, 407.

35. *Ibid* at 403.

36. *Ibid.*

37. *Ibid* at 398, 403.

38. *Ibid* at 405.

39. *Ibid* at 406.

40. *Ibid* at 407.

41. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) at 3.

42. *Ibid.*

43. *Ibid* at 3, 4.

44. *Ibid* at 5.

45. *Ibid* at 10.

46. *Ibid* at 12.

47. *Ibid.*

48. *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950) at 122.

49. *Ibid* at 124, 125.

50. *Ibid* at 123.

51. Nichols' The Law of Eminent Domain, (New York: Matthew Bender Co., Inc., 2004) Vol. 4, Part 4 §12C.01 *Special Use Property Defined*.

52. The bathhouse was condemned by the National Park Service to use as a museum. The owner attempted to rely on feasibility studies of the Park Service as a predicate of value for museum use. However, the facts and circumstances evidenced that while the Fordyce family had built the intricate and elaborate structure in 1914, and operated a bathhouse business under contract with the Park Service thereafter until 1962, the business had closed some fourteen years prior to the condemnation by the Park Service of the possessory interest in 1976.

53. The reviewing court affirmed the trial referee's using the reproduction cost method to measure the value of the club improvements while also discounting the underlying land value from what would otherwise be the value of unimproved vacant land at its highest and best use as if vacant. The reviewing court agreed with the trial referee for not losing sight of the market value of the package for its highest and best use. Apparently, comparable sales existed of other similar clubs which were then converted to other uses seeming to indicate that clubs of such type were outliving their usefulness, and evidence existed of the club's own poor financial picture. These facts and circumstances made doubtful application of the jurisdiction's definition of specialty. . *Matter of*

the County of Nassau (Town of Hempstead), N.Y.S.2d at 559-561. *Fordyce v. United States*, 7 Cl. Ct. at 592-594.

54. Special citation is given to owner's counsel for convincing the appellate court to *favor* an alternative valuation method initially referred to in the opinion as the "*disfavored* depreciated reproduction cost approach to value." *Benevolent & Protective Order of the Elks, Lodge No. 65 v. Lawrence Redevelopment Authority*, 604 N.E.2d at 716-718.

55. Lack of comparable sales from which to arrive at market value was a predicate factor.

The court held that when a property was unique and there were no comparable sales on the open market, the factfinder could consider other data, such as replacement cost less depreciation, so long as he considered the property in its entirety. *Assembly of God Church of Pawtucket v. Vallone*, 150 A.2d at 12-13.

56. Lack of comparable sales from which to arrive at market value was a predicate factor.

In affirming the jury's verdict from an appeal taken by the condemnor, the court made it a point to discuss the sale properties testified to by the condemnor's appraiser, who distinguished between sales that were "direct comparable sales" and that did not have such qualifier when considered merely "comparable sales."

The court summarized its finding concerning the use of sales that were not directly comparable by expressly stating that "Sales of noncomparable property are irrelevant to the value of the property being condemned." *Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach*, 189 Cal. Rptr. at 755.

The court further summarized a familiar pattern of facts and circumstances in the

condemnation of unique or special purpose properties as follows:

"As we earlier observed, underlying the entire valuation process is the concept of "just compensation." The principle sought to be achieved by this concept "is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken." *Citation omitted*. Accordingly, neither the Legislature nor the courts of this state have singled out any one appraisal technique as an exclusive method of valuation. *Citation omitted*. In most instances, the nature of the property condemned will determine which of the three approaches provides the best estimate of fair market value. Naturally, the condemnee will seek to employ that method which establishes the highest approximation of value and the condemner, the lowest. The jury, after hearing evidence from both parties and being instructed on the law by the court, must sift through the morass of conflicting testimony and determine the level of just compensation." *Ibid*, 189 Cal. Rptr. at 759.

57. Long-standing membership of a church, alone, did not qualify the two witnesses to provide testimony as to value. *First Baptist Church of Maxwell v. State, Dept. of Roads*, 135 N.W.2d at 758-759.

58. The court upheld replacement cost by method of substitution as an appropriate valuation methodology. *County of Cook v. City of Chicago*, 228 N.E.2d at 187.

59. The court upheld replacement cost by method of substitution as an appropriate valuation methodology. *State v. Waco Independent School Dist. (Tex)*, 364 S.W.2d at 268.

60. In a partial taking case, the court amended the condemnation award to include a cost to cure maintaining substitution of land, but adding replacement cost, less depreciation, for improvements. *State ex rel. Dept. of Highways v. Quachita Parish School Board*, 162 So.2d at 404-405.

61. In determining that just or full compensation standards requires that the valuation method utilized should not exclude either consideration of capitalized earnings or the value of contributed property, the court reasoned as follows:

“The case law and treatises on eminent domain reveal a multitude of valuation methods which have been considered appropriate to value public service corporation in particular cases. 4A Nichols on Eminent Domain, §15.4 and following (3rd ed. J. Sackman 1971), and cases cited therein. The conclusion to be drawn is simply that the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case.” *Dade County v. General Waterworks Corporation*, 267 So.2d at 639.

62. The court held that “although profits of a business do not determine value of land, it is proper to show, in arriving at market value, that it is valuable for certain purposes and productive to the owner.” *Sanitary District of Chicago v. Pittsburgh, Ft. Wayne and Chicago Railroad Co.*, 75 N.E. at 252.

63. Courts will not blindly award going-concern value. While similar to *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) in the acquisition of both the real estate and business operations, the bus terminal and routes were operating at a loss. *Gray Line Bus Company v. Greater Bridgeport Transit District*, 449 A.2d at

429-430.

64. *Producers’ Wood Preserving Company v. Commissioners of Sewerage of Louisville*, 227 Ky. 159, 12 S.W.2d 292, (Ky. 1928) at 167.

65. *Denver Urban Renewal Authority v. Berglund-Cherne Company*, 568 P.2d 478 (Colo. 1977).

66. *In re City of Great Bend, Kansas*, 869 P.2d 587 (Kan. 1994).

67. *Dept. Of Transp. v. 2.734 Acres of Land*, 309 S.E.2d 816 (Ga. 1983) at 6-10.

68. *Department of Transportation v. Livingston*, 413 S.E.2d at 249.

69. *Lutheran Synod*, 441 U.S. at 513-514.

70. *Ibid* at 509.

71. *Ibid*.

72. *Ibid*.

73. *Ibid* at 518.

74. *Ducanville*, 469 U.S. at 27-28.

75. *Ibid* at 26.

76. *Ibid* at 27.

77. *Ibid* at 34-35.

78. The court stated candidly, “KQRS frequently loses sight of this fact in its argument and shifts its focus almost entirely to its own use and its own subjective value. Doing this, KWRS virtually ignores the ‘market.’” *State v. KQRS* at 10.

79. *Producers' Wood Preserving Company v. Commissioners of Sewerage of Louisville*, 227 Ky. 159, 12 S.W.2d at 165-167.

80. Crawford, Robert G. & Cornia, Gary C., "The Problem of Appraising Specialized Assets," *The Appraisal Journal*, [Appraisal Institute] (January, 1994).

Duvall, Richard O. & Black, David S., "Methods of Valuing Properties Without Compare: Special Use Properties in Condemnation Proceedings," *The Appraisal Journal*, [Appraisal Institute] (January, 2000).

Crawford, Robert G. & Slade, Barret A., "Appraising Industrial Special-Purpose Properties," *The Appraisal Journal*, [Appraisal Institute] (April, 2001).

Clark, Stephen R. & Knight, John R., "Business Enterprise Value In Special-Purpose Properties," *The Appraisal Journal*, [Appraisal Institute] (January, 2002).