Calculating Damages and Just Compensation In Eminent Domain Proceedings

By Mark S. Shipman

In most cases, condemnees do not contest the taking of their property. Rather, they are concerned with achieving the most value for the property taken. In this discussion, we will explore various kinds of takings and various types of valuation. In all instances, the goal is to provide just compensation to the condemnee. Both the Fifth Amendment to the U.S. Constitution and Article 1, Section 11 of the Connecticut Constitution provide that no property may be taken for public use without just compensation. The issue then, is what is "just compensation" and how is it determined in a particular circumstance. Just compensation has been defined as the "fair equivalent in money for the property taken from the condemnee as nearly as its nature will permit." Colaluca v. Ives, 150 Conn. 521, 530 (1963); see also Schnier v. Comm'r of Transp., 172 Conn. 427, 431 (1977). The fair measure of damages to the condemnee is the value in its hands at the time of the taking and not the value to the condemnor. City of Norwich v. Styx Investors in Norwich, LLC, 92 Conn.App. 801, 806 (2006).

It is customary to engage, at least, one appraiser as an expert, to present your best estimate of value. You need to be careful if you select more than one. Generally, in discovery, you will be required to turn over all appraisals and there may be one you don't like. Nonetheless, irrespective of the appraiser's testimony and opinion, it is, ultimately, the court's function to determine value and just compensation. The expert testimony provided by the appraiser is merely a guide in choosing the most appropriate method of determining the value of a taken property. See, D'Addario v. Comm'r of Transp., 180 Conn. 355, 365 (1980); Slavitt v. Ives, 163 Conn. 198, 209 (1972); Moss v. New Haven Redevelopment Agency, 146 Conn. 421, 425-26 (1959). The court is more than just an arbitrator of differing opinions of experts:

> He is charged by the General Statutes and the decisions of this court with the duty of making an independent determination of value and fair compensation in the light of all the circumstances, the evidence, his

> general knowledge and his viewing of the premises. He is not limited by the estimate of value reached by the taking authority.

Birnbaum v. Ives, 163 Conn. 12, 21 (1972). The court has the right, as of the trier of fact, to ignore a method advocated by all of the appraisers. In other words, the court may ignore the testimony of any or all of the appraisers, evaluate the evidence and come to a conclusion of its own. See, Robinson v. Westport, 222 Conn. 402, 412 (1992).

I. Approaches to Fair Market Value

Market value is defined as the:

> most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:
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> (1) Buyer and seller are typically motivated;
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> (2) Both parties are well informed or well advised, and acting in what they consider their own best interests;
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> (3) A reasonable time is allowed for exposure in the open market;
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> (4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
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> (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

12 CFR § 564.2(g); see also Nichols on Eminent Domain Vol. 9 § G31.04 (2013). Courts generally use the term Fair Market Value as opposed to Market Value. There are three approaches or methodologies that appraisers use to determine what they describe as "Fair Market Value": the cost approach, the income approach, and sales comparison. The Appraisal Foundation publishes, yearly, the Uniform Standards of Professional Appraisal Practice ("USPAP"). The USPAP standards must be followed by each appraiser. They should be reviewed and understood before analyzing an appraisal. In examining or cross

examining an appraiser, always inquire into his knowledge and application of the USPAP.

A. The Cost Approach

This methodology is based upon the proposition that an informed purchaser would pay no more for the subject than the cost to produce a substitute property with equivalent utility. This approach is generally not used for income producing property. It is often utilized when the property being appraised involves relatively new improvements that represent the highest and best use of the land or when relatively unique or specialized improvements are located on the site and for which there exist few sales or leases of comparable properties. It is also sometimes used to verify the results from another methodology. Appraisers rarely use this method. Most are not qualified to do so. However, when they do, they often rely on outside sources such as builders, architects, construction cost manuals (Marshall & Swift) or construction estimators.

A critical element in the Cost Approach is entrepreneurial profit. It is defined as the value increment over and above actual development costs. It is distinguished from the general contractor's overhead and profit which is typically categorized as hard or direct construction costs. It is difficult to quantify as there is no set percentage to apply to the summation of direct and indirect (soft) costs. Hence, it limits the accuracy of this approach to value. Depreciation, in all forms, is also difficult to quantify with any degree of accuracy, thus detracting from reliance on this approach.

B. Income Capitalization Approach

The Income Capitalization Approach reflects the subject property's income-producing capabilities. This approach is based on the assumption that value is created by the expectation of benefits to be derived in the future. Specifically, it estimates the amount an investor would be willing to pay to receive an income stream plus the reversionary value from the property over a period of time. The two common valuation techniques associated with the Income Capitalization Approach are direct capitalization and the discounted cash flow analysis.

In the Direct Capitalization Method, the appraiser converts the first-year net operating income into value utilizing an overall capitalization rate (reflective of an all-cash transaction) derived from comparable sales and the market surveys. While the typical buyer reviews and analyzes historical revenue and expense information, the major focus is on the future and, in particular, the first year of ownership.

In the Discounted Cash Flow Analysis the appraiser uses a discounted rate of yield capitalization and a property residual technique using an overall capitalization rate for direct capitalization. This methodology makes a forecast of net operating incomes and cash flows over a period of time ranging from five to 15 years (ten years is typical) and then determines a purchase price which will justify the degree of risk inherent in the proposed investment by discounting the cash flows at an appropriate rate. The rate is generally reflective of the return expected and the strength of the property and its tenants. The result of the Income Capitalization Approach is usually the primary value indicator for income producing property.

Existing leases are not binding on the Appraiser. The property is valued by an Appraiser, free and clear of any encumbrances, including leases. While actual rents may provide a good indicator, the may not be reflective of current market rentals. The Appraiser should do a study of the rents for similar properties in the marketplace, in order to determine a fair rental value. The exercise is similar to the exercise used to determine comparables in the Sales Comparison Approach (see below). A grid is prepared and adjustments are made to reflect relevant differences between the subject property and the comparable property. The same warnings regarding comparable properties discussed below with regard to the Sales Comparison Approach also apply to evaluation of the properties used for rental comparison. In addition, anyone evaluating an appraisal based on rental comparisons should look at the length of the comparable leases and whether there were incentives such as free rent or high improvement allowances that created an artificial rent per square foot.

After determining the appropriate rent per square foot, the Appraiser then estimates the expenses. As with any other subjective determination, those expenses

should be verified and tested against expenses in comparable properties. If they vary significantly from the actual expenses of the building, it is a cause for concern. There are also many subjective factors such as vacancy, repairs and management fees.

After subtracting the expenses from the determined rent, the Appraiser applies a capitalization rate. The determination of the capitalization rate or "cap rate" is the most important factor in determining value under the Capitalization of Income approach. The lower the cap rate, the higher the value. The capitalization rate is determined after consideration of many factors; including, rates of return on other types of investments and a band of investment which allocates between mortgage and equity based on usual percentages of each. The mortgage interest rates and rates of return on common investment vehicles are then blended to arrive at a capitalization rate. That resulting cap rate is divided into the net income to determine value.

After determining the value based on the Income approach, the Appraiser generally compares that value to his/her findings under the Sales Comparison Approach and/or the Cost Approach (rare). If the property is income producing property, the appraiser will, generally give more weight to the Income Capitalization Approach.

C. <u>The Sales Comparison Approach</u>

The Sales Comparison Approach is also sometimes referred to as the Market Approach or Market Sales Approach. The application of this approach consists of comparing the subject property with similar properties of the same general type which were sold recently. This comparative process involves judgment as to the similarity of the subject and the comparable sales with respect to many value factors such as location, size, zoning, timing, topography, availability of utilities, construction age, condition, lease profile, etc. The appraiser applies a percentage differential, either up or down, when comparing the sale to the subject premises. He then arrives at a value for each of the comparable sales, creates a grid and uses an average of the adjusted sales prices to determine the value of the subject. Although this approach is highly judgmental, it is important since it reflects the direct actions of market participants.

It is rare when an appraisal does not include the Cost Approach. Even where the ultimate valuation is based on the Income Approach, the Cost approach is used to test the validity of that determination. Appraisers often average the Cost and Income approach findings to arrive at value.

In dealing with comparable sales (sometimes "comps"), there are a number of things to consider. The comps should be verified to make sure they are where and what they are purported to be. The sales should be reasonably close in time. They should be adjusted to reflect rising or falling market conditions. They should be of basically the same highest and best use as the subject property. Watch out for large adjustments. Large adjustments probably reflect less comparability and an attempt to justify a predetermined result. When trying to achieve a particular result, appraisers often try to reach for comparables that will support their desired result. Look for out of market and out of date comps. Also look for big adjustments. If the adjustments are too big, the properties are probably not comparable.

II. Highest and Best Use

The fair market value of a particular parcel "should be determined in the light of the use to which it is being put or the use to which it could be put most advantageously". Gray Line Bus Co. v. Greater Bridgeport Transit Dist., 188 Conn. 417, 420 (1982). This concept translates into what is known as "Highest and Best Use". "The 'fair market value' is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use." Mazzola v. Comm'r of Transp., 175 Conn. 576, 581-82 (1978); see also Minicucci v. Comm'r of Transp., 211 Conn. 382, 385 (1989). Highest and best use is defined in The Dictionary of Real Estate Appraisal, Fourth Edition, 2002, published by the Appraisal Institute, as: "The reasonably, probable, and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." Thus, an opinion of the highest and best use must be conditioned by four criteria; the use must be: (i) legally permissible; (ii) physically possible, (iii) supported by effective market demand and financially feasible;

and (iv) result in the highest present value. As with just about all decisions that an appraiser must make, the determination of highest and best use can be highly subjective.

The determination of highest and best use for improved properties involves two considerations, as follows:

> • The value of the property as improved is compared to the value of the land (as if vacant) at its highest and best use, less demolition and possession costs (if any). If the "as improved" value is less than the land value (less demolition and possession costs), then the highest and best use is for demolition and redevelopment of the land. I f the "as improved" value is the higher of the two, then the existing use is the highest and best use.
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> • If the "as improved" value is greater, then the second consideration involves an examination of any remaining development potential (or reuse) of the existing property with respect to the four factors (legal, physical, market demand, and highest present value).

The Dictionary of Real Estate Appraisal, Fourth Edition, 2002, published by the Appraisal Institute.

In practice, the appraiser starts by determining the highest and best use to which the property may be put. "The 'highest and best use' concept, chiefly employed as a starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate." State Nat'l Bank v. Planning & Zoning Comm'n, 156 Conn. 99, 101 (1968). A highest and best use analysis involves assessing the subject both as if it were vacant and as if it were improved. In order to do this, the appraiser utilizes one or more of the three different approaches to determining the value of a property (cost, income capitalization, or sales comparison). Regardless of the approach used, the "fair market value of a piece of real property should be determined in the light of the use to which it is being put or the use to which it could be put most advantageously." Housing Authority v. Lustig, 139 Conn. 73, 76 (1952).

The appraiser needs to look at what the property might be used for, if it is not currently used for its highest and best purpose. Thus, implicit in the use of the words "highest and best use" is the proposition that the existing use may not be the highest and

best use to which the property may be put. For example, a large parcel may be looked at in the light of the probability of subdivision approval. See, Minicucci, 211 Conn. at 385. An appellant often raises the issue that the property is likely to be permitted to be able to be used for something it is not currently zoned for. This is often the case with undeveloped land where an appellant may urge the court, through its appraiser, to consider the property as subdivided; or consider that residential property may be rezoned for multi-family, office or industrial use. The appellant urging this bears the burden of proving it. The elements to be considered include whether action would be required by a zoning body to allow a potential use and the level of certainty, or uncertainty, that the zoning body would grant the necessary approvals. See, Mazzola, 175 Conn. at 582 (where "the use appears to be subject to certain restrictions or limitations the trier must first determine whether these impediments do in fact exist and if so whether it is reasonably probable that they may be removed in the near future"); Budney v. Ives, 156 Conn. 83, 87-90 (1968); Greene v. Burns, 221 Conn. 736, 746-49 (1992).

Where approvals are required from a zoning body to allow the highest and best use of the property, the value of the property based upon such potential use should contain a factor reflecting the likelihood of such approvals because such likelihood would affect the price a buyer would be willing to pay for the property. See, Transp. Plaza Assoc. v. Powers, 203 Conn. 364, 376 (1987). Even where evidence shows that it is highly likely that the governing zoning body would grant any necessary approvals, the uncertainty resulting from the mere fact that approvals are needed is sufficient to decrease the amount that a willing buyer would otherwise pay. Comm'r of Transp. v. Paul, No. CV 03 0197624 S, 2006 Conn. Super. LEXIS 424, *32-33 (Conn. Super. Ct. Feb. 3, 2006); see also New Jersey v. Gorga, 26 N.J. 113, 117 (1958) ("[n]o matter how probable an amendment [to the zoning regulations] may seem, an element of uncertainty remains and it has its impact upon the selling price").

An interesting discussion of the highest and best use of a property is contained in Town of Newington v. Estate of Young. 47 Conn.Supp. 65 (2000). This was a case involving a landowner and a contract purchaser. While there were many issues, Judge

Bieluch made an interesting analysis of how to value a subdivision, at pages 80-85, eschewing the lot valuation basis and discussing the issue of builder's profit and cost deduction.

III. Partial Takings

In many cases, the condemnor does not take all of the condemnee' s property. This usually occurs with road takings, road widenings or utility takings. The damages that result from these partial takings are generally referred to as severance damages; in other words, the damages that result from separating a portion of the parcel. Partial takings can also be easement takings.

In a partial taking, the damages are usually measured by valuing the property, as a whole, prior to the taking; and then determining the value of what remains after the take. The difference is considered to be the severance damage. Minicucci, 211 Conn. at 384. When only part of a property is taken the value of that part is not the only measure damages. The appraiser has to consider the injury or benefit to the part not taken. When that part is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. Meriden v. Ives, 165 Conn. 768, 771 (1974). Where the partial taking is an easement taking, the appraisal will include some estimate of the limitation imposed on the use of the easement by the servient tenement. That will, generally result in a percentage deduction of the severance damage reflecting the severity of the severance. For instance, the servient tenement may still have the right to traverse the easement, to park on it and do other things which do not interfere with the dominant tenement's use and purpose.

IV. Temporary Takings

Temporary takings are generally easements needed to facilitate construction. They might be easements to drain or slope. They could be for temporary access another parcel. Temporary easements for construction of a project are, separately, compensable. Knapp & Cowles Manufacturing Co. v. New York, New Haven and Hartford Railroad Companies, 76 Conn. 311 (1903). The value of a temporary easement is usually estimated based on the market rental value for the easement area. The annual rental value

for the temporary easement area is calculated by applying an appropriate capitalization rate to the underlying value. The underlying value is based on the per square foot value as estimated for the easement area in the previous analysis. There are circumstances where the loss can be substantial; for instance the loss of parking spaces or the extent to which the Temporary Easement extends into the property.

The appraiser needs to be aware of the impact on the owner. In that regard, it is helpful to have him/her talk the owner. Even with temporary takings, it is necessary to remember that the proper measure of damages is one which puts the landowner in as good a position as it would have been if the property was not taken. Citino v. Redevelopment Agency, 51 Conn.App. 262, 283 (1998).

V. Determination of Fair Market Value in a Recession

The utilization of comparable sales that are time sensitive in the sales approach to determining fair value (and the use of comparable rents in the income capitalization approach) will adjust the values for the current market. That is why it is essential to make sure the appraiser's comparables are time relevant. In the cost approach, the problem is a little more difficult. The costs are what the current market for labor and materials may be. This does not always reflect the recessionary state of the economy. That may become a factor in the Appraiser's choice of appropriate methodology.

VI. Considerations in Determining Damages

A. Land Value

See discussions under Cost Approach and Highest and Best Use.

B. Trade Fixtures

In order to constitute a trade fixture:

> it is essential that an article should not only be annexed to the freehold, but that it should clearly appear from an inspection of the property itself, taking into consideration the character of the annexation, the nature and the adaptation of the article annexed to the uses and purposes to which the realty was appropriated at the time the annexation was made, and the relation of the party making it to the property in question, that a permanent accession to the freehold was intended to be made by the annexation of the article.

Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208, 215-16 (1984) (internal citations and punctuation omitted). Up to now, Connecticut has applied the principle that just compensation in an eminent domain action is based on the value of the real estate and fixtures are treated in accordance with the traditional fixture analysis. City of New London v. Foss & Bourke, Inc., 85 Conn.App. 275, 280 (2004). That case was subsequently appealed on the basis that the court should have applied the assembled economic unit doctrine recognized in Pennsylvania. While affirming the Appellate Court on procedural grounds (late filing of appeal), our Supreme Court specifically reserved for a later determination whether to recognize the assembled economic unit theory. City of New London v. Foss & Bourke, Inc., 276 Conn. 522, (2005).

The assembled economic unit theory is a principle of Pennsylvania state law which requires the state to include in eminent domain awards an allowance for machinery, equipment and fixtures that cannot be economically or feasibly moved to a new location. Pou Pacheco v. Soler Aquino, 833 F.2d 392, 400 (1st Cir. 1987). The burden is on the condemnee to demonstrate that the "business requires a unique building for its operation, such that no other building within a reasonable distance is adaptable to the functioning of [the] business … ." Singer v. Oil City Redevelopment Authority, 437 Pa. 55, 67 (1970). At this time, Pennsylvania is the only state that has adopted the economic unit theory and a number of states have rejected it, including New York, Ohio, New Hampshire, Alabama, Delaware, Florida, Indiana, Maryland, Oklahoma, and West Virginia. How our Supreme Court will treat it when presented with the issue is unknown.

C. Tenants and Lease Provisions

Most leases contain a provision which excludes the tenant from recovery for anything other than its trade fixtures (if applicable) and relocation expense and effects a termination of the lease. If there is no such provision, the tenant can claim a portion of the damages based upon the value of the remainder of the lease. This is done by asking the court to determine the various equities in a motion to so. That motion can be made at the time the owner seeks to have the deposit paid. The tenant can also assert a claim to any excess awarded in the owner's appeal, in the same manner.

D. Cost to Cure

This concept is generally used where a statute or case law contains provisions for consequential damages. Our jurisprudence, generally, includes all related injury and damage in the overall valuation. For instance, in a partial taking, among the damages that may be evaluated by an appraiser and/or supported by other experts, could be the effect of noise, lighting, odor, etc. on the remainder of the land not taken. In calculating the damages resulting from those effects, the court may consider how much it may cost the condemnee to mitigate or alleviate those conditions. However, there has not been a body of case law that has developed in this state that is specific to the cost to cure.

E. Damage To A Business On The Property

The general rule is that nothing should be included in the appraisal of land for loss of business. Gebrian v. Bristol Redevelopment Agency, 171 Conn. 565, 575 (1976). This is because the owner can usually continue the enterprise at another location. Kimball Laundry Co. v. United States, 338 U.S. 1, 11 (1948); 4 Nichols, Eminent Domain (1981) § 13.3. Lost profits should not be considered in determining the fair market value of land. U.S. v. Certain Land in Town of Stratford, Fairfield County, Connecticut, 113 F.Supp. 465, affirmed 206 F.2d 289 (1962). There are, however some exceptions to the general rule. See, Gray Line Bus Co. v. Greater Bridgeport Transit Dist., 188 Conn. 417, 422 (1982) (in the condemnation of a public utility for the purpose of continued operation of the utility by a governmental agency, going concern value); Monongahela Navigation Co. v. United States, 148 U.S. 312, 328-29 (1893) (a profitable franchise); State v. Suffield & Thompsonville Bridge Co., 81 Conn. 56, 62, (1908).

An additional potential issue in connection with a business on the property is where there is some sort of farming or timber operation being conducted. Payment for growing crops, sometimes referred to as *fructus industrialis*, is codified in Section 48-14 of the Connecticut General Statues which provides that "the value of any crops upon the land subject to condemnation shall be taken into account in computing the damage". There is a dearth of judicial interpretation in Connecticut upon this statute. There are, however, cases under Section 16-268 of the Connecticut General Statutes, which

provides that public service companies shall pay the owners of property damages for growing crops destroyed by construction, maintenance and/or repair of a pipeline. The court in Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P., interpreting that statute, stated: "In an action for damages for injury for growing crops, the measure of damages is the value of the unmatured crops at the time of the injury." No. CV 920124088, 1998 Conn. Super. LEXIS 2300, *26-27 (Conn. Super. Ct. Aug. 14, 1998) (internal quotation marks omitted, citing Burke v. Thomas, 313 P.2d 1082, 1089 (1957)). That value is determined by estimating the yield of the crop, but for destruction; valuing that yield in the marketplace; and deducting, therefrom, the expense required to nurture, mature and market the crop. 21A Am. Jur. 2d Crops, (1981).

Compensating for growing crops assumes (1) that there are crops and (2) that they are growing. Until a growing season there is no crop. Any other interpretation would require the Court to treat the growing enterprise as a going business, paying him for a loss that was going to be sustained. However, nothing should be included in a condemnation award for the loss of a business (see below), unless specifically authorized by statute. Wronowski v Redevelopment Agency of the City of New London, 180 Conn. 579, 584 (1980). Since Section 48-14 authorizes payment for "crops upon the land", if there is no crop on the land at the time of taking, then there is no payment due.

F. Complications Caused by Multiple Owners

Issues may ensue where there is an ownership layer. While the landlord/tenant situation (discussed above) is usually taken care of in the lease, there are other kinds of ownership layers. There can be a life tenant on the property or there can be an option holder. There can also be a Bond for Deed providing for a definitive transfer. All of those situations raise a c\cautionary flag for document drafters. Here we will only discuss the after effects and not the prophylactics.

We have considered situations where condemnees urge zoning probabilities and prospective highest and best use scenarios on the court. These bear greater significance in the case where a third party has an Option or a Bond for Deed. That is because the Bond for Deed purchaser or Option holder may have a specific use in mind, that having

been the purpose of his contracting. As an example, a shopping center developer and vacant land; or a home builder and farm land. This often creates a conflicting situation. The landowner wants the court to consider the highest and best use of the property and award it for the vacant land, to him. The developer, contract holder says that the increased valuation belongs to it. The matter is clearer where the contract is a Bond for Deed because it can be argued that the landowner has valued its interest at the price it has accepted under the contract. In the case of an option, it can be the same, except that the Option holder has no obligation to purchase.

As pointed out earlier, there is an interesting an extensive discussion of the rights of contract purchasers and valuation methodology in Town of Newington. 47 Conn.Supp. at 93. In that case, Judge Bieluch stated:

> Since the measure of damage to the holder of an unexercised option to purchase of land taken by eminent domain is the excess, if any, of the total award above the optioned purchase price, the same principle applies, a fortiori, to the purchase contract … with two successive options to purchase the property taken by the town in eminent domain. Accordingly, the (landowner) is entitled to the purchase price agreed to in its contract … and (the contract holder) is entitled to the excess of damage found in the award from the taking over its contract purchase price, plus the return of its escrow deposit paid to the (landowner).

Id.

It is a complicated valuation process that requires the appraisers for the respective parties to consider the other in their valuation analysis. They often urge the same facts with different results.

G. Assemblage Value

Just as courts may consider the probability that a parcel may be used for other than its zone permits, so may the court consider the value of separate parcels assembled as a whole.

> The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value … There must be a reasonable [probability] that the owner could use this tract together with the other [parcels for such]

> purposes or that another could acquire all lands or easements necessary for that use.

Olson v. United States, 292 U.S. 246, 256-57 (1934); see also United States v. Fuller, 409 U.S. 488, 490 (1973) ("highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken"); Commissioner of Transp. v. Towpath Associates, 255 Conn. 529, 548 (2001). Nonetheless, courts are usually guided by one or more of the appraisers. Therefore, a discussion of the various appraisal techniques used by appraisers to come to a conclusion of value is essential.

H. Effect of Non-Conformity After Taking

In many cases, the result of a partial taking is that the remaining parcel either becomes non-conforming or has an existing non-conformity increased. The condemning authority is entitled to seek a variance for rendering the remaining parcel non-conforming, but only as to area. Conn. Gen. Stat. § 48-24. That statute further provides that if the condemnor is unsuccessful, it must take the whole property. However, the court can determine whether there is a reasonable probability that the zoning authority would grant relief beyond that afforded by the statute.

In the case of Commissioner of Transportation v. Paul, the court looked at the evidence from the appraisers and decided that the Commissioner had established that there was a probability that zoning relief for the created non-conformities would be received and that even if it were not, enforcement was unlikely. No. CV030197624S, 2006 Conn. Super. LEXIS 424 (Conn. Super. Ct. Feb. 3, 2006). Nonetheless, the court determined that there was a loss in value which resulted from the uncertainty that the situation would present to a likely purchaser. Id. at *32-34. In any case that involves leaving a non-conforming parcel, care should be had to make sure that you provide a sufficient foundation for the appraiser's opinion. This may include the use of local zoning officials. It may also include the necessity of obtaining Demolition Insurance in the event of damage to the building or buildings where reconstruction would be limited or prohibited.

This is an area where the appraiser will need some support in the record for a position that the non-conformity is limiting. However, it is important to, at least, have him/her value the effect of the risk of uncertainty.

I. Circuity of Travel

Connecticut follows the general rule that an owner is not necessarily entitled to damages for loss of a particular access. Warner v. New York, N.H. & H.R. Co., 86 Conn. 561, 564 (1913). The condemnor does have to leave the owner with sufficient access to be able to continue its business. W.R. Associates of Norwalk v. Comm'r of Transp., 46 Conn.Supp. 355, 378-79 (1999). However, a taking which merely results in circuity of travel does not entitle the landowner to compensation for inconvenience. Comm'r of Transp. v. Danbury Rd. Assocs., No. FSTCV020192695S, 2006 Conn. Super. LEXIS 762, *27-28 (Conn. Super. Ct. Mar. 2, 2006), citing Selig v. State of New York, 10 N.Y.2d 34, 39 (1961).

J. Water Rights

Connecticut has no significant case law isolating water right in eminent domain. Rather, those rights would be viewed, as with other emoluments in determining the value of a particular property

K. Environmental Issues

Two statutory provisions deal with the issue of pollution and its impact on value. Connecticut General Statutes Section 13a-76 (Reassessment of damages or benefits by judge trial referee or court) provides in part:

> The reassessment by the court or such judge trial referee shall take into account any evidence relevant to the fair market value of the property, including evidence of required environmental remediation by the Department of Transportation. The court or such judge trial referee shall make a separate finding for remediation costs, and the property owner shall be entitled to a set-off of such costs in any pending or subsequent legal action to recover remediation costs for the property.

Connecticut General Statutes Section 48-17d (Environmental remediation costs) provides that "(i)n all condemnation proceedings, environmental costs shall be considered in assessing fair market value."

Even though environmental issues affect a buyer's consideration of the property, appraisers do not usually account for environmental conditions. They, generally, specifically, exclude them from their consideration. The proper way to deal with the issue is by determining the cost of remediation and deducting it from the value. Conn. Gen. Stat. §13a-76.

It should be noted, however, that the Connecticut Supreme Court, in a case that was contemporaneous with the passage of Section 48-17d, stated that it did not need to consider that statute in determining that environmental considerations affect value, stating:

> In view of our jurisprudence governing the valuation of real property taken by eminent domain and the well reasoned authority from other jurisdictions favoring the inclusion of contamination and remediation evidence, we join those courts that have adopted the first approach just described, and hold that evidence of environmental contamination and remediation costs is relevant to the valuation of real property taken by eminent domain and admissible in a condemnation proceeding to show the effect, if any, that those factors had on the fair market value of the property on the date of the taking.

Northeast Ct. Economic Alliance, Inc. v. ATC Partnership 256 Conn. 813, 832-33 (2001).

If your client is aware of environmental issues it is incumbent upon you to obtain an expert to determine the appropriate cost of remediation, if any; and to have your appraiser consider the impact.

You should also be aware that Connecticut General Statutes Section 48-13 provides that the taking authority, with either permission or by court order, may enter onto the land prior to taking to conduct inspections, surveys, borings and other tests. Environmental problems are not likely to go undiscovered.

L. Relocation Benefits

Congress has enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (uniform relocation act), 42 U.S.C. § 4601 et seq., of which 42 U.S.C. § 4652 is a part, to assure fair and uniform treatment of land-owners and those displaced by federally funded land acquisition. See, 42 U.S.C. §§ 4621 and 4651.

The Act requires federal agencies to follow uniform procedures when taking real property and to compensate those displaced by such takings for their relocation costs. See, 42 U.S.C. §§ 4621, 4622, 4651. It further requires states using federal funds for projects to comply with the provisions of the act. 42 U.S.C. §§ 4655, 4604.

In response, the Connecticut legislature enacted the state relocation act, § 8-266 et seq., which provides for the payment of relocation expenses to those displaced by state projects or programs. State law provides a separate mechanism to compensate Viacom for the loss it will incur because of the mandatory removal of billboards. Under the state relocation act, businesses are eligible to receive compensation for relocation expenses and losses when they are forced to remove personal property as a result of the state's acquisition of real property. Conn. Gen. Stat. § 8-268. If a business seeks to contest the amount of compensation offered by the state, the state relocation act requires an appeal to the acquiring agency; General Statutes § 8-278; followed by an administrative appeal to the Superior Court pursuant to the Uniform Administrative Procedures Act.

VII. Litigation Costs

Connecticut General Statutes Section 13a-76 provides that "if the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, the court or such judge trial referee shall award to such property owner such appraisal fees as the court or such judge trial referee determines to be reasonable." This is generally the major expense in the litigation. There may be other experts utilized, but the appraiser is usually the most significant. While the award of appraisal fees is mandatory, all other costs are discretionary. When the appraiser and any other expert testifies, make sure to have them testify as to their fees. Their invoices should be put in evidence. Fees for other than the appraiser will need to be handled through the regular Bill of Costs process, unless they are specifically awarded by the court in its decision.

VIII. Additional Comments

Although not on the agenda, one of the most important considerations is the selection of an appraiser. Condemnations are often complex. Not all appraisers are

imaginative. Sometimes imagination is needed. You need your appraiser to be able to see errors and anomalies in the other side's valuation and to help you explore ways to examine those. You need your appraiser to assist you in the preparation of your cross examination. You need him/her to advise you as to whether he needs additional expert testimony to rely on for his opinion. Additionally, it is not just the appraiser's opinion; it is the ability to communicate it to the court. Presence and credibility are important. Cases are won and lost by appraisers as well as by lawyers. Some appraisers have appeared before many judges and referees in the Judicial District where your matter is being heard. Try to find out how they have fared and how they are perceived. In the final analysis, you are the director of this "play" and casting is important.