Acquisition Through Administrative Procedures

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• This discussion is concerned with the acquisition of right-of-way through administrative procedures. The methods of condemnation are divided into two broad types: the administrative method and the judicial method. The administrative method may be described as a means of condemnation whereby title and/or the right to possession rests on the filing of certain designated papers with a legally constituted condemnation authority which may be an administrative agency or may be a court acting in an administrative role. The judicial method involves formal court proceedings, terminating in a judgment and award of compensation.

Probably one of the most significant differences between these two methods relates to the vesting of right to possession of the condemned land. When the judicial method is used, the right to possession cannot vest in the condemnor, in theory at least, until the proceedings are concluded. In practice, however, the statutes of most States have modified this technical rule, but have left a variety of rules in its place regarding the precise point in the proceedings when the condemnor's right is perfected.

It is clear that delay in vesting the right of possession may seriously affect the interests of the landowner, the condemnor, and the public. From the standpoint of the condemnor and the public, construction of urgently needed facilities may be delayed. The public must wait a longer time before a new and improved highway becomes available. Delay in possession also has financial consequences. The cost of the new facility may become prohibitive through the rising costs of building and labor. If the proposed project is to be financed through revenue bonds, the delay in possession may mean that interest will be paid on bonds months before construction can even commence.

Insofar as the landowner is concerned, it cannot be said that he is generally benefited by the delay in the right of possession, although one gets serious argument from most landowners on this point. First of all, once condemnation proceedings are instituted the landowner is deprived of many valuable incidents of ownership during the pendency of the proceedings. The laws of the majority of jurisdictions provide that any improvements made on property subsequent to condemnation or commencement of proceedings are not compensable. The saleability of the property condemned and its rental value may decrease drastically once condemnation is commenced. Also, the landowner's capital is tied up during court proceedings and he may not have the funds required to relocate.

It is, therefore, imperative that the condemnor have the right of immediate possession, at the earliest possible moment. The administrative method takes care of this situation and the majority of States utilizing the judicial method have provisions that allow the condemnor to take possession at some stage during the proceedings. In some States this right is acquired immediately on the filing. Some States must pay compensation before they are allowed to proceed; others must pay or deposit estimated compensation into court; and in other States compensation must be paid or secured in advance of the taking. The Pennsylvania Supreme Court has held that the taxing power of the Commonwealth can secure just compensation and that the highway de-

partment can condemn and take possession prior to payment.

According to Highway Research Board Special Report 33, the States of Connecticut, Maine, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin utilize the administrative method in one form or another. I will not attempt at this time to describe the procedures used in each of these States, but I would like to tell you about the procedure in Pennsylvania. Our acquisition procedure is commenced by the preparation of a condemnation plan, which may be for a mile or five miles according to the particular project. This plan is prepared and it shows the right-of-way line of the entire taking. This plan is then signed by the Governor and the date of the taking occurs when the Governor signs the plan. The plan is then recorded in the county in which the land is located. We then conduct title searches, and order appraisals. Following this the district office in the district involved submits these appraisals to the central office in Harrisburg with a recommendation. These are then reviewed by a reviewing appraiser, and he is the one who determines the damage figure.

We have the firm offer system; that is, we make the landowner one offer and unless he can show us some reason that our appraiser is wrong, that there is some deficiency in his appraisal, or something has not been considered, we then notify the landowner that he may petition for a Board of Review, or we can petition for it. For the most part, the Boards are composed of an engineer, a real estate man, and an attorney who acts as chairman. If either party is dissatisfied with the Board's decision they can then appeal to the court for a jury trial. It is an automatic right of appeal for either party.

In Pennsylvania, this system applies chiefly to the highway department in its acquisition of right-of-way. Other condemnors, such as corporations who are invested with the right of eminent domain, condemn by court of resolution. The Turnpike Commission has its own procedure established by statute. As a result of all these different methods, the Joint State Government Commission has been directed by the Legislature to make a study of eminent domain law and procedure and recommend possible revision to achieve more uniformity.

DISCUSSION

ROSS D. NETHERTON, *Counsel for Legal Research, Highway Research Board, Presiding*

G. L. Zoellner.—A question for Mr. Buscher regarding the interrogatories: I think he spoke of them as a two-edged sword. Has this ever been thrown back at him by the attorney for the condemnee?

J. D. Buscher.—Oh, yes indeed.

Zoellner.—And you have no objection to that?

Buscher.—We might, but there is nothing we can do about it. We have to answer it.

Canada.—I would like to ask generally of those who have had experience in using discovery tactics prior to trial: what is your experience regarding the additional personnel, if any, required for the work entailed in answering interrogatories, going to discovery hearings, and taking depositions, etc.? Have any had enough experience to be able to give me an idea of how many additional men or what percentage of men you have added to your staff to handle this work?

Buscher.—I am not sure I can give you a precise answer. At present the legal staff of the Maryland State Roads Commission consists of 15

special attorneys now, more or less full-time. We increased it by 4 about 2 years ago when we took on the procedure of handling our own right-of-way closings. Prior to that time we farmed out the closings to local attorneys throughout the State, but, partially at the insistence of the Bureau of Public Roads, and partially because of our own thinking, we decided to put at least one attorney in each of the seven engineering districts throughout the State. That meant dispersing some from the Baltimore office and hiring others in those areas. It was around that time that we got into the discovery tactics.

It does take more work. But even if it costs you three or four more men, it is well worth it. We find it is well worth the dollars.

J. T. Amey.—We have a decision in Arizona holding that the highway department has the right to discover by pre-trial discovery, including depositions, interrogatories, and requests for admissions. We are under the so-called "Federal Rules." We pursued this course because we have a number of property owners' lawyers who have virtually unlimited access to highway department information. They can use our files, because they were successful in the State in convincing the judges that these were not only public records but that they were open to inspection at any reasonable hour.

So we took the position that, fine, this is a double-edged sword. But when we sought to acquire information from counsel for a property owner, he took the position that this was either an attorney-client privilege, or else these were his work files. Now we have this decision, and Florida also has a decision in the Shell case [*State Road Department v. Shell,* 122 So.2d 215 (Fla. 1960), 135 So.2d 857 (Fla. 1962)]. I think these decisions demonstrate a trend on the part of the courts in various jurisdictions to broaden the scope of discovery in the eminent domain field. I predict that other jurisdictions will soon follow whether it is at the insistence of the property owners' attorneys or the State highway department.

I think that the pretrial discovery contemplated under the Federal rules indicates this, and I think the contrary preponderant Federal court determinations in this area are wrong. I think it is evidenced by the Southern District of California Rule 9 (i). This sets up a procedure whereby attorneys have a mandatory pre-trial conference in all eminent domain matters. It sets up a listing of all the items they intend to prove. In this itemized listing, for example, if the parties are going to use the comparable sales approach they must indicate the exact properties they are going to use in evidence. If they are going to use the capitalization approach, they have to state their recap rate and all the other information contained on that. This is all sent forward prior to the time of the pre-trial hearing. Then at the pre-trial hearing the attorneys exchange information. They must also have all of their trial exhibits prepared.

This, I submit, goes a great deal further in pre-trial proceedings than is anticipated by the Federal rules, but it does indicate that at least one district court feels that pre-trial discovery in the eminent domain field of the appraiser's work product is not regarded as the attorney's work product under the rule of *Hickman v. Taylor.*

Netherton.—That is an extremely interesting description of the extent of discovery. I am glad you detailed it like that, because I have been wondering whether we could say that discovery is limited to the appraiser witnesses' end-product—a finished product of his appraisal conclusions —or whether we are being pushed back into the working steps taken in the formulation of the appraiser's conclusion. His notes, his estimates, the things which were rough-cut in their written form as notes but subsequently polished up later in the light of further work. My curiosity about this point was first aroused by

a recent case in Wisconsin and I hope someone from Wisconsin will tell us about it.

Price (Office of County Attorney, Milwaukee, Wis.)—The case you referred to occurred last November.[1] The attorney for the property owner brought an action against two appraisers for the State. One was an employee who formerly worked for the American Appraisal Company, and left them, and the other was a fee appraiser. The Attorney General's Office moved to suppress the evidence of the discovery examination, but was unsuccessful. The Attorney General then went to the Supreme Court on a writ of prohibition against the circuit judge. Oral and written arguments were submitted, and the Supreme Court quashed the writ and held that the discovery was admissible. The Supreme Court based its decision on the fact that Wisconsin in 1961 had enacted a discovery statute that had been on the books for about 30 years. And this discovery statute was just about parallel to the Federal discovery rules.

R. F. Carlson.—We have the same problem, and to show you the trend in California, we adopted the Federal rules and then got a decision last year holding that not even the "work-product rule" helps us anymore. In fact we do not even have the privilege rule applying to the opinion of our witnesses. The courts have held so far that the actual report itself is privileged, but you can take a deposition from the expert witness and get his opinon on highest and best use, comparable sales and value. It has resulted in this problem: when we sign a contract with fee appraisers now they have put a clause in the contract calling for not just their witness fee, but if they give a deposition to the other side they want $100 a day for their deposition.

Netherton.—What, if anything, has this development prompted in other States? This appears to be getting over into what Mr. Cage (Alabama) was talking about when he said that because of the trend of pre-trial discovery we were having to readjust the way in which we prepare our appraisal witnesses for the trial.

Carlson.—In line with the practice in Maryland, we are using interrogatories extensively and taking depositions of property owners. We have found that very advantageous in finding out their theories, the past history of the property, and their contentions. So far we have not made it a practice to take depositions of their appraisers, because we still have a few hip-pocket points we are saving and keeping that report out of their hands. We are trying to work for a rule that will have a simultaneous exchange of comparable sales data and appraisal reports so that the other side does not get a free ride.

C. H. Lehmann.—À propos the last remarks, we have a ruling from the Circuit Court of Baltimore County that where we furnish or the other side furnishes a complete written report you can take a deposition of the other side's expert witness. But in such an instance, the party calling him must pay him, and that is about $100 a day; that discourages the property-owners from imposing on the appraiser's time.

The advantage of our interrogatories is that it is implemented by the rulings of the court; if the property owner does not have an appraisal (and this is usual), then in a reasonable time before trial he must give us all this information, otherwise he is in trouble when he gets to trial because he will not be able to prove this.

Canada.—The rule in Florida, as stated in the Shell case, is that the property-owner may discover of the condemnor, but it very carefully avoids any mention of whether the condemnor may discover from the property owner. The extent of discovery goes not only to work papers

[1] State *ex rel.* Reynolds v. Circuit Court of Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1962).

but to correspondence and everything back to preliminary engineering sketches.

The day we contact our appraiser or an engineer to build a highway, or the idea is generated, from that day forward everything that happens is subject to discovery, including the end product. Our statute is an exact paraphrase of the Federal rules. We have no work-product rule, we have no attorney-client privilege as far as condemnation is concerned.

P. J. Doerner.—I would like to ask a State that has had experience with this discovery procedure whether this has actually led to the settlement of these cases, or whether it has led to more expeditious trial of cases. It seems to me that the underlying assumption of these cases is that both sides have the same basic data, but have arrived at widely divergent conclusions of value. In effect, however, they force the parties to pre-try the whole case by the lawyers without a judge or jury, then a few months later they go through the same thing before a jury. Has this sort of pre-trial practice led to the settlement of more cases which otherwise probably would have been tried? Has it really served to expedite the trial?

Carlson.—As far as California is concerned it has seemed that after the property owner has sunk that much more money into the case it is just that much harder to settle. In my opinion it is really a waste of money because they could get that very same data if they would get their own appraisers out there instead of going for a free ride. All the data of comparable sales, highest and best use, assess value, cost of reproduction of improvements is all equally available to the property owner. It is just that he wants the condemnor's information. In addition, I think we should be concerned lest the addition of these discovery porcedures make the cost of litigation so great that proper trial of a condemnation case becomes prohibitive both to the condemnor and condemnee. We seem to be heading in that direction.

J. E. Thomson.—Just a comment on the use of oral depositions of the landowners. I have found them very helpful for the reason that we, as the defendant, put on the rebuttal and are in an initial position of uncertainty as to what we are going to have to meet. No matter how much we go out and look at the property we can never completely anticipate everything that the landowner will complain about. We feel that oral deposition helps nail down the complaint and get the history of the property. We like it as a pre-trial run-through which takes much of strain off the attorney who during the trial might otherwise have to run out and look at the property again or round up some last minute witnesses.

Buscher.—I disagree somewhat with Mr. Carlson, I know of cases where by pre-trial discovery we have gone into the property owner's case, and I have become convinced that the theory used by the State was wrong. I do not take the position that the State right-of-way department is infallible, and cases come to me sometimes where I would like to tell them that we do not want to try their case unless they get another appraisal. I think there are times when you may want to take another look at the theory of your own case after you find out the theory of the property owner. And where reasonable attorneys are representing the property owners, I think that the same thing could happen and does happen when they learn the theory of our case.

I do not think that it makes the trial of a case any easier, but it may save the time and patience of the judge in ruling on evidence. In some cases depositions and interrogatories cannot do any good because the parties are just too far apart, but in many cases I find that if you do understand the property owner's case you might want to change your mind.

R. E. Robinson.—As yet we have not used depositions or preliminary examinations to any great extent. From these people who have used them I would like to get their reaction. Do landowners make so much use of this procedure that it becomes burdensome? We have not started it in our work, and it is our fear that if we start it we are going to start getting hit. I wonder if this has been true where it has been used.

Amey.—I think you will find that people who represent property owners, and particularly people who specialize in it, are going to come across these cases, and it is simply going to be a question of time before someone sends your office a set of interrogatories or summons your witnesses for deposition. I think this is part of the problem that Florida had. They took the position that they were not going to let these people have any information contained in their records, and as a result their Supreme Court has ripped them wide open and the language in that case is most unfortunate. If you have occasion to get a problem like this, read that decision and compare it with the Arizona decision. Our decision is unclear in some respects. For example, our court did not hold that I could take pre-trial discovery of every individual contacted in the appraisal report of the other side. They did say I could take depositions from and address interrogatories to the property owner relative to the valuation opinion of individuals he intended to call as witnesses.

As the people from Maryland have said, pre-trial discovery is a two-edged sword. We make our interrogatories in a continuing form so that immediately the case is filed and assigned to an attorney one of the first things he does is to submit these continuing interrogatories and takes a deposition of the property owner.

I can illustrate some of the possible advantages of this by reference to one of our recent cases. In connection with taking a small piece of farm land I asked the owner, on deposition, what he thought his property was worth. He said: "I don't know, I don't have the faintest idea." This answer contrasted with a case we had about a year ago where the property owner took the stand and you could not distinguish his testimony from those of his expert appraisers. He began to define highest and best use, fair market value, and all of the other terms of art. Under this most recent deposition, as our procedures are now, we ask the property owner whether he has any understanding of the term "highest and best use." He said: "No, would you tell me what it is?" I said, "Well, if you do not, say so. We are not trying to trap you. If you know tell us what your concept of it is." This information is invaluable if at some later time these people take the stand and begin to sound like they have been appraising all their lives.

Netherton. — This is interesting in terms of the old axiom that whoever has the power to define terms has the power to guide the thinking that follows. I wonder if you feel there is an advantage in getting your definition of some of these key terms, like "fair market value" agreed on in the record in advance. Does this put you where you want to be strategically in the proceedings that follow?

Amey. — It does particularly if at some later time the property owner or appraiser then gives a definition on the witness stand that is different from what he gave in response to an interrogatory or deposition.

Canada. — I can tell you something of the reaction of the property owners' lawyers in Florida. The decision in the Shell case came out on Friday; it was mailed to us so that we got it Monday morning. On that Monday morning in question our chief trial counsel came into my office with three sets of interrogatories. Neither of us knew what these were all about. At 10:00 A.M. the Shell decision came in the mail, and by 4:00 P.M. we had 27 sets of interrogatories. This gives an idea of how closely the property

owners' lawyers were watching the outcome of this case. We now get on the average of about 15 a week.

Thomson. — I have been interested in this comparison of pre-trial discovery to a two-edged sword. It seems to be that it is a two-edged matter especially in the urban areas where expert witnesses are employed by both sides. By expert witnesses I mean professional appraisers or near-professional appraisers. However, when you get out in the rural areas, I wonder if this is true. In the rural areas the witnesses for the landowner generally consist of one real estate man and some friends and neighbors. Chances are that you never know who they are unless you get a pre-trial conference and force the other side to disclose who it is going to use.

If you were to go into a pre-trial discovery proceeding immediately, chances are that the landowner would not know who he was going to use. In the end he may fall back on friends and neighbors, other farmers whose chief merit is that they are from the area and are insiders who know the area in a way that the outside appraiser does not no matter how extensive his written appraisal is.

Netherton. — How much of this squeeze that the trial attorney feels can be relieved by the use of economic evidence? Can this burden of having to rely so much on the appraisal witness, whoever he may be, be spread out over other forms of evidence? It is about the only direction that we have mentioned today in which we can move to relieve this problem.

A. J. Allen. — We have a problem in connection with the use of economic studies. Most of the attorneys who have spoken on the use of these studies have a situation in which they are allowed to offset benefits. In Iowa, however, the constitution prohibits us from considering benefits to the landowner resulting from the improvement. We have thought that this pretty well knocked out the use of most of these economic studies in our case. I am wondering whether any other States have a similar rule which does not allow them to or limits what they can consider in the way of benefits.

Carlson. — Well, I have seen some economic studies and I can understand why they are not used in evidence. They were not very good economic studies. They were made too much from the viewpoint of the highway department. If we could get a good objective study perhaps it would really be of some benefits as evidence.

W. H. Donham. — We provide for interrogatory discovery in Arkansas, but I have found that the other attorneys sometimes switch doctors before the trial. Now thinking of this in terms of appraisers, if this happens, all we can do is plead surprise and get a continuance. It is hard enough to get a condemnation case accepted in Arkansas as it is without giving the landowner a chance to take a non-suit on you. How are these admissions regarded in other States? Do they have the status of pleadings and answers? Are the parties stuck with them? Or can they come in at the trial and use another witness?

Buscher. — We have ours as continuing interrogatories, and if the other side changes witnesses they have to notify us. If they come into court with a new appraiser, the judge will consider it as a surprise and will not consider it in evidence.

Donham. — Well, that is the only way that the rule would have any effect. The practice as it is in our State, where the trial court merely gives a continuance, has no effect.

Amey.—We have had similar rules in the trial courts in Arizona. The rule is that if we have not had sufficient time to submit interrogatories or take the deposition of the valuation witness he may not be introduced at the trial.