

**AN INTRODUCTION TO EMINENT DOMAIN
LAW AND PRACTICE:
A PRIMER AFTER THE GRAND FORKS FLOOD**

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AN INTRODUCTION TO EMINENT DOMAIN LAW AND PROCEDURES

I. INTRODUCTION

These materials have been developed to assist the attorney who is not experienced in eminent domain proceedings by providing an overview of the condemnation process and practice pointers.

Eminent domain is usually governed by statute; check relevant state law. Real property acquisitions by the federal government are governed by the Uniform Relocation Assistance and Real Property Acquisition Act, 42 U.S. C. § 4601 et seq. and the Regulations to that Act found at 49 C.F.R. Part 24.

A useful handbook on eminent domain in Minnesota is Minnesota Condemnation Law and Practice by Lindall, Lefevre and Dobbins, published and updated by Butterworth Legal Publishers, St. Paul, Minnesota. The leading national treatise is Nichols' The Law of Eminent Domain (rev. ed. 1990) by Sackman and Rohan. Uniform Appraisal Standards for Federal Land Acquisitions (Interagency Land Acquisition Conference, Wash. D.C., 1992) is a helpful guide to federal condemnation practice.

II. THIRTEEN BASIC POINTS ABOUT CONDEMNATION PRACTICE

1. Just Compensation Is A Constitutional Right.

The right to just compensation when private property is taken or damaged for public use is established by most state constitutions.

- “Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.”

North Dakota Constitution, Art. I, sec. 16

- “Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.”

Minnesota Constitution, Art. I, sec. 13.

2. Eminent Domain Is Governed By Statute.

The procedures for eminent domain are governed by statute. In Minnesota, by Minnesota Statutes Chapter 117, in North Dakota by NDCC Chapter 32-15.

The statutory procedures differ significantly, although the fundamental legal principles are similar.

3. Does The Condemnor Have A Duty To Negotiate?

In North Dakota, the condemnor has a statutory duty to make “every reasonable and diligent effort to acquire property by negotiation. “As part of this requirement, the North Dakota condemnor must provide the owner with a written appraisal if one has been prepared.” NDCC § 32-15-06.1(1)(4). No parallel duty to negotiate or to provide the owner with an appraisal exists in Minnesota. Cf. Minn. Stat. § 117.165.

North Dakota also requires the condemnor to disclose upon request the names of neighboring property owners to whom offers are being made. NDCC § 32-15-06.2. No such disclosure requirement exists in Minnesota and no discovery is available in Minnesota at the commission level.

4. Consider Whether To Challenge The Public Purpose Of A Taking.

Before property can be taken, the condemnor must establish both that the taking is (1) for a “public purpose” and (2) that the taking is “necessary” to such a purpose. (See Minn. Stat. § 117.075; NDCC § 32-15-05.)

Challenges to public purpose or necessity are difficult and seldom successful because great deference is usually given to the findings and conclusions of the condemning authority. See, e.g., City of Duluth v. State, 390 N.W.2d 757. But, such claims do on rare occasion succeed, see, e.g., Univ. of Minnesota v. Chicago and Northwestern Transp. Co., 552 N.W.2d 578 (Minn. App. 1996) and may have value in gaining time or leverage in negotiations.

Questions of public purpose are deemed to be questions of laws and thus are to be decided by the Court and not by the jury. See Gissel v. Kenmore Township, 512 N.W.2d 470 (N.D. 1994); State v. McAndrews, 175 N.W.2d 492 (Minn. 1970).

In Minnesota, a challenge to public purpose must be made at the time the Petition for Taking is first heard by the Court. Such challenges are usually accompanied by a request for an evidentiary hearing before the court on the disputed issues. See, e.g., Univ. of Minnesota, 552 N.W.2d 578, supra.

In North Dakota, if the owner accepts payment of the condemnor's deposit, he waives all defenses, including public purpose and necessity, other than the claim for greater compensation. NDCC § 33-15-29.

5. Land Use Restrictions May Constitute A Regulatory Taking and Provide a Basis for Inverse Condemnation.

The Supreme Court has been increasingly willing in recent years to hold that certain kinds of land use regulations may constitute a taking. See, e.g., Lucas v. South Carolina Coastal Commission, 112 S. Ct. 2886 (1992). The nominal "test" for making such determinations is the three-factor analysis set forth in Penn Central v. City of New York, 438 U.S. 104 (1978), in which the court instructed that one must balance (1) the character of the government action; (2) the economic impact of the regulation; and (3) the reasonable investment-backed expectations of the property owner.

While this formula has produced some holdings favorable to landowners in the federal courts, its essential murkiness has allowed state courts to continue to find that most such regulations do not constitute a taking.

Thus, for example, the Minnesota Court of Appeals has upheld as constitutional a zoning moratorium which prevented all economically viable use of a property for two years despite the adverse impact on property owners. Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1992). See also Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979)(state has broad authority to enact reasonable land-use regulation without compensating property owners for restrictions on use).

6. The Measure of Compensation In Eminent Domain Is "Fair Market Value."

Property is to be valued at its fair market value which is "the highest price property can be sold for in the open market, by a willing seller and a willing buyer, neither acting under compulsion and both exercising reasonable judgment." City of Hazelton v. Dougherty, 275 N.W.2d 624 (N.D. 1979). Accord, City of St. Paul v. Rein Recreation, 298 N.W.2d 46 (Minn. 1980).

The “market value” is measured from the perspective of the property-owners, not the condemnor. That is, the value is not measured by the benefit gained by the condemnor, but by what the owner has lot. Fitzpatrick, 277 N.W. 294 (Minn. 1937).

Any competent evidence may be considered, if it legitimately bears upon the fair market value. State v. Harbor City Oil, 486 N.W.2d 455 (Minn. App. 1992).

7. Compensation Is To Be Determined As Of The Date Of Taking.

A key fact in the determination of just compensation is that the value of the land taken is fixed as of the date of taking. See City of Devils Lake v. Davis; 480 N.W.2d 720 (N.D. 1992); Mpls-St. Paul Sanitary District v. Fitzpatrick, 277 N.W. 394 (Minn. 1938). The date of taking will usually be the date on which the condemnor deposits its appraised value with the court.

Any increase or decrease in the fair market value of the property from the project to be constructed may not be considered. Fitzpatrick, 277 N.W. 394; NDCC 32-15-06.1(3).

8. Do Not Overlook Relocation Benefits.

Where a person or business is “displaced” by a government taking, there may also be a separate right to relocation benefits. See Minnesota Statutes § 117.52; NDCC § 54-01.1; 49 C.F.R. Part 24. This right is separate and distinct from the rights under an eminent domain claim (see Schnaible v. City of Bismarck, 275 N.W.2d 859 (N.D. 1979); NDCC 54-01.1-15, “Payments not element of condemnation damage”; Duluth Ready-Mix Concrete, Inc. v. City of Duluth, 520 N.W.2d 775 (Minn. App. 1994). The purpose of the Relocation Act is to ensure “that persons displaced as a direct result of programs or projects undertaken by a state agency . . . will not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement.” NDCC § 54-01.1-01.

9. Who Pays The Attorney’s Fees?

In North Dakota, the court is given the discretion to award the landowner its reasonable costs and attorney’s fees. NDCC § 32-15-32. In awarding

such attorney's fees, the court is likely to look at the difference between the original payment or deposit by the condemnor and the amount awarded at trial. See, e.g., City of Devils Lake v. Davis, 480 N.W.2d 720.

By contrast, attorney's fees are not ordinarily available in Minnesota. See State v. Carter, 221 N.W.2d 106 (Minn. 1974). Thus the actual compensation received by the owner will be reduced by the amount of such fees.

10. How Does The FEMA "Buyout" Differ From Condemnation?

FEMA has funds available to buy homes that were damaged by the flood and which, if removed, would reduce the number of properties vulnerable to future flooding. This program is entirely voluntary; the property owner must (1) want to sell and (2) be able to convey clear title to FEMA. FEMA will appraise the property at its pre-flood condition and purchase at the appraised amount. It will also require the seller's agreement that he will not move into another property within the 100-year flood plain.

Once FEMA has acquired the property it will convey it to the appropriate local government unit with a restrictions that preclude any development on the site.

Some amounts may be paid to assist in moving, but Relocation Assistance as understood by 49 C.F.R. Part 24 is not available to participants in the FEMA budget because it is voluntary.

By contrast, condemnation is not voluntary. In condemnation property will be assessed at its post-flood value (whatever that may be at the time of taking). Also, by contrast with a condemnation, Relocation Assistance would be available which would, for example, (1) pay actual moving expenses (or a specified payment in lieu of the same); (2) make certain additional necessary to purchase "comparable replacement housing"; (while usually limited in some instances these additional payments may be very substantial) and (3) ensure that "comparable replacement housing" is in fact available.

Finally, FEMA is likely to be relatively quick for those to whom it is available; condemnation will be a slower, longer, litigated process; relocation, though intended to be relatively simple, may also be a lengthy and sometimes litigated -- process

11. Your Case Is No Better Than Your Experts.

Condemnation litigation is expert intensive: the key issue will be value. Although an owner can testify to value, persuasive testimony requires an appraiser who 1) knows the area, 2) is competent to appraise the particular type of property at issue, 3) is familiar with the special issues raised by condemnation, and 4) can be an effective witness as to his opinion of value. A computerized legal database can provide you with references to an expert in court testimony and give you some indication of his likely effectiveness.

The best general discussion of the specific valuation issues raised in condemnation is T. Eaton, Real Estate Valuation in Litigation, 2d ed., 1995.

Depending on the circumstances other experts may be required, particularly planners, engineers and contractors. This is particularly true where there is a question as to the “highest and best use” of the property.

Look for an expert with real world experience with the kind of problem you are addressing: a little dirt under the fingernails can do a lot for a soils engineer.

12. Make Sure The Court Sees What Has Been Taken.

Photographs of the property are essential to ensuring that the court understands what the property was like before the taking. It is a mistake to assume that plans, elevations or other line drawings will provide adequate information as to the nature and attributes of the property.

Good exhibits will significantly strengthen the testimony of your witnesses, should make examination of these witnesses easier and more concise, and will provide a tangible reminder to the court about the consequences of the taking.

13. Valuation for Eminent Domain is Subject to Special Rules

Valuations for eminent domain are subject to special rules. Typically these include, among others, rules regarding the base date for valuation, how highest and best use is to be regarded, and how any impacts from the project itself are to be regarded. An appraisal done without knowledge of these rules will not accurately reflect the value of the property for purposes of eminent domain.

III. PRE-TAKING PREPARATION AND NEGOTIATION*

The client calls. He has received a letter from a local official informing him that his property is needed for a government project and, if the client will not sell it to the government, the government will condemn it. The client goes on to say that the government has made an offer for the property and told the client that the offer has been based on the government's own appraisal. The client is somewhat uncertain as to whether the client needs your services at all, but before the client commits to the direct sale, the client wants to have a better understanding of just what his rights are in this matter.

The situation is an all too frequent one in which the property owner who is unfamiliar with the issues and procedures of eminent domain is uncertain about how to protect his interests.

This outline suggests some of the matters that should be addressed before the actual condemnation takes place so as to assure that the property owner's interests are adequately protected.

A. Early Contacts from the Condemnor

Initial contact with the property owner will usually come in the form of a letter from the condemnor followed by a phone call or visit, but often word of the proposed condemnation is known sometime in advance of any formal notice. This is especially true in condemnations which will involve relocating a person or business to another property since notice of relocation is required to be given as early as practicable. Too often, casual or uninformed statements by the property owner in response to these early contacts will later be used by the condemnor against the owner.

It is essential that your client understand that he should be in touch with you from the earliest stages of the proposed condemnation. Clients will frequently avoid retaining counsel until the actual petition for taking is in hand -- this is sometimes a costly mistake.

B. Initial Matters to Discuss With Your Client

1. How the process works under Chapter 117, how it is different from the usual court proceedings.
2. Likely timing for the petition, the taking, hearing and appeal.

* The following materials are adapted from Minnesota Condemnation Law and Practice which Bruce Malkerson and I prepared for the MSBA in 1994.

3. What the client's short-term and long-term plans are for the property, including any proposed or considered development or change in the property's use:
 - a. Does the owner have plans to subdivide?
 - (1) What plans have been made for possible subdivision?
 - (2) Consider submission of plans for approvals to help establish the highest and best use.
 - b. Is the parcel one of several contiguous parcels with a common use?
 - c. Is it useful to acquire other adjoining property before the condemnation to increase the total damages?
4. Who should handle initial contacts with the condemnor.
 - a. It is often easier for the owner to obtain certain kinds of information from the government at early stages of the condemnation.
 - b. Determine at what point it will be most helpful to the client's interests for the attorney to make a formal appearance.
5. Discuss the need for, selection of and use of experts.
 - a. Appraisers:
 - (1) Use of preliminary valuation letter;
 - (2) Need for appraiser familiar with condemnation;
 - (3) Need for appraiser recognized in local area;
 - (4) Need for appraiser familiar with valuation of the particular existing use or potential use of the property;
 - (5) Need for appraiser consistent with approach to case -- settlement likely or litigation through trial.
 - (6) Check court's references to appraisals in published cases.
 - b. Planners.
 - c. Other experts on unusual valuation issues including contamination, wetlands restrictions, zoning, or specific engineering issues.
6. Consider existing leases and how they will be impacted by the condemnation.
 - a. Is there a condemnation clause which governs?
 - b. Is it possible or desirable to add or amend a condemnation clause before the taking? Should leases be renewed?
 - c. Availability of relocation benefits for tenants.

- (1) Consider approaching the tenant to discuss the need for cooperation in the condemnation.
 - (2) Discuss allocations of damages under the lease or procedure for determining same.
7. Consider existing licenses and permits.
 - a. Will condemnation terminate or interfere with existing licenses necessary to continue existing use of remainder of site if it is a partial taking?
 - b. Are other suitable sites available near by for continuation of use? If not, going concern issues are raised.
8. Consider existing zoning and other land use planning.
 - a. Will condemnation force a change in the highest and best use of the remainder of the property?
 - b. Is zoning consistent with uses available for the remaining portion of the property in a partial taking case?
9. Consider existing liens and encumbrances.
10. Consider specific changes to property's use which will be caused by a partial taking.
 - a. changes in size;
 - b. changes in shape;
 - c. changes in access;
 - d. changes in drainage;
 - e. changes in visibility from roadway;
 - f. changes in view;
 - g. changes in grade;
 - h. changes in zoning to a non-conforming use;
 - i. loss of parking;
 - j. loss of expansion area;
 - k. loss of area for snow storage;
 - l. loss of desirable buffers;
 - m. temporary construction interferences.
11. Discuss valuation issues.
 - a. Owner's knowledge, history and expectations;

- b. Knowledge of condemnor's offer and basis;
 - c. Tax valuations and any prior tax appeals;
 - d. Previous use of appraisers;
 - e. Previous use of brokers.
12. Discuss special local issues.
- a. How does local jurisdiction typically handle condemnations.
 - b. Local variations in valuation issues.
 - c. Local variations in hearing commissioners.
 - (1) Owner's knowledge of local commissioners.
 - (2) Role of court and parties in selection of commissioners.
 - d. Consider public perception and business politics.
13. Discuss information to be made available to condemnor.
- a. Consider what information should be made available.
 - b. Consider timing of same.
 - c. Review all information for accuracy and consistency.
 - d. Take steps to protect privileged information.

C. Gathering Information Essential to Review and Analysis of the Property

Representation of your client's interests requires that you have all relevant information regarding the property, its use, its history, its regulation and its valuation at the outset. The attached Memorandum form ("Information Needed for Condemnation Analysis" -- Appendix A) suggests materials that you should obtain from your client or, as necessary, from other sources with knowledge or records of the property.

D. Considering Settlement

Condemnation matters are often settled before the hearing or even before the actual date of taking. Neither side, however, will be able to consider settlement seriously unless it believes it has an adequate factual basis for doing so.

1. Consider whether your appraiser is one who will have credibility for purposes of negotiation.
2. Consider to what extent, if any, you want to make your appraisal information available to the condemnor.

3. Consider what your costs and fees will be and whether they will be recoverable.
4. Consider negotiating changes in the proposed taking rather than simply dollar damages.
 - a. Demonstration of substantial damages may be sufficient to cause condemnor to modify taking.
 - b. In some instances, modifications to taking may be more beneficial to client's interest than dollar damages.
 - c. Landowner may need to take initiative to accomplish such modification - may require use of planner to show feasibility.
5. Consider using relocation costs as an element of settlement.
6. Possible advantages of settlement:
 - a. Elimination of uncertainty, allows for better planning for both parties.
 - b. May be most cost efficient.
 - c. May allow for negotiating partial modifications or perks of benefit to the owner:
 - (1) access issues
 - (2) vacation of street issues
 - (3) zoning changes or approvals for remainder of property.
 - d. May allow owner to maximize relocation benefits.
 - e. Intangible good will issues for business.

IV. OVERVIEW OF MINNESOTA STATUTORY REQUIREMENTS AND CASE LAW

- A. Overview of the Statutory Requirements (Minnesota Statutes Chapter 117). Up to the Commissioners' Hearings and Practice Pointers Related Thereto.
 1. The petition is prepared by the condemning authority and describes the property to be taken, the purpose for the taking, and the names of all record owners, lienholders or other owners known to the petitioner, including the tenants. The petition is served on all of the above. The petition requests the appointment of three commissioners to view the property and determine the damages as to each party who has an interest in the property. Minn. Stat. § 117.055. The condemning authority must file a lis pendens with the county recorder describing the petition and property to be taken. Minn.

Stat. § 117.065. When you receive the petition, contact the petitioner to obtain all the information you can concerning the taking, e.g., right of way maps, grade change maps, construction plans, property to be taken. The petitioner will rarely provide you with its appraisal of damages, but always ask.

2. After at least twenty days notice, the court hears evidence in support of or against the granting of the petition. The condemnor must show that the taking is necessary and authorized by statute. If there is opposition to the petition an owner must assert the objection; a separate evidentiary hearing may be scheduled. The courts rarely rule that the petition is not for a valid public purpose. See City of Duluth v. State, 390 N.W.2d 757 (Minn. 1986). If the owner believes that the use of two or more contiguous parcels is so related so that a taking of all or a portion of one parcel damages the other parcel, then the parcels can be considered as one parcel, but the owner must raise this issue and the court must so order at the time of the hearing on the petition. Minn. Stat. § 117.086; State v. McAndrews, 175 N.W.2d 492 (Minn. 1970); City of Mankato v. Hilgers, 313 N.W.2d 610 (Minn. 1981).

At the hearing on the petition some judges ask the attorneys for suggested names of commissioners. Determine local practice before attending the hearing. Usually the commissioners are named from the Judge's list that has been developed through the years and/or from a list provided by the Court Administrator. You should obtain copies of the lists, learn about who the prospective commissioners are, and recommend appropriately.

3. In its order granting the petition, the court will select three commissioners and two alternates who must be disinterested persons, and residents of the county where the subject property is located. The court must inquire of a prospective commissioner if there is any potential conflict of interest. Rule 141 of the General Rules of Practice for District Courts provides the method for objecting to the commissioners selected by the court. There is no automatic right to disqualify a commissioner; challenges should be carefully considered. The court may appoint an attorney who is knowledgeable in eminent domain, but need not do so. In Hennepin County, the court normally does so. All other commissioners must be knowledgeable about real estate values. In its order the court will set the first meeting date at the courthouse at which time the commissioners are sworn in. Minn. Stat. § 117.075.
4. You, and if possible, your client, should attend the first meeting of the commissioners so you can introduce yourself and your client. Frequently

the commissioners will then set the time for viewing of the subject property.

5. You and your client should attend the viewing with the commissioners. Be sure the property is presentable. You should make sure the commissioners see everything on or adjacent to the subject property which you believe will be relevant in your proof of damages thereafter. No testimony is taken at the viewing, however, there is usually an opportunity to inform the commissioners about your theory of damages to the extent you want to reveal it. Since there is no formal discovery in Minnesota until after the commissioners' award (if there is an appeal), neither the condemnor or the condemnee will know much about the other's case until the hearing.

At the viewing the commissioners frequently establish the meeting dates for subsequent evidentiary hearings. If you know when your valuation and other experts will be ready and available, you should be prepared to agree to those dates. Otherwise, the dates are usually selected later by mail, conference call, or a special meeting of the commissioners. If requested, the commissioners may require the petitioner or owner to furnish to them plats, surveys, or other data. You should always obtain all the information you can from the condemnor at the viewing (or prior thereto) or have the condemnor commit to provide that information.

6. Thereafter, the commissioners will conduct one or more public hearings to take testimony under oath. The commissioners may subpoena witnesses on their own or at a party's request. Minn. Stat. § 117.085. You, your client and your other witnesses (as appropriate) should attend each hearing.
7. After the hearings are closed, the commissioners will meet one or more times in private to make the award of damages. The commissioners must make their award and sign a Report of Commissioners. which is filed with the Clerk of District Court within 90 days after the court appoints them. The deadline may and often is extended by motion of the condemnor. Minn. Stat. § 117.105. Within ten days of filing of the Report, the petitioner must notify each owner and attorney of the award by mail. Minn. Stat. § 117.115. Any party may appeal the award to district court for a jury trial within 40 days from the date the Commissioners' Report is filed. Within ten days of the date of mailing of an appeal, any other party may appeal Minn. Stat. §117.145.

V. PREPARING YOUR CASE FOR COMMISSIONER HEARINGS

- A. The Commissioners. Once the commissioners are appointed, learn about their background, their experience in pending or completed condemnation cases in the area, their favorable or unfavorable impressions as to certain appraisers and other experts. This information can usually be obtained from discussions with the commissioners at the meetings prior to being sworn in or at the viewing, from your client, your experts, other condemnation attorneys and experts who have appeared before them.

Develop and coordinate your presentation of damages accordingly, including the selection of experts who are known to be credible to these commissioners.

- B. Analysis of Damages. To the extent possible, prior to the viewing develop a preliminary analysis of damages so you can educate the commissioners accordingly at the viewing, to the extent you wish to reveal your analysis. In a total taking case the damage is the fair market value of the property as of the date of taking, unless there is an impact on the value of a contiguous or non-contiguous parcel in the same ownership, in which case there will be a claim for severance damages. In the case of a partial taking (i.e., not all of the property is taken or access is denied or limited), the damages are the difference between the before taking and the after taking valuation, including any claim for severance damages to the remaining property not taken.

It is best to develop a preliminary analysis of damages with your appraiser, together with input from the owner and other consultants. The attorney must make sure that the appraiser's analysis of damages encompasses the relevant legal and compensable elements of damages in your jurisdiction, otherwise the commissioners (usually in response to the objections of the opposing party) may disregard all or a portion of your appraiser's testimony and opinion of damages. Moreover, on occasion an appraiser may not understand all of the legal and compensable elements of damages. You must educate the appraiser accordingly. In some cases you must instruct the appraiser to include a certain type of damage analysis based upon an attorney's understanding of the relevant law, in which case the appraiser should state that instruction in the appraiser's report, e.g. legal compensability of certain claims, date of taking. After the preliminary analysis of damages is completed, you must review and coordinate the development of the appropriate evidence and testimony to be submitted in support of the final analysis of damages and prepare your direct examination and anticipated cross examination of the opposing party's witnesses. An experienced condemnation appraiser can also help the

attorney in preparing direct testimony and in preparing cross examination of the condemnor's appraiser and other witnesses.

C. General Legal Principles Relating to Damages

1. To determine the fair market value of property in a condemnation proceeding any competent evidence may be considered, if it legitimately bears upon the market value. State v. Harbor City Oil Company, 486 N.W.2d 455 (Minn. App. 1992); Ramsey County v. Miller, 316 N.W.2d 917, 919 (Minn. 1982); State v. Malecker, 265 Minn. 1, 5, 120 N.W.2d 36, 38 (1963).
2. The measure of compensation is the amount which a purchaser willing, but not required, to buy the property would pay to an owner willing, but not required, to sell it, taking into consideration the highest and best use to which the property can be put. State v. Harbor City Oil Company, 486 N.W.2d 455 (Minn. App. 1992); Ramsey County v. Miller, 316 N.W.2d 917, 919 (Minn.1982); City of St. Paul v. Rein Recreation, Inc., 298 N.W.2d 46, 49 (Minn. 1980).
3. Minnesota courts have traditionally used three methods of determining fair market value of real property: (a) market data approach based on comparable sales; (b) income-capitalization approach; and (c) reproduction cost, less depreciation. These techniques are neither conclusive nor exclusive but are factors to consider in arriving at the fair value. State v. Harbor City Oil Company, 486 N.W.2d 455 (Minn. App. 1992); Ramsey County v. Miller, 316 N.W.2d 917, 919 (Minn. 1982).
4. The fourth approach to damages available in certain cases is the Development cost approaches The development cost approach is designed to reflect, through cash flow analysis, the current price a developer-purchaser would be warranted in paying for the land, given the cost of developing it and the probable proceeds from the sale of developed sites. The Court in Ramsey County v. Miller, supra, approved of a typical development cost appraisal approach which would include those steps set forth by the American Institute of Real Estate Appraisers in The Appraisal of Real Estate, (7th ed. 1978).

Finally, while the development cost approach is now permissible, specific numerical, analytical and illustrative evidence supporting

the development cost approach appraisal will be allowed only if the party introducing such evidence can lay a proper foundation to show that (a) the land is ripe for development; (b) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (c) the development will not take place at too remote a time. Ramsey County v. Miller, 316 N.W.2d 917, 922 (Minn. 1982). The use of the development cost approach for the redevelopment of urban land with an existing building was approved in Port Authority of City of St. Paul v. England, 464 N.W.2d 745 (Minn. App. 1991).

VI. PROCEDURES BEFORE COMMISSIONERS

A. Pre-Hearing Submissions.

In a case involving any special circumstances (e.g., a partial take case), it is often advisable to present the commissioners with a pre-hearing brief discussing the applicable law and perhaps a summary of the evidence you are intending to present (although since there is no discovery, you may decide not to discuss your evidence in much detail).

B. Nature of Hearings

1. The hearings are usually somewhat informal, with the parties seated around a table and the commissioners seated at one end. Prior to the hearing (usually at the swearing in of the commissioners), the commissioners will have chosen a chairperson who is responsible for the administrative matters, swearing in the witnesses, and usually rulings on evidentiary objections, if any. All witnesses must be sworn.
2. The extent to which the rules of evidence are applied will vary from commission to commission. Generally evidence is freely received, although commissions headed by an attorney may be more restrictive. An attorney who objects to evidence too often risks alienating the commissioners. However, you should object to totally irrelevant or redundant evidence, lack of foundation, and evidence which is clearly not admissible in court. The commissioners will normally allow the evidence to be heard and will accept most documentary evidence over objection on the basis that they will decide what is relevant later or give it the appropriate weight in their deliberations.

3. If the damage claim is large, or the case is complicated, or if you anticipate that the award will be appealed, you may wish to have a court reporter transcribe the testimony of the condemnor's witnesses and perhaps your witnesses also.
4. At the outset, the chair of the commissioners will swear in all witnesses who are present and will testify. The condemnee proceeds first. Typically a short opening statement is given to provide to the commissioners an overview of your case. Thereafter, the condemnor's engineer or project manager is commonly called to explain the reason for the project, the scope of the project, the nature of the taking, the subject property generally, and the property (or property rights) which are being taken. Arrange with the condemnor's attorney to have that person present or else have the commissioners subpoena the person.
5. Thereafter, depending upon the nature of the taking and the subject property, it may be appropriate to call one or more of the following witnesses in this or some other appropriate order:
 - a. The owner who describes the past, present and future use and plans and income and expenses for the property (if income producing property) in the before taking and after taking scenarios. The owner has a right to give an opinion of damages even if not an expert and often should do so. It may be useful to have the owner develop a written report to support the testimony and offer it as an exhibit. The owner's testimony also lays the foundation for the most important expert, the independent appraiser.
 - b. Frequently, before or after the owner testifies, a planner, architect and/or engineer may be called to discuss the development constraints and physical characteristics of the property in the before and after taking scenarios. Their reports should also be offered as exhibits.
 - c. Finally, the appraiser testifies as to the value of property before and after the taking and reasons for his/her opinion on damages.
6. Give a copy of the witness' reports to each commissioner and opposing counsel after the witness is sworn in and immediately before the witness testifies and ask for the reports to be admitted. Large exhibits used should be reduced where possible and made a

part of the reports so the commissioners have all of the relevant information readily available to them when they adjourn each day. Frequently, a commissioner will inspect the property and comparables used during and/or after the hearings.

7. At the end of your direct examination of each witness, the opposing counsel will cross-examine and you can thereafter redirect. Frequently, there is re-cross and re-direct.
8. After you rest your case, the condemnor may give a brief opening statement (if not given at the outset of the hearings). Usually thereafter the condemnor, as appropriate, may call one or more of the following in this or some other appropriate order:
 - a. The project engineer or manager who will usually restate the basics of the project, the nature of the taking and the property taken. That witness may then seek to rebut the foundation or other evidence submitted by the condemned.
 - b. An engineer, planner or architect who may seek to rebut the foundation or other evidence submitted by the condemned.
 - c. The appraiser then testifies as to the before and after valuations and gives his/her opinion of damages.
9. As before, there is cross-examination and redirect. The condemnor then rests.
10. The condemnee may then present rebuttal evidence through one or more witnesses, followed by cross-examination and re-direct. The condemnor may then present a rebuttal case, etc.
11. After all parties rest their cases, the commissioners may ask if the parties want to present oral closing arguments and/or briefs. It is sometimes helpful to provide a written closing argument as part of the brief. Such a written closing argument/brief can summarize the testimony of all witnesses and provide the factual and legal rationale why the commissioners should adopt the preferred analysis of damages. Specific references to the transcript can especially be of great help in the persuasion process.
12. During the hearing process, both parties will usually try to present their cases so that the other side does not have an opportunity to study the reports submitted prior to cross examination. Because there is no discovery in Minnesota prior to trial, one party usually

does not know the basis for the other party's opinion of damages until the report is handed out at the outset of each witness's testimony. For that reason, when the hearing dates are established, the condemnee usually wants to make sure there are no breaks in the proceeding (i.e., days off) during which the condemnor can prepare a stronger case. Frequently commissioners meet for one-half day sessions only, so for the same reason each party tries to present the direct testimony of each witness and afford an ample time to cross examine that witness on the same day. Frequently, commissioners will acknowledge this situation and will adjust the hearing schedule accordingly.

VII. PERFECTING THE APPEAL: MINN. STAT. § 117.145

Minnesota Statute Chapter 117 allows any party to the proceeding to appeal the award of the commissioners to the district court within 40 days after the date on which the Commissioners' Report has been filed with the court. Thus, it is possible that an eminent domain matter in Minnesota may be heard, first, by the commissioners, second, in a *de novo* appeal proceeding before the district court, third, by the Court of Appeals, and, finally, by the Supreme Court.

A. Timing of the Appeal

1. Any party dissatisfied with the commissioners' award, or with the allocation of that award among the parties, may appeal to the district court. Notice of appeal must be filed with the court administrator within 40 days of the date on which the Commissioners' Report is filed. Copies of this notice must also be served by mail upon all respondents and all other parties to the proceedings shown in the Petitioner's Affidavit of Mailing required by Minn. Stat. § 117.115. The time limit is jurisdictional and cannot be extended either by the court or by stipulation of the parties. State v. Goins, 286 Minn. 54, 174 N.W.2d 231 (1970). This is a recent change in the appeal practice and must be strictly observed.
2. Within 10 days of the date of mailing of the appeal, any other party having an interest in the property may file a cross-appeal and provide mail notice to the other parties with an interest in the property. Again, this 10 day limit is jurisdictional and may not be extended.

B. Contents of the Notice of Appeal

1. Pursuant to Minn. Stat. § 117.145, the Notice of Appeal must state:

- a. the particular award or failure to award appealed from;
 - b. the nature and amount of the claim;
 - c. the land to which it relates;
 - d. the grounds for the appeal; and
 - e. notice of a claim for the unity of non-contiguous tracts pursuant to § 117.086, if applicable.
2. Typically, the basis for the appeal is described in general language to the effect that the award of damages fails to constitute just compensation, that the award fails to reflect the fair market value of the property, that the award is contrary to the evidence presented at the hearing, that the award fails to follow the law as established by the Minnesota courts and by Chapter 117, and that the award is contrary to the same.
 3. Minn. Gen. R. Prac. 141.02 requires that a Certificate of Representation (per Rule 104) be filed with the Notice of Appeal.
 4. Where a jury trial is sought, the jury demand should be filed with the Notice of Appeal.

C. Partial Payment to Landowners Pending Appeal

If either petitioner or respondent appeals the award, the respondent (except for encumbrancers) may demand partial payment of the award pending final determination of the same. Minn. Stat. §117.155. The petitioner must make such interim payments in an amount permitted, but not required, to exceed 3/4 of the amount of the award less any amounts previously paid under the quick-take provision. The condemnor, however, may petition the court for reduction of this statutory amount if cause is shown. Typically, interim payment is 3/4 of the award amount.

VIII. TRIAL: PRELIMINARY AND FUNDAMENTAL MATTERS

A. Introduction

Unlike the Commission proceedings, trial following appeal to the district court is governed by the Rules of Civil Procedure. Thus, discovery under the Rules is available to the parties. Similarly, the Rules of Evidence which are often loosely employed at the Commission Hearing are applicable at trial.

The trial, whether by court or by jury, is *de novo*. Minn. Stat. § 117.175, subd. 1. Nonetheless, any of the commissioners who previously heard the matters may be called as a witness by any party To testify as to the amount and the basis of the award. Such testifying commissioners may be examined and qualified like any other witness. Obviously, if the commissioners are properly qualified and are testifying to the same matters which were presented at the Commission Hearing, their testimony may be persuasive. Such testimony by commissioners is not, however, in any way dispositive as a matter of law.

If the owner has been properly represented by counsel at the hearing before commissioners, then much of the preparation for trial should already have been completed, unless, as is permitted, the party changes its valuation theory or the experts supporting the same.

B. Availability of Jury Trial

Both owner and petitioner are entitled to a jury trial, if either so chooses. Minn. Stat. § 117.165, subd. 1. A jury demand should be made with the Notice of Appeal in order to ensure that the jury right is not waived.

C. Special Trial Disclosures Required by Minn. Stat. § 117.165, subd. 2

1. **Disclosures Required**

Prior to trial, either party may demand that the other disclose in writing and under oath its appraisal witnesses to be called at trial and the amount of each such expert's valuation of damages. Minn. Stat. § 117.165, subd. 2. Disclosure is to be made within 15 days. The demand is a continuing one under the terms of the statute.

2. **Preclusion of Testimony for Non-Disclosure**

Section 117.165, subd. 3 specifically provides that failure to provide disclosure as required by subdivision 2 of § 117.165, shall result in the party not being permitted to use the undisclosed expert, unless just cause is shown.

D. Scope of District Court's Jurisdiction on Appeal

On appeal from the Commission, the court's jurisdiction is limited to those matters relating directly to the award of just compensation. Thus, matters relating to the hearing and practice of valuation (and to factual matters tied to the same) are properly heard by the court. Alexandria Lake Service Region v. Johnson, 295 N.W.2d 588 (Minn. 1980). On the other hand,

however, all questions as to whether a taking was necessary or whether such taking was for a public purpose must be heard at the time of (or in connection with) the petition on the taking. Failure to assert such legal arguments at the time of taking will result in waiver of the same. City of Mankato v. Hilgers, 313 N.W.2d 610 (Minn. 1981).

E. Burden of Proof

The landowner bears the burden of proof as in any other civil action. Minn. Stat. § 117.175. With this burden comes the right to open and to close at trial.

F. Request for Allocation of Damages Under Minn. Stat. § 117.175

Upon request of any party to the appeal, the court (or the jury, if it is the decider of fact) shall show:

1. The amount of the award of damages which is solely to reimburse the owner for the value of the specific area actually taken in the condemnation;
2. A separate amount of the award of damages for damage to the remainder of the owner's parcel, whether or not such was actually taken or was described in the petition. Minn. Stat. § 117.175, subd. 1.

The order (or verdict) shall also show separately the allocated amounts awarded to each person with a compensable interest in the property. See Minnesota Civil JIGS for eminent domain.

G. Costs and Fees

1. Under Minn. Stat. § 117.175

The court has discretion under § 117.175. subd. 2 to allow as taxable costs the owner's reasonable expert witness and appraisal fees together with the owner's reasonable costs and disbursements. Attorney's fees are not required, but may be permitted, under the statute; there is no separate constitutional entitlement to such fees. State v. Carter, 300 Minn. 495, 498, 221 N.W.2d 106, 107 (1974). (Carter notes that "Reform in this area is long overdue," but defers to the legislature to relieve the owner of the burden of attorney's fees.) Costs may be awarded to the owner whether or not the owner is a prevailing party at trial, so long as such costs bear on the owners proof of damages at trial. See In Re MCDA, 447 N.W.2d 891

(Minn. App. 1989). No fees, costs or disbursements may be awarded to the condemnor. Minn. Stat. § 117.175, subd. 1.

2. Under the MEAJA

In a recent case, State v. Baillon, 503 N.W.2d 799 (Minn. App. 1993) the Court of Appeals held that the Minnesota Equal Access to Justice Act does apply to eminent domain proceedings involving the State and that a prevailing party as the court defines that term is entitled to recover its attorney fees. The Minnesota court, however, rejected the more expansive reading of prevailing party used by the federal courts in interpreting the parallel federal act.

H. Right to Appeal from the Trial Court

Appeal from the trial court's decision is governed by the usual rules governing civil appeals. Any party to the trial court proceeding retains the same right of appeal as in other civil actions.

IX. PREPARATION FOR TRIAL

A. Introduction

Fundamental to trial of any eminent domain matter are expert witnesses, including appraisers, who will present valuation testimony and exhibits which will illustrate to the jury (or court) the facts surrounding the taking and the factual basis for damages. While frequently the same experts and exhibits are used both at the commission hearing and at trial, such is not required. Because substantially more information is available to the parties at the time of trial than at the commission hearing, it is often desirable to revise the presentation of witnesses and exhibits at trial to account for the outcome of the hearing and any subsequently discovered information.

B. Appraisal Witnesses for Trial

The ability of appraisal witnesses to give understandable and credible testimony at trial must be carefully evaluated. Appraisers who may be acceptable before commissioners who are familiar with real estate and eminent domain matters, may be less than satisfactory as witnesses before a fact finder unfamiliar with these areas. This is particularly important in instances where the appraiser's testimony at trial may be contrary to that of commissioners called as witnesses. In sizable cases, it is common to use two appraisers, each working independently, and each of whom will present

his valuation at trial. Matters to be discussed with the appraiser are outlined below:

1. The Initial Post-Hearing Meeting. An initial meeting should be held with the appraiser after the commission hearing to discuss all information and facts regarding the case which are then available.

Details of the testimony and exhibits used at the hearing and the apparent conclusions of the commissioners should be discussed carefully. Usually the commissioners will allow you to interview them (or else depose them) to find out why the commissioners found the damages to be those set forth in the commissioners' report. Any areas of the appraisal that require support by additional experts or supporting legal opinions should be discussed and resolved. The appraisal for trial should be begun with a clear understanding of the facts as they exist following the conclusion of the hearing.

2. Reviewing the Appraiser's Analysis. After the appraisal expert completes his valuation analysis, but well in advance of trial, counsel should meet with the appraisal witness to discuss the following:
 - a. The facts, analyses, conclusions and valuations set forth in the appraisal. The lawyer must carefully check and test the expert's work prior to trial;
 - b. Any legal issues pertaining to the admissibility of testimony and evidence and, in particular any foundation questions that may arise;
 - c. The need for any additional information or data from other or supporting experts. This may be particularly important with regard to questions involving possible contamination or to certain kinds of development or zoning issues.
3. Preparing for Testimony. Shortly before trial the attorney for the party (and the landowner himself if he is knowledgeable about the property) should meet with the appraiser to discuss the following:
 - a. The nature of the direct examination and how particular exhibits including the appraisal report are to be used;
 - b. How the appraiser's testimony will fit with the testimony of other witnesses for this party;
 - c. The nature of the anticipated cross-examination and a review of any cross-examination used at the commission hearing. Even for experienced witnesses, it is helpful to be tested by the kind of sharp questions they will get during cross examination:

- d. Careful review of exhibits and anticipated testimony of other witnesses. It is important, however, that the testimony of each appraisal witness be arrived at separately and independently.

C. Exhibits

Exhibits are often critical to establishing the claim for damages in a condemnation action. This is particularly true since it is typically the case that at the time of trial the property is no longer in the same condition that it was at the time of taking. Thus, if the fact finder is to be able to properly judge the difference in the property before the taking and after the taking, such information must be presented through exhibits. Exhibits which are frequently and effectively used at trial include the following:

1. Pre-taking or historical photographs of the subject property showing the condition, location, siting, access, visibility, view, and topography of the subject property before the taking;
2. Post-taking photographs showing the same features as are illustrated in the historical photographs of the property;
3. Building plans, layouts and blue prints. It is often helpful to have these rendered into a simplified form that can be understood by a lay person;
4. Aerial photographs of the property before the taking and after the taking. Aerial photographs have a peculiar reality to them that will often make them a key exhibit at trial. Acetate overlays can be used with such aerial photographs to delineate property boundaries, access routes, areas taken, areas interfered with, or other matters important to the trial;
5. Right-of-way maps. Again it is often helpful to have such maps simplified or highlighted with color so they are more readily understandable by lay persons;
6. Zoning maps and comprehensive plan maps. It is often useful to have a sequence of such maps showing the development over time of the comprehensive plan and of zoning for a particular site;
7. In many cases where traffic volumes and/or access questions are at issue, it is important to have traffic maps showing both traffic flow and traffic counts. These are frequently obtainable from public sources. In some instances specialized studies or analyses may require the retention of a traffic engineer or planner skilled in traffic issues;
8. Area maps which will put the subject property into context and will show it in relation to other roads, commercial areas, parks, public areas, retail areas or similarly used sites with which the jurors may be familiar.

The property can be lost among the trees; it is important to keep it in its proper geographical context;

9. Demographic data will often be important in sites to be used or developed for commercial, retail or residential purposes. Such data can be obtained from both public and private sources for highly specific areas and may include information pertaining to population, income, family size, household income, retail expenditures, educational levels, employment and other matters which may be of importance to both commercial and residential developers;
10. Topographical surveys where elevations or questions are of the buildability of terrain may influence value; topographical maps or surveys may prove helpful;
11. Development plans or layouts consistent with theories of development being used in the case;
12. Exhibits showing comparable properties used by the appraiser so that their comparability can be evaluated by the jury;
13. Finally, each case will have specialized aspects which need to be powerfully and clearly illustrated to the jury. Counsel for the landowner should give careful thought in each case to how these unique issues can be best shown to the jury.

D. Discovery of the Other Party's Case

It is important to do adequate discovery of the adverse party's case so that your client is fairly apprised of what matters will be presented at trial. To this end, discovery will usually include the following:

1. Expert interrogatories addressed to each witness expected to be called asking for the identity and qualifications of such witnesses; the subject matter on which the expert is expected to testify, the substances of the facts and opinions which will be testified to; and the grounds for each opinion;
2. Often, factual matters pertaining to the nature of the taking and impact on valuation will be useful subjects for discovery.

X. TRIAL OF THE CONDEMNATION ACTION

A. Jury Selection

Jury selection follows the usual procedures of *voire dire* in Minnesota state courts. The condemnor, as the functional defendant in the action begins *voire dire*. Usually six jurors are selected.

B. Opening Statement

The landowner as the functional plaintiff has the right to the first opening. Although condemnation may be familiar to the attorney handling this matter, it is almost certainly unfamiliar to the jurors (and frequently to the court). Careful thought should be given to determining which issues are really at the nub of the matter and making those known in the opening. Use of demonstrative exhibits in the opening (including photographs, drawings and aerial photographs) will often be helpful in setting the case in context. Thought should be given to how the inevitable warts are to be presented.

C. Viewing of the Property

Attorney for the condemnee should be certain to request a viewing of the property: there is no substitute to actually seeing the property to understand the consequence of the taking. The judge and court reporter will often attend the viewing. The court will usually instruct the jurors not to ask questions. If questions are asked, they should be directed to the court. While granting of the viewing is discretionary with the court, it is usually permitted. If a viewing occurs, the JIG pertaining to viewings should be used.

D. The Landowner's Case in Chief

While the methods of presentation of the owner's case are as diverse as the number of cases presented, it is common to present witnesses in the following order:

1. Testimony by the Engineer. Testimony is often given regarding background and preliminary matters from an engineer or other employee of the condemnor who is called for cross-examination under the rules. (Sometimes need for this can be eliminated by written stipulation as to the undisputed facts of the taking.) Use of this kind of engineering witness to open the proceeding is regarded as an ordinary matter by both owner's counsel and counsel for the condemnor. Specific matters which should be covered will generally include:
 - a. The total area of the parcel before the taking;
 - b. The total area being taken by the condemnor;

- c. The amount of the taking which is in fee, the amount of taking which is taken as an easement, the amount of taking which is temporary and the duration of any temporary taking;
 - d. The area of the property remaining after the taking;
 - e. The areas which will be affected by any temporary taking;
 - f. Changes, limitations, or interferences with access or egress to the site before and after the taking;
 - g. Any changes in topography affecting the site including changes in grades or elevations between the property and adjacent properties;
 - h. Factual data pertaining to the site including:
 - (1) nature of surrounding roadways including classification of the same and traffic volumes on each;
 - (2) presence of contaminants or other environmental conditions believed by the condemnor to be affecting the property;
 - (3) results of any soil tests or other investigations regarding the soil structure or hydrology of the property;
 - (4) information pertaining to drainage onto the property and relationship of that drainage to adjoining properties;
 - (5) distances from the property to other roadways and other significant geographical features;
 - (6) timing and history of other roadway improvements or public construction affecting the property in the area.
2. Testimony by the Owner. While testimony by the owner before the commission may be of minor importance, it is an important matter in a jury trial. The jury wants to know who it is that owns this property and how that person perceives the property is being damaged by the taking. Inquiry as to technical aspects of the property will vary with the owner's background, but as a general matter, inquiry should be sufficient to give the juror a sense of the property owner's direct concern for the damage to the property caused by the acquisition. Areas of inquiry typically include:
- a. Information regarding ownership of the property, including expectations of the owner at the time the property was acquired and any basis for showing the reasonableness of such expectations;
 - b. Personal observations of the owner regarding the property and the neighborhood in which it is located including development trends. This is often an important area of inquiry since the owner as a

resident may have a keener sense of development trends than other witnesses;

- c. A description of the property's current use and the reasons for such use as well as a description of anticipated or planned uses;
 - d. A description of subject property including the nature of particular improvements and their relationship to the property's use;
 - e. The owner's opinion of the highest and best use of the property. It is important before testifying on this subject that the owner understood that the highest and best use of the property need not be (and often is not) the use to which the property is presently being used;
 - f. The owner's opinion of the fair market value of the property before the taking. If the owner has a demonstrable basis for this opinion, that should also be explored;
 - g. In cases involving a partial taking or involving severance damages the owner may also testify as to his opinion as to the market value of the property after the taking and the reasons for the lowered market value. Similarly in partial taking cases, the owner may testify to changes in the highest and best use of the property caused by changes to the property caused by the taking.
3. Testimony by the Valuation Expert. Because the critical issue in the trial is the valuation of the property, the appraiser or other real estate expert who will testify as to value is generally the critical witness at trial. While questions to be asked of the appraiser must be specifically tailored to the particular features of each case, including whether the case is a total taking or a partial taking with severance damages, the following points will generally be inquired about:
- a. Qualifications of the witness that make him not only capable of testifying as an evidentiary matter, but credible and persuasive to the jury. Since many appraisers testify frequently, their recital of such qualifications can begin to assume a rote quality which is undesirable. Counsel must retain control of this examination so that it is tailored to the facts of the case, the qualifications of the expert and the needs of the jury. It must not be boring. Particular attention should be paid to the specific details of the property and how they fit with the appraiser's experience. Evidence of the appraiser's familiarity with a specific location or neighborhood, with specific kinds of businesses or properties should be emphasized. Mere recitation of credentials without explanation of their significance will have little persuasive effect on jury members. Evidence of

experience in testifying that suggests recognition of the appraiser's expertise is highly valuable. Instances where the appraiser now working for one party has previously done similar work for the other may suggest both competence and impartiality to the jury;

- b. The appraiser should be asked about applicable standards that govern his appraisal and conformance thereto. Inquiry along these lines should be handled as though it is a real test for the appraiser. Since failure to comply with applicable professional standards may severely undercut an appraiser's credibility, this is an area that must now be carefully inquired into;
- c. Nature of the preparation which the appraiser did in valuing the property, including viewing and investigation of the property itself, examination of records, inquiry of other persons familiar with the property whose opinions were used or relied upon, comparison of other sites and circumstances which would allow a reasonable judgment of damages as to the property, should all be explained so as to provide the basis for the expert's opinion;
- d. The expert should be asked to explain the various basis on which the property can be valued and how each applies to the particular property at hand. The appraiser should be able to clearly and persuasively explain the use of the income, cost and market approaches, the circumstances in which each is best used, and how each was used in the current case;
- e. The appraiser should be asked to show in a step-by-step manner how the theoretical valuation methods were applied to the particular property at hand. If the appraiser is comfortable in doing so, it is often helpful to have him walk through the numbers. This must be done in such a way, however, that the jurors can comfortably follow the appraiser's thinking;
- f. The appraiser should be asked to discuss the concept of highest and best value and to express his determination of what highest and best use of the property is;
- g. Once the method of valuation, the facts supporting valuation, foundational basis for opinion, and the highest and best use of the property are established, the appraiser should be asked his opinion of the value of the property before the taking and after the taking;
- h. The appraiser should be asked to summarize his conclusions and draw a bottom line number which shows (1) the value of any land actually taken on a square foot or other unit basis, and (2) the

difference in the value of the remainder before the taking and after the taking and how this before and after difference translates into dollar damages. Successful testimony will be sufficiently clear that any juror should be able to recite the total damages claimed and the two principal components of those damages.

4. Other Witnesses Who May Be Called to Testify. Depending on the complexity and size of the case, it may be desirable to call other witnesses who have particular expertise. These are likely to include:
 - a. Planners. In development cases, a planner who can testify to various issues regarding the physical feasibility of development. Engineers may also be useful in these kinds of cases;
 - b. Traffic Engineers. In cases involving access or parking issues, the testimony of an expert traffic engineer will often provide important support to the appraisal witness. Whether this witness's testimony should be used at trial or simply incorporated into the appraiser's testimony is a decision to be made on a case-by-case basis;
 - c. Soils Engineers and Hydrologists. Because development particularly of commercial properties will often require soils and hydrological analysis, these experts will frequently be necessary in commercial development cases;
 - d. Contamination or Hazardous Substance Experts. Because of the increasing frequency with which contaminants are found on commercial property, it will often be essential that testimony be obtained from competent experts regarding the extent, scope and consequence of such contamination. Without such expertise, it may be impossible for the landowner's appraiser to establish a credible (or even admissible) appraisal. Similarly without such expertise, the condemnor be able to effectively argue that the stigma caused by contamination makes the property valueless;
 - e. Other Experts. The need for experts is as diverse as the nature of the uses of property itself. While experts can be used needlessly and foolishly to prolong and complicate a simple case, their proper use will help clarify to the jury key issues pertaining to the nature and use of the property in question.
- E. The Condemnor's Case in Chief. The condemnor's case in chief will typically resemble a mirror image of the landowner's case. Instead of the owner testifying, however, frequently an official of the condemnor will attempt to testify regarding the public purpose of the improvement.

F. Rebuttal Testimony

Rebuttal is technically limited to new matters. Nonetheless, its importance should not be overlooked.

G. Final Arguments

Because the condemnor is functionally the defendant in the action, the condemnor presents the first closing. The landowner is given the final word and should use this opportunity effectively. The landowner retains the position as the final party closing regardless of who has initially filed the appeal resulting in the trial.

H. Jury Instructions

The Minnesota Civil JIGS contain jury instructions on a number of topics usual to this type of litigation and should be used as a basis for jury instructions. Because, however, these instructions may not reflect the recent case law in this area, they should be modified as necessary to reflect the current law of eminent domain in this jurisdiction. Thus, it is particularly important with regard to cases involving temporary takings, access and loss of visibility that instructions be carefully examined and modified so as to conform with present law.

M2:20097849.02

MEMORANDUM

TO: [Client]

DATE: [_____]

FROM: [Attorney]

RE: Information Needed For Condemnation Analysis of [Property]

To aid us in handling your condemnation matter, please supply us with the information or documents indicated on the following checklist, at your earliest convenience. If there is any additional data that you feel will be helpful, please make it available to us. As your case develops, we may think of other items we will need and we will so advise you in that event. If you have any questions, please call.

I. OWNERSHIP

- ___ 1. Acquiring deed or deeds.
- ___ 2. Abstract of title or Torrens Certificate.
- ___ 3. Title Opinions, title insurance policies.
- ___ 4. Lease or leases, past and present.
- ___ 5. Agreements, options, easements, franchises or other documents relating to ownership or lease interest.
- ___ 6. Mortgages and notes.
- ___ 7. Satisfaction of mortgages or written statement from mortgagee of balance due and per diem rate of payoff.
- ___ 8. Any surveys, plats or engineering plans or drawings, topographic maps, soil tests, or other maps.
- ___ 9. Zoning proceedings, minutes, ordinances, notices, special assessment proceedings, etc., relating to property.
- ___ 10. Copy of City's Zoning Code, Subdivision Code, and Comprehensive Plan.

- ___ 11. Applications for reduction of estimated market valuation on tax rolls and results thereof; current real estate tax statements.
- ___ 12. Surveys or plats, if any, of adjacent property or property in the vicinity that you or related entities own or in which you or related entities have any financial interest.
- ___ 13. Any proposed plans you or others have regarding the property.

**II. IMPROVED OR PARTIALLY DEVELOPED PROPERTY
(IF APPLICABLE)**

A. BUSINESS

- ___ 14. Architects' plans or renderings.
- ___ 15. Building permits, licenses, guarantees.
- ___ 16. Names of engineers and their engineering reports and drawings re: subsoil, drainage, sewage system or any other.
- ___ 17. Contracts of any kind, including tenant leases.
- ___ 18. Records of all costs and expenses of improvements or development, including cost of financing if involved.
- ___ 19. Statement of use of building, names, addresses, businesses and phone numbers, length of term of present occupants or tenants. Diagram of building and property showing location of each tenant.
- ___ 20. History of the past 5 years of rents received, operational expenses, vacancies experienced.
- ___ 21. List of improvements made by lessee or lessees, date of same and their cost.
- ___ 22. List of special construction features.
- ___ 23. List of furnishings and fixtures and their value, if known, indicating which are custom made for your premises and unusable elsewhere, and which are permanently fixed to the building and cannot be removed without damaging the building.

B. HOME

____ 24. For a home, please list the following:

a) size of lot: _____

b) foundation size: _____

c) number of stories: _____

d) square footage: _____

e) year built: _____

f) name of builder: _____

g) number of rooms and size for each:

Bedrooms: _____

Bathrooms: _____

Kitchens: _____

Living Rooms _____

Dining Rooms _____

All Season Porches _____

Screened Porches _____

Dens _____

Studies _____

Recreation Room _____

Laundry Room _____

Entry Way(s) _____

Basement _____

Home Office _____

Garage _____

Other _____

h) type of heating system: _____

i) type of air conditioning: _____

j) describe any significant defects in the property before the taking:

k) What year did you purchase the house? _____

l) What was the purchase price? _____

m) Have you attempted to sell the property? _____

When? _____

At What Price? _____

Did you receive any offers? _____

n) Describe any special attributes of the house that may affect its value:

o) Describe any special attributes of the lot that may affect its value:

p) Describe any special attributes of the property's location that may affect its value:

q) What is the current assessed value of the property for tax purposes.

r) Tax I.D. number: _____

III. BUSINESS INFORMATION
(If Operated by Client on the Property)

- ___ 25. State how long business has been conducted at its present location and give financial statement of profit and loss, operational expense and gross volume of business per year, for as far back as 5 years to the present; give income tax returns for the business, if possible.
- ___ 26. State what business was using premises before yours and give names and addresses of principals, if known; if you took over the same business, state the name and address of your predecessor and the date you took over the business.
- ___ 27. State what will be the anticipated impact of the taking on your business in your opinion.
- ___ 28. Itemized inventory of stock on hand and its value.

IV. KNOWLEDGE AND OPINION OF CLIENT

- ___ 29. What, in your opinion, you should be paid for the taking of your property? \$ _____. Please break this figure down into as many elements of damage as you feel exist and itemize them by description of damage and value given to each such element. Tell me your reasoning in arriving at your conclusions.
- ___ 30. What are your plans regarding the relocation and re-establishment of your home or business after the taking? Please describe the possible problems involved and expenses or loss that might be caused.
- ___ 31. State the sales or listing prices of other properties in your area of which you have knowledge. List any brokers that you know are active or located in your area for your type property. State all previous offers made to you for your property, and who made them and why they were turned down. In answering these questions, please give names, addresses and property addresses or location.
- ___ 32. What reconstruction will need to be done to the property after the taking?
- ___ 33. Please describe the problems the taking will cause to your property and what construction will be needed to cure these problems.

- ___ 34. Have offers been made or settlements been reached with your neighbors by the condemnor? Provide as much information about such offers or settlements as you can.

V. DOCUMENTATION OF THE PROPERTY

Please provide the following:

- ___ 35. Photographs or videos of the property at all stages of development.
- ___ 36. Scale models of the property.
- ___ 37. Any surveys of the property.
- ___ 38. Any site plans or drawings of the property.
- ___ 39. Any blueprints of the property.

VI VALUATION INFORMATION

- ___ 40. Please provide me with any valuation information you have or can readily obtain regarding the property:
- a) appraisals.
 - b) letters of valuation.
 - c) mortgage valuations.
 - d) real estate agent's market analysis.
 - e) tax assessor's valuation.
- ___ 41. Have you contacted any appraisers about valuing your property? If you have, please provide the name and address of the appraiser.
- a) Has the appraiser indicated a value to you before the taking?

 - b) After the taking? _____
- ___ 42. Have you obtained any estimates of moving costs? If you have, please provide the names of the persons who provided the estimate.
- a) Estimated moving amount: _____

- ___ 43. Have you obtained (or made on your own) any estimates of the costs of relocating your home or business separate from actual moving costs? Please describe what these costs would be for and their amount. Provide me with a copy of the estimates.
- ___ 44. Have you obtained any bids or estimates for the cost of reconstructing your property so as to cure problems caused by the condemnation? Please describe what these costs would be for and their amount. Provide me with a copy of the bids or estimates.

VI. MATERIALS FROM CONDEMNING AUTHORITY

- ___ 45. All materials given to condemning authority.
- ___ 46. All materials received from condemning authority.
- ___ 47. Please prepare a written summary of all conversations with condemning authority.
- ___ 48. All materials given to or received from the condemnor's relocation agent.
- ___ 49. Please provide a written summary of all conversation with the relocation agent.

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