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**DEALING WITH CONTAMINATED LAND
FROM THE CONDEMNEE'S PERSPECTIVE**

by

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I. ADMISSIBILITY

Landowner's counsel should vigorously oppose injection of contamination issues into any phase of eminent domain proceedings. There are sound procedural, substantive and policy arguments to be made on the owner's behalf. Caselaw is currently split on the issue of admissibility and is still evolving, so condemnees should take full advantage of favorable precedent.

A. Landowner's Arguments

1. **Procedural / Jurisdictional**

- (a) Extraneous Cause of Action:
Environmental counts or *de facto* environmental liability claims are procedurally impermissible because eminent domain statutes do not authorize the inclusion of other causes of action in condemnation proceedings. Eminent domain statutes are to be strictly construed against condemnors, *Tosohatchee Game Preserve, Inc. v. Central and Southern Flood Control District*, 265 So.2d 681 (Fla. 1972), and therefore this lack of authorization renders environmental liability procedurally improper.

- ! *Cf. Department of Transp. v. Fina Oil & Chemical Co.*, 390 S.E.2d 99, 100 (Ga. Ct. App. 1990) holding that an eminent domain proceeding could not include a landowner's counterclaim for unauthorized use of the remainder because the proceeding was statutorily restricted to determining the propriety of the condemnation and the value of the land taken;

- ! *Cf. E & R Leasing Co. v. City of Cape Girardeau*, 851 S.W.2d 78, 79 (Mo. Ct. App. 1993) (per curiam) holding that a

counterclaim to quiet title was impermissible in an eminent domain proceeding because it was not within the statutory procedure and because the only issue properly at trial was the compensation to be paid for the taking of the property.

- (b) Ripeness:
If a landowner must exhaust administrative remedies before seeking compensation from the government through inverse condemnation, the government should be required to exhaust available environmental administrative remedies before seeking to reduce just compensation because of contamination. *Cf. Martinez v. Bolding*, 570 So.2d 1639 (Fla. 1st DCA 1990) *reh. den.* 581 So.2d 163 (Fla. 1991).
- (c) Procedural Due Process:
Existing statutory schemes for environmental liability afford owners of contaminated land certain procedural safeguards, rights and defenses. Admission of contamination into an eminent domain valuation trial circumvents those established statutory procedures and denies due process of law.

For instance, owners of contaminated property are not automatically required to clean it up. They may qualify for "monitor only" status or a determination that "no further action" is required. Fla. Admin. Code R. 17-770.600(5) and (6), 17-770-630.(3) and (4). If contamination were to be admissible at a valuation trial before completion of the administrative process, it is conceivable that a landowner could suffer reduced compensation due to the trace of a pollutant, only to later find that no response would have been required by the agency.

2. Substantive

(a) Thwarts Full Compensation:

- ! The polestar for determining full compensation is "that the owner shall be made whole so far as possible and practicable." *Jacksonville Expressway Authority v. Dupree*, 108 So.2d 289 (Fla. 1959).
- ! This must be achieved by reference to the state of affairs that would have existed absent any condemnation. *Florida Department of Revenue v. Orange County*, 620 So.2d 991 (Fla. 1993).
- ! The condemnee should be placed in the same financial position after the taking as he was before the taking. *Department of Transportation, Division of Administration v. Jirik*, 498 So.2d 1253 (Fla. 1986).
- ! Upon condemnation, money compensation becomes the substitute for the land taken. *State Road Department v. Chicone*, 158 So.2d 753 (Fla. 1963); *City of St. Petersburg v. Department of Transportation*, 293 So.2d 781 (Fla. 2d DCA 1974).

With the above principles in mind, it is apparent how admitting evidence of contamination at an eminent domain valuation trial thwarts full compensation. Presuming that property is environmentally contaminated, the landowner holds the property at a certain fair market value and also has certain possible legal liabilities for the environmental contamination. If the property is condemned and valued as though clean, the owner is then placed in the same financial position as before the taking. If the property is condemned and valued as environmentally contaminated, the landowner is placed in a different, lesser

position: the landowner would have less than the normal value of the property and still have the same legal liabilities as before.

- (b) Project Influence:
Market value affected by project influence is inadmissible. *Cf. State Road Department v. Chicone*, 158 So.2d 753 (Fla. 1963); 73.071(5) Fla.Stat.. Where contamination is found by the condemnor, its impact on market value is a result of the project and should be excluded. Similarly, even if there is known contamination prior to condemnation, alleged market "stigma" should be inadmissible because the condemnation project forces the condemnee to sell while the property is perceived as "dirty."
- (c) Speculative:
Especially where contamination is (sometimes conveniently) discovered on the eve of condemnation, admission of contamination evidence for valuation would force the jury to speculate about the extent of contamination, type of response (if any) required by governing agencies, and costs of remediation. Even where agency determination of these factors can be obtained before trial, juries may not be the best arbiters of this highly technical information.
- (d) Probative Value Outweighed by Prejudice:
The topic of environmental contamination generally is charged with emotion. The issues are also highly technical and potentially confusing. Because a landowner's liability for contamination may exist even after condemnation, charging the landowner for remediation via eminent domain valuation is unnecessary. The probative value of admitting contamination evidence is therefore outweighed by the potential prejudice and/or confusion of the eminent domain jury. This is especially true where, as in *Finkelstein* (discussed *infra*), a condemned site has already qualified for state-funded cleanup. Neither the owner or a potential purchaser

would be liable for contamination in any way. Under these circumstances, what possible reason can there be to introduce contamination evidence, other than to prejudice the jury?

- (d) In Personam vs. In Rem:
Environmental liability arguably is *in personam*, not *in rem*. An eminent domain action is *in rem*. *In personam* costs of remediation cannot set off damages in a purely *in rem* proceeding.
- (e) Conflicting Burdens of Proof:
Many environmental liability statutes place the burden of proof on the owner to show that he was not responsible for contamination on his property. Condemnors have the burden of proving the value of property taken. *City of Ft. Lauderdale v. Casino Realty*, 313 So.2d 649 (Fla. 1975). If condemnors assert that contamination is relevant to eminent domain valuation, condemnors should have the burden of proving its existence, extent, required response, and remedial costs.

3. Policy

- (a) Creates a Double Jeopardy
Landowners could suffer discounted compensation in condemnation proceedings without corresponding collateral estoppel protection in any subsequent environmental enforcement proceedings. Even after losing title, condemnees remain potentially liable for contamination in common law and statutory causes of action. 376.308 Fla.Stat.; 42 U.S.C. 9607. The issues and parties in subsequent actions would not be identical to those in the condemnation suit, so the condemnee may not be able to raise a bar. *Cf. Mobil Oil Co. v. Shevin*, 354 So.2d 372 (Fla. 1978); *State of Florida Department of Transportation v. Gary*, 513 So.2d. 1338 (Fla. 1st DCA 1987). Even if estoppel did apply, how would the landowner prove the exact amount he had already contributed toward his liability?

- (b) Spawns More Litigation
Introducing contamination into eminent domain proceedings serves neither judicial economy or finality. Only those with current interests in the property taken are joined as parties (§73.021(4) Fla.Stat.), so potentially responsible parties (former owners, adjacent owners, illegal dumpers) are not before the court and their liabilities cannot be adjudicated. Addressing contamination through eminent domain could leave an innocent owner no choice but to pursue actual polluters in subsequent litigation, that is, if he could prove how much the eminent domain jury had reduced compensation because of contamination.
- (c) Does Not Guarantee Cleanup
A condemnation proceeding cannot achieve the true goal of environmental liability actions - cleanup. An eminent domain judgment may only fix the value of the property taken. It may not enforce cleanup any more than it can force a condemnee to actually spend monies received for a mitigating cure in that fashion. The cost of cure is merely a measure of compensation. *Canney v. City of St. Petersburg*, 466 So.2d 1193 (Fla. 2d DCA 1985); *Mulkey v. Division of Administration, Department of Transportation*, 448 So.2d 1062 (Fla. 2d DCA 1984). Inviting an eminent domain jury to reduce market value for the cost of remediation could similarly be without effect.
- (d) Condemnors Have Protection
If condemnors had no other way to avoid paying for remediation, it might be conscionable to admit contamination evidence at the eminent domain valuation trial. But this is not so. Condemnors have an array of statutory and common law remedies available to them for recovery of remediation costs should they inherit contamination problems. For example, in Florida, condemnors may bring actions under Chapter 376, Fla.Stat. (particularly §376.313) or common law actions

for indemnification, negligence or strict liability to recover cleanup costs from the actual polluters. Condemnors may also seek contribution under CERCLA, 42 U.S.C. §9601 *et. seq.* In these actions, all potentially responsible parties may be joined and the contamination issues resolved once and for all.

- ! Florida's Department of Transportation is further protected by a 1989 interagency Memorandum of Understanding which allows DOT to expedite remediation without resort to normal administrative delays, assuring eligibility for state reimbursement. A copy of this Memorandum is in the addenda.
- (e) Superiority of Existing Statutory Schemes
Admission of contamination evidence at a valuation trial effectively converts an eminent domain proceeding into an unauthorized and speculative environmental liability suit for which a jury is ill-equipped. By contrast, under existing statutory schemes, contamination is addressed by a plethora of technical regulations administered by expert agencies with power to enforce their terms against potentially responsible parties once required response is determined. Full due process is afforded to the landowner.

B. Caselaw

Caselaw on this subject is rather sparse. So far, courts nationwide are evenly divided on the issue of whether contamination evidence should be admissible at an eminent domain valuation trial.

Cases holding such evidence admissible are cited below and critiqued from the landowner's perspective. They are further discussed in Robert McMurry's outline from the condemnor's perspective.

1. Cases Holding Contamination Admissible

- (a) *Department of Health v. Hecla Mining Co.*, 781

P.2d 122 (Colo. Ct. App. 1989).

Condemnation for decontamination of former uranium mill site pursuant to Uranium Mill Tailings Radiation Control Act -- the estimated cost of cleaning the subject property was 11 times its market value. The owner contended that he was entitled to project enhanced value, that is, the value of the property as though decontaminated. The court held that the owner was not entitled to project enhancement, so the property was valued as contaminated at trial.

! *Hecla* is factually distinct from most condemnations in that the land was taken for the very purpose of decontamination. There was no uncertainty about the contamination.

! The owner's only argument was based on enhancement. Issues of due process, etc. were not raised.

! Florida law entitles an owner to project enhancement to the value of the property taken. See *Nalven v. Division of Administration*, 455 So.2d 301 (Fla. 1984).

(b) *Redevelopment Agency v. Thrifty Oil Co.*, 5 Cal. Rptr. 2d 687 (Cal. App. 2d Dist. 1992).

Gas station was condemned for redevelopment purposes. The redevelopment agency took possession before trial and expended \$182,000 in cleanup costs. At trial the agency contended that the site had nominal value after deduction of the remediation costs. The owner only disputed the amount of remediation costs, arguing that reasonable cleanup would have cost \$50,000. In affirming, the appellate stated that remedial costs were properly before the jury, noting that the owner's own appraiser discounted value for contamination.

! arguably, the court's "holding" about contamination in eminent domain is dicta because the owner had not properly preserved the issue on appeal.

! there was no question that the contamination existed or that the condemnee was the polluter.

(c) *State Dep't of Transp. v. Finkelstein*, 629 So. 2d 932 (Fla. 4th DCA 1993).

A gas station site was condemned for highway purposes. The site had known contamination, but there was some uncertainty about its source because a "plume" from a nearby contaminated site had merged with the groundwater under the gas station. The precise source had not been critical, however, because prior to the taking the site had become fully eligible for state-funded cleanup.

DOT moved in limine to introduce evidence of the contamination, DOT's costs of exigent cleanup, average costs of cleanup, and its appraisal, which discounted market value for contamination. The owner objected on the basis that the probative value of contamination evidence was outweighed by the potential prejudice, especially in view of the fact that the owner had vested rights to state cleanup. The trial court denied DOT's motion and the resulting verdict was favorable to the landowner. DOT appealed.

The appellate court reversed, relying on *Thrifty Oil, supra*, and *FPL v. Jennings*, 518 So.2d 895 (Fla. 1987) which held that market fear due to electromagnetic fields was admissible to prove severance damages resulting from the taking of a powerline easement.

The case was subsequently certified to the Florida Supreme Court as a question of great public importance. Oral argument is scheduled for January 11, 1995.

- (d) *City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993).

The City condemned a service station for right of way purposes. Petroleum contamination existed on site. Over the owner's objections, the City's appraisers testified to the impact of petroleum contamination on the fair market value of the property. The landowner unsuccessfully argued such evidence should be excluded because the state Storage Tank Act ("Act") was a specific statute preempting all other statutes or common law that might address petroleum contamination. The appellate court also rejected the owner's preemption argument. While recognizing the rule that a specific statute that was "complete in itself" controlled over a more general statutory provision, the court found that the Act established a regulatory scheme and authorized agency action concerning environmental remediation, but that it did not reimburse for costs of all remediation actions. *Id.* at 1290-91. The court found that the Act was not "complete in itself" as to remediation costs, *Id.* at 1292, and accordingly held that contamination evidence was admissible.

! the owner's argument here was very narrow. Rather than the preemption of environmental statutes, the owner might have better argued the exclusivity of eminent domain proceedings. The owner might have also raised more compelling issues such as the denial of due process afforded by the state environmental laws.

2. Cases Holding Contamination Inadmissible

- (a) *State Dep't of Health v. The Mill*, 868 P.2d 1099 (Colo. Ct. App. 1993).

In *The Mill*, the Colorado Court of Appeals receded from its decision in *Hecla, supra.*, holding that property condemned under the

Uranium Mill Tailings Radiation Control Act should be valued as though dcontaminated. The court relied on the announced purpose of the Act, that the federal government pay to clean uranium sites mined at its behest, in reasoning that the owner should not be charged for the cleanup by means of discounted compensation in eminent domain.

! This case can be cited for the proposition that contamination evidence should be inadmissible where cleanup funding is available to a site.

(b) *Murphy v. Town of Waterford*, 1992 W.L. 170588 (Conn. Super. Ct. 1992).

This is an unpublished trial opinion worth the reading. A gas station site was totally taken, and under state law, both sides submitted appraisals to a referee. The owner appealed the referee's findings, and contamination was found during the pendency of the appeal. There was no proof that the condemnee was responsible for the pollution, yet during the ensuing trial the condemnor sought a setoff for cleanup expenses contending that such information would have been considered by willing buyers and sellers. The trial judge refused to allow deduction of cleanup costs on several grounds: the existence of other statutory remedies for cost recovery; the fact that condemnation forces an owner to sell while property is in a contaminated state; the absence of proof that this condemnee was responsible; and the equitable nature of eminent domain proceedings.

(c) *Department of Transp. v. Parr*, 633 N.E.2d 19 (Ill. App. 3d Dist. Ct. 1994).

The Illinois Department of Transportation ("DOT") condemned the Parr's property in connection with a bridge project. DOT valued the property at a negative \$100,000.00 and later at zero due to alleged contamination (previously unknown to the Parrs). DOT

sought to admit evidence of the cost of cleanup at the valuation trial, contending that remediation costs "are a factor adversely affecting the property's value." *Id.* at 21. The trial court rejected that contention, and DOT appealed. The issue on appeal was "whether environmental remediation costs are admissible in eminent domain proceedings to determine the fair market value." *Id.* at 21. The court held remediation costs inadmissible, reasoning that (1) such costs, without proof of contaminated condition, do not affect the value of property and (2) even if contamination is proven to exist, admission of such costs "would violate the procedural due process rights of the owners of condemned property." *Id.* at 22, 23.

Specifically, the court found that admission of such costs would deprive the condemnee of procedural safeguards, rights and defenses provided under state statutes and that admission would permit DOT to circumvent procedures established by the legislature. *Id.* at 22. The court also noted ways in which the state Environmental Protection Act was superior to the state Eminent Domain Act for the handling of environmental issues, such as the expertise of decision-makers and the ability to implead potentially responsible third parties. *Id.* at 22. By its holding, the court emphasized that the constitutional rights of landowners are paramount to the condemnor's interest in determining "market value" and that condemnors must resort to legislative mechanisms outside the context of eminent domain proceedings when addressing remediation costs. *Id.* at 22, 23.

DOT's petition for leave to appeal *Parr* to the Illinois Supreme Court was denied November 15, 1994.

3. The Hennepin Approach

Hennepin County Regional Railroad Authority v. CMC

Real Estate Corporation et al., Case No: CD 2139, District Court, Fourth Judicial District is an example of one court's attempt to reconcile the interests of the condemnor and condemnee-owner of contaminated property.

Because the landowner did not deny liability for the contamination, the *Hennepin* court had the jury determine market value of the property as though clean and established an escrow fund for actual cleanup. Where liability is admitted, this approach reduces speculation about the actual cost of cleanup and ensures that the jury will not punitively value condemned property. A copy of *Hennepin* is in the addenda to this outline.

II. OTHER PRACTICE TIPS

A. Environmental Testing

1. Determine whether the condemnor has the statutory right to test the property.
 - (a) If no statutory right exists, the landowner should consider objecting to the testing.
 - (b) If a statutory right exists, the landowner should consider objecting to the timing of the testing (e.g., object to any testing until the court determines whether the taking of the property is permissible).
2. Monitor the condemning authority's testing.
3. The persons testifying at trial should be the same who monitored the condemnor's testing.
4. When appropriate, seek to designate which portions of the landowner's property may be environmentally tested by the condemnor.

Benefits to the landowner: contamination cannot be discovered where it is not tested; limiting testing also may lessen costs if the owner is subsequently required to pay for the costs of investigation and remediation.

Disadvantages to the landowner: the condemnor may characterize the landowner as attempting to "hide" environmental contamination.

5. Obtain a stipulation from the condemnor as to environmental testing of the property.

Full testing: Obtain a stipulation from the condemnor that permission from the landowner for full testing does not constitute an acquiescence to the reasonableness of the testing or the associated costs.

Limited testing: Obtain a stipulation from the condemnor that permission from the landowner for only limited testing may not be used to the owner's disadvantage before the judge or jury.

6. Obtain portions of each test sample taken by the condemnor for use in independent testing by the landowner. (Make certain that the condemnor or its agents did not introduce any contaminants on the property during its testing.)
7. Comparatively analyze the condemnor's procedures for environmental testing with those implemented in the field.

B. Trial Strategies - If Contamination is admitted:

1. Give the court an alternative: argue that contamination should be handled through apportionment. This avoids punitive valuation and may allow time for ascertaining required response and actual remedial costs.

Support this by introducing transactional documents which illustrate that buyers and sellers isolate contamination from purchase price by escrows and indemnities.

2. Use comparable sales which demonstrate little or no market impact for contamination.
3. Develop expert testimony to contest the cost of

remediation.

4. Demonstrate how agencies have required either no response or less expensive responses than claimed by the condemnor. This would be analogous to the probability of variance argument approved in *Broward County v. Patel*, 19 Fla.L.Weekly S269 (Fla. 1994).
5. Move in limine to require threshold showing by condemnor that contamination exists, that condemnor is liable party, that agency would require response, etc., before contamination evidence is mentioned to the jury.
6. Delay the trial until administrative remedies can be pursued or until after remediation to reduce speculation. If the landowner remediates, he has more control over the cost.
7. If the condemnor conducts remediation or is permitted to reduce compensation for that purpose, insist upon an indemnification from further related liability from the condemnor in the final judgment.
8. Request a special verdict to isolate the amount deducted for contamination by the jury for appellate and estoppel purposes.