

Real Property Valuation and Appraisals – The Real Estate Attorney’s Survival Guide

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I. THE ATTORNEY'S PERSPECTIVE.

A. What is the purpose of the valuation?

This is the essential question that the attorney must be able to answer. If the valuation is being done for purposes of eminent domain, for example, certain ordinary expectations of "fair market value" may need to be modified by assumptions imposed by law. Similarly, valuation for purposes of property tax must follow certain statutory requirements distinctive to property tax. Unless, the purpose of the valuation is clearly understood, the attorney cannot effectively assist the client.

B. Know exactly what it is that is being appraised.

Is the task to value the leased fee interest or the fee simple interest? The entire asset or only the real estate? The real estate including the fixtures or apart from the fixtures? These and similar questions must be considered and resolved. See *EOP v. County of Hennepin*; Mn. Tax Court, February 11, 2005. *Franconia Associates v. United States*, Court of Fed. Claims, August 30, 2004.

C. The Attorney must have a working understanding of the three traditional approaches to value.

In order to represent the client effectively and select the best appraiser for the task, and to work effectively with the appraiser, the attorney needs, at a minimum, a working understanding of the three traditional approaches to the value in the appraisal process and also the development cost approach to value.

1. Cost Approach to value: What would it cost to construct a substitute property.
2. Market Approach to value: The principle of substitution.
3. Income Approach to value: What would one pay for certain anticipated benefits.
4. Development Cost Approach to value. (Subdivision Development Analysis)

Definitions of the above approaches to value are found at the end of this outline.

See also, "What Lawyers Need to Know about Real Estate Appraisal Reports" *The Practical Real Estate Lawyer*, January, 2005.

D. Know the law applicable to the use of these approaches in the relevant jurisdiction.

For litigation cases especially, the attorney needs a more in-depth knowledge of the appraisal process and the limitations imposed by the courts in that jurisdiction relating to the type of appraisal testimony that may be offered.

1. Determine what the courts have said as to relevant legal principles impacting valuation for the specific type of litigation involved.
2. Read the Appraisal of Real Estate (12th ed.) and Real Estate Valuation in Litigation (2nd ed.) published by the Appraisal Institute, 875 North Michigan Avenue, Chicago, Illinois 60611-1980. Other specialized texts published the Appraisal Institute may also be relevant.
3. Review the facts with the appraiser; discuss with the appraiser the valuation issues in the case. Make good use of the appraiser's expertise.
4. Look for articles on valuation of specialized properties if subject property is a specialized property. See e.g., The Appraisal Journal.
5. Review articles on emerging valuation issues. See, e.g., Just Compensation.

E. How to find potential appraisers.

1. Ask other attorneys who practice in the relevant area of law and in the area where the property is located. Talk to someone who has actually worked with the appraisers who are being considered.
2. Check the approved list from the financial institution which may lend the money to your client.
3. Review the MAI membership list for Minnesota (or other state in which you are working) and other appraiser associations. See Appraisal Institute web site (www.appraisalinstitute.org) as an information source for publications, research, etc.
4. Real estate brokers in that area of the state where property is located (caveat: brokers are not appraisers).
5. Financial institutions in that area of the state where property is located.
6. Your client.

7. If you have a working relationship with a local appraiser, ask that appraiser to help you find the right appraiser in other locations.

As a last resort, look at the yellow pages (caveat: sometimes the biggest ads are by the least experienced appraisers). Always check these with a local service.

F. What should the attorney look for in retaining an appraiser?

1. No conflict of interest from attorney's perspective: discuss property, parties, and attorneys involved. Appraisers generally do not believe they have a conflict of interest because the opinion of value should always be the same regardless of what parties are involved.
2. Analytical abilities consistent with the problem being considered.
3. General experience with specific type of property involved in that geographical area (e.g. industrial, commercial, multifamily, single family residential, vacant or developed property as to each of these). Ask for specific examples and names of clients or attorneys involved. Call and confirm experience.
4. Specific experience as to specialized property if relevant (e.g., downtown office buildings, sand and gravel pits, parking lots and ramps, gas stations, car dealerships, etc.).
5. Ability to write a well reasoned and thorough appraisal report. Obtain and read examples from appraiser as to specific type of property involved.
6. Ability to testify credibly and persuasively.
7. Make sure the appraiser is licensed to perform the type of appraisal requested and the license is current for the state in which the appraisal is to be used.
8. Have any ethics charges ever filed against appraiser; what were they and results thereof. Any pending charges? Check the Department of Commerce for the State of Minnesota.
9. What have courts said about the appraiser in available opinions?
10. Ability of appraiser to complete assignment on schedule.
 - a. Preliminary value letter.

- b. Draft appraisal for your review to see if any factual or legal errors.
 - c. Final appraisal.
 - d. Availability for consultation, hearings and trial, etc.
11. Extent of support staff and resources available to appraiser in his/her office. Does the appraiser have less expensive support staff who can do much of the “leg work” at a lower cost? Or will too much of the work be done by someone less experienced than you would like?
12. Is affiliation necessary for this appraiser with another appraiser (not in same office) in order to complete the assignment?
13. Cost of services.
- a. Hourly (for each person involved, what is average hourly rate for assignment of this type?).
 - b. Set fee for each major step of appraisal process.
 - c. Combination of set fee and hourly rates.
 - d. Payment date: when task completed, or after loan closed or case over, etc.
 - e. Obtain and read a proposed retainer agreement and the proposed conditions of appraisal (disclaimers) so no surprises later. Is it acceptable to you?
 - f. Best to have written retainer agreement between appraiser and the client so attorney is not liable for the bill. The attorney should, however, work to ensure that the bill is paid by the client so the client does not refuse to pay a valid bill and the attorney later will have a hard time employing that appraiser in the future.
14. What non-appraiser experts must be hired to provide information or opinions on which the appraiser must rely in order to complete the assignment?

G. Specific issues for appraisers relating to loans from a lending institution.

- 1. Experience with specific lending institution.

2. Is appraiser on any required approved appraisal list used by the lending institution? Obtain list from lending institution. Discuss acceptability of potential appraiser with the lending institution. Does the lending institution approve or use that appraiser?
3. Who will be the review appraiser, if any, for the lending institution?
4. In the case of Federally regulated lending institutions, the lending institution chooses appraiser, hires appraiser and is the recipient of the appraisal. The appraiser may not share the appraisal with the applicant for the loan without approval by the lending institution.

H. Specific issues for appraisers relating to litigation.

1. Prior litigation experience. What cases? What results? Attorneys involved. Talk to the attorneys to make sure appraiser can do the job.
2. Ability to effectively educate a jury, judge or arbitrators as to the appraisal process used and ability to persuade.
3. Ability to respond adequately to cross-examination.
4. Willingness to understand any special legal or factual issues involved and use same in the appraisal and testimony.
5. Willingness to review opponent's appraisal, assist in preparation of discovery and cross-examination, and possibly testify in rebuttal case as to flaws in opponent's appraisal.
6. Will appraiser be a strong advocate for his/her opinion of value or damages at hearing or trial or before arbitrators?
7. Consistency of subject appraisal with prior appraisals on similar properties or issues and any articles which the appraiser may have written in the past, prior speeches, prior depositions or court transcripts.
8. Opposing attorney's likely assessment of ability of your appraiser and resulting impact on settlement.
9. Importance of being from the area where case will be venued (e.g. Minneapolis appraiser in a rural community?). Ask local attorneys. Are there local experienced appraisers available? Possible use of a local appraiser or realtor in addition to non local appraiser.
10. Hire the best qualified and experienced appraiser. Make sure that the client will pay for in depth analysis. Inexpensive appraisals are usually

weak appraisals. The need for an experienced appraiser is especially true if the attorney is not experienced in valuation matters.

I. Working with the appraiser in a litigated matter.

1. Attorney should inspect the testifying property and neighborhood with client and review material from client as to property. Consider carefully the interplay with the 60 day reimbursement period under § 117.036.
2. Meet with appraiser and client to review all relevant facts as to subject property.
 - a. Provide as much information as possible.
 - b. Much of the information may be available from prior appraisals.
 - c. Discuss any relevant legal issues impacting valuation.
 - d. Find out what information the appraiser needs (will other experts be necessary?) and determine who is to obtain same.
 - e. Date of valuation.
3. Client and attorney should inspect property with appraiser.
4. Discuss appraiser's preliminary non-written opinion of range of values.
5. If appraiser's oral preliminary range of value appears to be reasonable, have appraiser proceed to complete an unsigned draft written valuation analysis addressed to attorney. If client and attorney disagree with range of value, try and find out if client, attorney or appraiser is mistaken as to relevant facts and/or relevant legal principles. If client believes appraiser is not capable of understanding true value of property, consider selecting another appraiser. In some cases, the attorney may decide not to represent the client further. In choosing an appraiser as your selected arbitrator on a panel, you should discuss these issues before selecting the appraiser as your arbitrator.
6. Review draft of appraisal with client to see if any: mistakes of fact; mistakes of law; mathematical errors; lack of clarity; adequacy of supportive documentation; reasonableness of stated appraisal assumptions.
7. Attorney should then review those areas of concerns with the appraiser. Attorney and client should inspect comparables used, if any, with

appraiser to determine how relevant they are, appropriateness of adjustments made by appraiser as to comparables.

8. The appraiser is and must be an independent expert. However, attorney and client have right (and also an obligation) to educate appraiser and make sure appraiser understands what mistakes or weaknesses the client or attorney sees in the draft appraisal.
9. Determine the date by which final appraisal should be completed. Delays in completion of appraisal may be warranted for numerous reasons such as results of discovery by your opponent as to your case and results of your discovery as to opponent's case.
10. Discuss with appraiser, when appropriate, what information the appraiser believes is relevant to be sought through interrogatories, request for admissions, depositions (formal discovery not available in condemnation case until after appeal of commissioners' award).
11. Prepare appraiser for direct examination and cross-examination as appropriate.

J. Special considerations in condemnation cases.

1. Try not to finalize choice of testifying appraiser until commissioners are appointed by the court. Consider carefully the interplay with the 60 day reimbursement period under § 117.036.
2. Once commissioners are known, learn their background from:
 - a. Discussions with commissioners when they take the oath of office and at viewing of property.
 - b. Discussions with prospective appraiser as to his/her specific experience with each of the commissioners.
 - c. Discussions with other attorneys in the area who have appeared before each of the commissioners, who was appraiser, how effective was the prospective appraiser if involved.
 - d. Who is opponent's appraiser?
3. Is appraiser working for any other property owners in the area? If so, for whom, what type of property, when scheduled for hearings, etc.? There are advantages and disadvantages of using an appraiser who is already working on other cases in the area. Some of the advantages are:
 - a. Greater knowledge of comparables and area.

- b. Possible savings in cost of appraisal work.
- c. Familiarity with commissioners.
- d. If appraiser has already testified, attorney can find out strengths and weaknesses of opponent's case if similar type property.
- e. If commissioners already made an award, attorney can determine how effective appraiser was.

Some of the disadvantages are:

- a. If similar type property, appraiser must follow most of prior analysis of value.
 - b. If commissioners did not agree with appraiser's prior analysis, they are not likely to agree in your case.
 - c. Opposing party will know what comparables and other data your appraiser is likely to use and be able to conduct a more effective cross-examination.
4. An appraiser who works for condemning authorities and property owners frequently has more credibility as an impartial witness. Appraisers who testify almost exclusively for one party (or one attorney) may be neither credible nor persuasive, even though they have extensive experience.

K. Special considerations in land use cases.

- 1. An appraiser is frequently used by the property owner to show to the government:
 - a. Why the property should be rezoned due to market conditions.
 - b. Why the current zoning is not reasonable given market conditions.
 - c. The increase in value and, therefore, tax base if the zoning approvals sought are approved.
 - d. The diminution in value to the property (thus supporting a claim for damages) if the government refuses to:
 - i. Rezone as requested.

- ii. Grant the variance, conditional use permit or other zoning approval as requested.
 - iii. Abandon a proposed down-zoning of the property.
 - iv. Amend its ordinances as requested.
 - e. Lack of adverse impact on surrounding property values if the zoning approvals sought are approved.
2. An appraiser is sometimes used by the opposing neighborhood group and/or the government to rebut the above appraisal testimony.
 3. Most land use decisions on appeal to the District Court are decided by the Judge based upon a review of the record before the local unit of government. Swanson v. City of Bloomington, 42 1 N.W.2d 307 (Minn. 1988). Therefore, if an appraiser is to be used, be sure that the appraisal is part of the record before the local unit of government and in most cases that the appraiser is available to testify before the local unit of government.
 4. In some regulatory takings cases (inverse condemnation), the court may allow testimony by an appraiser at trial, but until such time as Swanson is clarified as to this issue, it is safer to present the appraisal evidence during the review process of the local unit of government.

L. Tax court considerations in cases.

1. Prefer appraiser who has worked for landowners and taxing authorities:
 - a. Adds credibility.
 - b. Appraiser can usually do a better job in cross-examination.
 - c. Appraiser can better assist landowner's attorney in preparing the case.
2. Appraiser's experience with specific Tax Court Judges.
3. Appraiser's understanding of general rules of valuation the Tax Court has been using in recent cases generally and for the specific type of property involved.

II. THE APPRAISER'S PERSPECTIVE

- A. When engaging an appraiser, have a clear idea about the purpose and intended use of the appraisal.**

