

VALUATION OF PRIVATE PROPERTY WHEN TAKEN  
FOR PUBLIC USE

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Numerous occasions have arisen through the years when it became necessary to convert privately owned land to some public use. Using Ohio history to illustrate, an extensive canal system was developed more than 100 years ago. A little later more land was taken for our railroads. Today we are finding it necessary to improve and expand our system of highways. Numerous other developments could be cited. The point is that fairly frequently privately owned lands are acquired under the authority of eminent domain either by some department of government or by a corporation providing some service which is directly related to the public welfare. Consequently, questions are asked generally about the whole procedure and particularly about the basis for compensation of a property owner when his land is taken.

What is "Eminent Domain"? A law dictionary definition is: "The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner." (Bouvier's Law Dictionary, Baldwin's Revision, p. 346)

The appropriation of private property for public use could be a very arbitrary thing unless tempered by the safe-guard of "just compensation" to the owner. The basis for this safe-guard is the Federal Constitution. Beginning with that point, let us trace the process by which "just compensation" is rendered to the owner when his property is appropriated for a public use.

The fifth amendment of the Federal Constitution assures the individual of certain rights; one being he shall not be deprived of his property without due process of law. This fifth amendment ends with the words "nor shall private property be taken for public use, without just compensation." The fourteenth

amendment of the Federal Constitution extends the "due-process-of-law" clause of the fifth amendment to the states and has been judicially construed to include the obligation to pay "just compensation." The Constitution does not provide any definition of "just compensation." That is a matter of judicial interpretation.

The Ohio Constitution (Section 19 of Article I) provides that before private property is taken for public use the owner must be compensated in money or secured by a deposit of money; "and such compensation shall be assessed by a jury, without deduction for benefits to any property owner." The following sketches this process as it applies to the authority vested in the Ohio Turnpike Commission which is taken as an example because of the current interest in the development of super highways.

The Ohio Turnpike Commission has been vested with the authority to appropriate property under powers and limitations similar to but not exactly the same as those vested in the State Highway Director. The main steps in appropriation by the Ohio Turnpike Commission follow:<sup>1/</sup>

(1) The Commission shall endeavor to agree with the owner (s) as to the compensation to be paid for the property.

(2) If unable to reach an agreement within the time considered to be reasonable, it shall declare by resolution that appropriation is necessary and begin such proceedings.

(3) Proceedings shall be begun either in the probate court or court of common pleas of the county where the property or part of it is located.

(4) Notice of this action must be served on all owners the same as in other civil actions. If the residence of an owner is unknown, notice can be by publication in a local newspaper.

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<sup>1/</sup> General Code of Ohio, Sec. 1208 (old code) as amended by House Bill No. 674, approved December 31, 1951.

(5) Determination of compensation shall be by jury with trial procedure following that common to civil cases.

(6) As soon as the compensation assessed has been paid, or its payment secured by deposit of money under the order of the court, possession of the property can be taken.

(7) If the Commission has not occupied or changed the property, it has 90 days after the final determination in which to elect to abandon the appropriation proceedings, upon payment of costs and attorney fees as fixed by the court.

(8) Costs of the inquiry and assessment shall be paid as the court may direct. When filing the application the Commission may offer to pay a certain amount for the property and the costs to that date. If the owner refuses the offer and, as a result of the trial case, does not receive more than the offer, he shall pay all costs after that date.

(9) The case can be carried to the court of appeals by either the Commission or the owner. When this is done the Commission can take possession of the property, provided it has paid, or deposited, the compensation assessed, plus any further compensation and costs as required by the court.

The foregoing sketches the main steps in procedure when property is appropriated under the authority of eminent domain. A central problem of the entire procedure is determination of "just compensation."

As has been indicated, the procedure contemplates purchase by negotiation when possible and acquisition by court action when negotiation is not successful. In either case the same rules for determination of compensation apply.

It is therefore desirable to know what criteria are used by a public agency (or in court action) to establish the value of appropriated property and to measure damages resulting from a "partial taking" of a tract of real estate.

Certain legal doctrines have been established by court decisions or instructions which serve as a general guide. On the other hand, the value of property rights is a complex thing which does not lend itself to any simple method of determination. Some general rules can be outlined but their application to a concrete situation still depends on human judgment.

Compensation to an owner is presumed to cover one or both of two things: the value of the property appropriated, and the damage to the remainder, "if any", resulting from a "partial taking." Let us first consider the accepted basis for the determination of value of the appropriated property.

Certain key decisions by courts have established precedents which guide the reasoning applying to valuation in other appropriation cases. The following traces the logic of these. In an early Cincinnati case the court directed that "consideration must be given to the nature of the property affected and the extent of the interest acquired."

Courts in various cases have held to the view that the value of property taken by eminent domain is its "market value" or "fair market value." The next question is what kind of a transaction demonstrates or determines fair market value? The answer to this as given by one court was -- "By fair market value is meant the amount of money which a purchaser willing but not obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all the uses to which the land was adapted and might in reason be applied."

The above statement is one way of saying that the "fair market value" is the value which the property would have when devoted to the highest and best use for which it is adapted. It may be pointed out that in specific cases an application of the willing buyer and willing seller concept runs into the problem of degree of willingness, of urgency, and the often imperfect play of market forces which

exist in the real estate market. As a further complication - in most cases where land is appropriated the market value must be determined by appraisal and not by current bonafied offers to buy or sell that specific tract.

A little further insight into the determination of highest and best use of a property was supplied by one court directing this to be: "Its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test."

The next question is whether or not potential use would be considered in determining market value. "It is the present market value which must be determined and not what the property may be worth some time in the future."

In another case it was directed that: "It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even though it is used as a farm and is covered with brush and boulders." Further on the same point: "If it appears that the land is especially adapted and available for some public use and that such adaptability and availability adds to its market value this feature must be taken into consideration." But in another case the court directed: "Any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land."

Can capitalization of income be used to determine value? As stated by one court: "If the owner relies upon his actual income from the property as furnishing a fair test of its value, he tacitly admits that the use to which the property is devoted is the most advantageous use to which it could be put, and the evidence necessarily throws some light on the market value." Again, this emphasizes that the value to be determined is "market value."

Another question which has arisen often -- should the value of the property to the appropriating authority be taken into account in the determination of just compensation? The answer is "no." "It is the loss of the owner which measures

the just compensation to which he is entitled."

Allowance for Damages

This applies to situations where only part of a property is appropriated. If, for instance, a roadway splits a farm, leaving two isolated and perhaps irregularly shaped tracts -- the damage to the remaining land might be substantial. In other situations the damage might be negligible.

Let us illustrate in a little more detail. Suppose a right-of-way for a proposed highway crosses a 160 acre farm. The land without the buildings is valued at \$32,000 or \$200 per acre. In addition the buildings are valued at \$16,000 and are considered adequate for a farm of this size. The right-of-way takes 20 acres which at \$200 per acre would be valued at \$4000. But the location of the road isolates 40 more acres from the rest of the farm. Suppose there isn't much demand for the isolated tract of 40 acres and its actual (or hypothetical) market price is only \$100 per acre, or just half the value before severance. This results in a damage of \$4000 in addition to the compensation of \$4000 for the 20 acres which is actually taken. If the owner chooses to keep the 40 acres could he measure his damage by the fact that he must travel three miles further to get to the tract and expend 10 percent more labor to farm it? Courts have been hesitant to admit such evidence except as it might throw light on the market value "before and after taking."

Let us make the assumption that the owner could not utilize the isolated 40 acre tract leaving 100 acres in the farm unit with buildings adequate for a 160 acre farm. Would the owner have a fair claim for damage because his farm is too small to fully utilize the existing buildings? This constitutes another problem in appraisal of damage. A claim for damage on this account would be given consideration.

Two alternative rules have been used to measure the total compensation due in "partial-taking" or "severance" cases. One rule is to determine the difference

between the market value of the property before and after the taking. The second rule is to determine the value of the part taken plus damages to the remainder.

In Ohio cases having a bearing on partial-taking cases the courts have used one or the other of these two doctrines. In one case the court instructed: "In awarding compensation the value of the interest remaining to the owner is to be deducted from the fair market value of the land." In another case the instruction was: "When part of an owner's tract is taken by an exercise of the power of eminent domain, the owner is not confined to recovery of the value of the part taken only, but is entitled to recover also for the damages thereby visited upon the area remaining in his title, possession, and use."

In assessing damages the usual doctrine has been to rely on present market value as the yardstick to measure damage. In various cases the courts have held that loss of future profits of a business conducted on the land should not be considered. As a matter of comment, this is drawing a not too distinct but important line between giving consideration to current use and profits and a resulting market value imputed to the land for its contribution to a business, and not giving consideration to the more hypothetical profits (or loss) which might be anticipated from use over a period of time in the future.

One of the most difficult situations in which to appraise loss and agree on "just compensation" arises when an owner is forced to hunt a new location and re-establish his business and home. It is in these situations that the market value concept as a measure of loss might be open to question. It may be pointed out also, that acceptance of a certain phraseology (such as fair market value) does not necessarily result in a uniformity of interpretation and application by juries in specific cases.

