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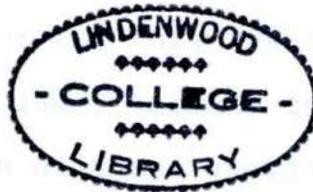
Timothy F. Hogan

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CONDEMNATION AND
'JUST COMPENSATION' FOR BUSINESS



Timothy F. Hogan, B.A.

An Abstract Presented to the Faculty of the Graduate
School of Lindenwood College in Partial
Fulfilling of the Rquirements for the
Degree of Master of Valuation Science

1993

ABSTRACT

Since the beginning of time man has always searched for justification in the acquiring of private property to serve some public need. In this endeavor, three explanations for this justification have evolved. They are 'higher law', 'sovereignty' and 'eminent domain', and each of these explanations has been used to forcefully take land from private individuals.

In the beginning land was taken without compensation, and this was justified by the concept of 'divine rule' and the inherent power of the state. Later in man's development, compensation was a stipend paid to the owner of the land in accordance with the prevailing social conscience, and this stipend was determined by the prevailing good will of the individuals representing the government, but not found in law.

With the development of the concept of 'free men' in the 'Magna Carta' (1215 A.D.); government attempted to define and circulate a concept of rights and privileges associated with citizenship in their society. However, even in this significant document, there is no mention of 'just compensation' for property seized by

the state. Even in the writing and approval of the Constitution of the United States; the concept of 'just compensation' took over one hundred years to be enunciated and defined by the Supreme Court (1933).

So its no wonder that 'just compensation' and the use of 'eminent domain' are still primitive and harsh powers exercised by the state. No where is this more obvious than in the practice and procedures associated with the condemnation of 'businesses' and in the private extension of this 'power of eminent domain' in urban renewal activities.

Hope does exist, however, in the exercise of this power, as 'Eminent Domain' is a dynamic concept and its uses and practices have evolved over time and do show that changes in the prevailing social attitude and conscience can occur. Because of this tolerance toward changes; there is always the possibility that through reason and education the problems associated with the improper use of 'condemnation' will be addressed and corrected.

CONDEMNATION AND
'JUST COMPENSATION' FOR BUSINESS

FROM THE JOURNAL OF VALUATION

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TABLE OF CONTENTS

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Table of Contents (faded text):

- Chapter I: Introduction 1
- Chapter II: Property in Law 11
- Chapter III: Large Parcel Merging & Partial Parcel Selling 16
- Chapter IV: Transactions for Mergers 21
- Chapter V: Acquisition of Property 24
- Chapter VI: Property Cited 28
- Chapter VII: Vita Auctoris 31

TABLE OF CONTENTS

I.	'Eminent Domain', Dynamics of Change	1
II.	Historical Development	8
III.	What is Public Interests	15
IV.	'Condemnation' and the Courts	22
V.	'Just Compensation'	31
VI.	Property in Use Valuation	33
VII.	Large Parcel Taking & Partial Parcel Taking	36
VIII.	Current 'Valuation' Procedures for Missouri	41
IX.	Valuation Procedure for a Functional Business	43
X.	Conclusion	50
	Work Cited	58
	Vita Auctoris	61

Chapter I

'EMINENT DOMAIN, DYNAMICS OF CHANGE '

'Eminent Domain' is a complex legal concept, and court decisions have explained this social phenomena as:

"In every political sovereign community there inheres necessarily the right of the duty of guarding its own existence, and of protecting and promoting the interest and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under government, and these last are, by necessary implication, held in subordination to this power and must yield in every instance to its proper exercise."(Schmutz, 1963, p.ix)

However, since this concept of 'Eminent Domain' is a power given to the state, its exercise and implementation must be understood to be appreciated. Understanding this concept, however, is not easy, and considerable time and effort must be expended in study before its functioning can be appreciated.

In this concept of 'Eminent Domain'; there is a power called 'condemnation' which grants, to the state, the power to arbitrarily seize land. However, before

this seizure can take place, several qualifying conditions must exist: first of all there must be a public need for the land being seized; and secondly, 'the state' must pay 'just compensation' for the land seized. Both of these conditions are justifiable, and satisfy a basic social need for 'fairness. Nevertheless, there are two significant aspects of 'Eminent Domain' which deserve special attention.

One aspect of 'Eminent Domain' is a dynamic concept and its elements are subject to changing standards of interpretation with the passage of time. This consideration enables this concept to meet the needs of the community over time. A consideration that is relevant and necessary if this power of the state is to continue to function in an interdependent and complex social context. The second aspect of 'Eminent Domain' is that in the act of exercising this power of 'condemnation', courts tend to err on the side of conservatism, in their assessment of 'just compensation'. Since both of these realities are inherent to this important social concept, and since the student in his/her quest to understand this social concept may fail to appreciate the

contribution made by these realities I hope to be able to illuminate and explain these contributions in this presentation.

To keep my explanation simple; I will begin at the beginning. What is 'Eminent Domain'? In order for one to understand the inherent problems associated with 'Eminent Domain', we have to understand the legal and social concepts responsible for the evolution of this legal act. This particular right, authorizing the taking of private property for public use by the state, has three distinct sources. They are: 'higher law', 'sovereignty', and 'eminent domain'. The concept of 'higher law' is extremely hard to explain as it emanates from a 'right' inherent from some universal authority; but it can be explained as a basic and necessary power inherent to government.

John Adams writes:

"There are rights antecedent to all earthly government, rights that cannot be repealed or restricted by human law, a right derived from the Great Legislator of the Universe."

(Macbride, 1979, p.6)

The exact origin of this quote is unknown, but it was used in both the Graeco-Roman era. Since our laws

owe their genesis to these ancient 'Rules of Law', and because we accept both of these legal codes as the foundation for our applications of public law; we are forced to recognize this vague concept.

However, our founding fathers put great stock in 'God and Country' and from their faith, there is undoubtedly a relationship that exists between the peoples of the United States and their individual 'God'. So, the phrase "Great Legislator of the Universe", is in reality simply a substitute for 'God'; and a direct reference to 'eminent domain' as an ordained power emanating from 'God'.

The definition of Sovereignty is similarly confusing as it encompasses two diverse concepts at the same time, hence double-edged sword. Sovereignty is defined by the American Heritage Dictionary as:

"n. 1. supremacy of authority or rule. 2. royal rank, authority, or power. 3. complete independence and self-government."

In the Common Law Maxim it is: 'The sovereign, when traced to his source, must be found in the man'.

(Macbride, 1979, p.8) However, the concept of sovereignty is best described in the works of England's

lecturer, author, jurist, and legal historian Sir William Blackstone in his "Commentaries":

"Civil society once formed, government is necessary to keep it in order. A superior must be constituted, whose commands all the members must obey. The control should be reposed in such persons, who possess in some degree the divine attributes of wisdom, goodness and power; wisdom to discern the interest of the community, goodness to strive to pursue such real interest, and strength or power to carry the knowledge and intention into action. These are the natural foundations of sovereignty, the requisites for every well constituted frame of government." (Macbride, 1979, p.8)

From this it is easy to see that the basis for sovereignty is 'social order' and 'accepted leadership'. As the designated leader must possess the human traits of reason and enlightenment in the exercise of government; and, in the administration of this sovereignty, the needs of the community must be identified and addressed by this designated leader. So a heavy burden is placed on the shoulders of anyone wishing to be the community leader, as he has to accept responsibility for those he has chosen to lead.

Now for a definition of 'Eminent Domain'. In the Seventeenth Century Huig de Grott (Grotius) a Dutch

statesman and jurist "formally articulated the notion of the scope, entente and effect of the power which he called eminent dominium, or 'Eminent Domain'"(Macbride, 1979, p.11). As a distinguished philosopher of government, he wrote:

"We have elsewhere said, that the property of subjects is under the eminent domain of the state so that the state, or he who acts for it, may use and even eliminate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for the needs of public utility, to which ends those who have founded civil society must be supported to; have intended that private ends should give way. But it is to be added that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the most, if need be, contribute."("Deiure belli ac pacis" c. 1625)

Public safety and community services are the overriding considerations for this government power. This concept is expressed by the Court in 'Casta Water Co. v. Van Rensselaer', (Federal Report Vol. 155, p.140-143, N.D. Cal., July 10, 1907) which reads as follows:

"the power of 'eminent domain' or 'the right to take private property' for a public use...is essentially a government function, existing in the sovereign, as a necessary constant, and inextinguishable attribute"(Schmutz, 1963, p.ix)

As one can easily see in this presentation; 'Eminent Domain' has evolved as a legal and social concept over time. The need-for and intent-of 'eminent domain' however are 'public safety' or 'public need'. In the course of day-to-day activities, situations arise in which a governments will by necessity have to exercise its power over the governed, for the benefit of those governed. It may be a road or some other physical consideration that the government implements that impacts on a specific individual, which is not beneficial to that specific individual, but which is essential to the community as a whole, and needs implementation.

Chapter II

HISTORICAL DEVELOPMENT

Prior to the advent of 'Mercantilism' the monarch, who was sovereign over the land, exercised supreme power over the people. His will and judgement always prevailed in all matters related to the needs and concerns of the community. Property could be seized without compensation to the owner and user of the land, for whatever reason the king had for seizing the land, without explanation or consideration.

From the earliest of days, there were four primary reasons for the exercise of this power of 'eminent domain'. They were: as a threat of retaliation for acts of treachery; for the construction of fortifications; to meet a communities need for providing water or water-courses to the community, and finally for the construction of roads which would bind the community together. Each of these causes for the exercise of this power by the sovereign resulted in select individuals losing their private rights to land, for the public good. In its application as threat against anarchy the monarch could confiscate the land of errant lords or nobles who actively plotted his

overthrow. Sometimes, however, if a lord or noble was a significant threat to the king, or he possessed land that the monarch coveted; this power of 'eminent domain' was used to confiscate the lands of the lord or noble, to put him in his place. In these acts of preservation, the monarch usually gained significant properties which later became sources of revenue.

In the act of providing fortifications for himself and his subjects; the monarch was actively engaged in providing for the communal protection of himself and his citizens and their property. Since conflict and warfare were the normal course of human events; these activities were necessary and beneficial for his survival.

Next, we come to water-courses justification for the use of 'eminent domain'. Because water was a necessary and beneficial commodity to the monarch and his community, and because no fortification could last long without it; elaborate provisions were undertaken to guarantee an adequate and continuous source of water. Water which could be used by fortifications and

as a communal necessity for the normal development for any organized community.

Finally, public roads have always been a significant concern for any government, as they bind a community together. Roads which carry the commerce and agricultural produce of the community, which are communications routes, and on which the armies of the king can march to the various outposts of the empire. All of these considerations justify 'eminent domain'.

With the advent of 'Mercantilism', the old feudal system of "the absolute sovereign" eventually gave way to the needs and concerns of the "common man". In England during this period of reform, the barons of the land came together and produced a proclamation for King John to sign. This document known as the 'Magna Carta' was to have a profound impact on the application of 'eminent domain'. The Common Law Maxim (Magna Carta and King John) state: "There is nothing more sacred, more inviolate, than the house of every citizen." (Macbride, 1979, p.9) This concept significantly enhanced this important document. Furthermore, the 'Magna Carta' has 63 chapters, of which the 39th., is

the most important to the study of condemnation, and 'eminent domain' for it states:

"No free man shall be taken, imprisoned, seized, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by law the lawful judgement of his peers and by the law of the land." (Macbride, 1979, p.10)

In this quote the term "free man" is the earliest evidence of the term, 'eminent domain'.

The 'Bill of Rights' in the United States Constitution reinforces these basic human rights, and proclaims to one and all the rights of the citizen in a free country. Even though the constitution did guarantee the private citizen protection before the law, it took some time before the judicial system addressed this problem of 'just compensation'.

Even in the early years of the United States, the thought of 'just compensation' was not a factor in the taking of private property. This can be seen in the early constitutions of several states, "e.g. Virginia, North Caroling and New Hampshire did not describe an obligation for the payment of compensation". (Macbride, 1979, p.13) to individuals who were deprived of their

property. A revolting situation for any democratic society.

In discussing 'eminent domain' one must take into account several unique American developments which significantly impacted on this important concept. In this country, we as a people, specifically set aside lands for 'public use' and planned growth. This can be seen in the maps and documents of the Colonial period.

Furthermore, overtime, additional innovative approaches have been implemented to provide for 'public need' through the concept of 'eminent domain'. Several of these innovative concepts were: land grant universities which sprang up in most of the western states; the Continental railroad system; and in the present, Urban Renewal. Each and everyone of these unique concepts has enhanced life in these United States.

Where would we be today without our 'Land Grant Universities' which were developed by the implementation of a creative and uniquely American use of 'eminent domain'. The federal government, by setting aside public lands, promoted and supported a

concept of higher education. Places where the "common man" could obtain a quality education, at reasonable costs. A significant contribution to the early development of this nation.

The encouragement and later development of a transcontinental railroad was then undertaken by the federal government. By using the concept of 'eminent domain', the government was able to pass legislation which would give any railroad developer larger tracts of public land for the construction and operation of railroads. These initiatives occurred at a time when this country desperately needed a railroad system linking the nation coast to coast. These incentives resulted in a spectacular railroad building program, and at a time when this country was experiencing a significant influx of emigrants, who wanted their own land. Because of these realities; our western states grew and developed at a phenomenal rate.

Today, the state and federal governments are working together to provide incentives for 'Urban Renewal' in our cities. To generate new construction and growth in areas where decay and abandonment are

common. The tool that is being used is 'eminent domain'. This new birth in older parts of our cities is being promoted by one of two tools. One tool allows local communities the authority to grant the right to 'eminent domain' to private developers, who agree to specific 'Urban Renewal' objectives. The other tool, or method, allows the community itself, the authority to initiate condemnation proceedings against individual owners, so that property can be seized, and then offered for sale to private developers who will then develop the property and operate it for a profit. Both of these tools allow the community the legal authorization to condemn and then take possession of 'blighted' or 'abandoned' property.

The current idea of 'just compensation' arose out of a court case, "Jacobs v. United States" (United States Report 290, p.13, Oct. term, 1933) in this important legal decision it was determined that this right of 'just compensation' is guaranteed by the Fifth Amendment to the Constitution. It seems impossible to believe that it took so many years for a Supreme Court decision to determine "just compensation".

Chapter III

WHAT IS PUBLIC INTEREST?

Since the citizens of a community expect fair and honest treatment before any court, and by law; the courts established by the 'sovereign' must strive to administrate, protect and serve the needs and concerns of its citizens. As such, we need to know how 'public interest' is served, in a 'condemnation suit'.

The American Heritage Dictionary defines public as:

"1. of, concerning, or affecting the community of the people. 2. maintained for, used by, or open to the people or community.: a public park. 3. serving or acting on behalf of the people or community: public office. 4. open to general knowledge: widely known. -n. 1. The community or the people sharing a common interest."

With this definition in mind, our interpretation of 'public interest' should be: a common concern or interest shared by a group of people for a specific purpose and the betterment of the community.

On the public side of the case, the property being sought must meet a need or special use of the community. This is a very important part of the condemnation process, for a community's need, and the

public benefit intended must be identified before a condemnation process can be initiated. The community need can be in the areas of road construction, public parks, public housing, the expansion of public facilities (city hall, hospitals, etc.) or a whole host of related activities.

In some cases, community interest and special interest, are inherent in the same project. So a diligent effort must be made to identify the community interest and the private interest beforehand, and then the proper public authority must define its problem in accordance with state law. An example of what can happen when any party fails to follow the prescribed course in the acquisition of land, using condemnation, is found on the following page. (Exhibit #1.)

In this example, the City of St. Louis condemned a plot of land, which it had 'blighted', and then negotiated to sell this land to a private entity. The legal complication arose due to several specific realities. The City of St. Louis had no intention of redeveloping the property itself, instead it planned to sell the property to a private developer. Secondly the

City Appeals Ruling On Lot Next To Mayfair

By Fred Faust

Of the Post-Dispatch Staff

Calling eminent domain "an essential weapon in the fight to promote urban redevelopment," the city has appealed a court ruling that blocked its effort to condemn a downtown parking lot.

Eminent domain gives the city power to take private property — giving the owner compensation — for public good.

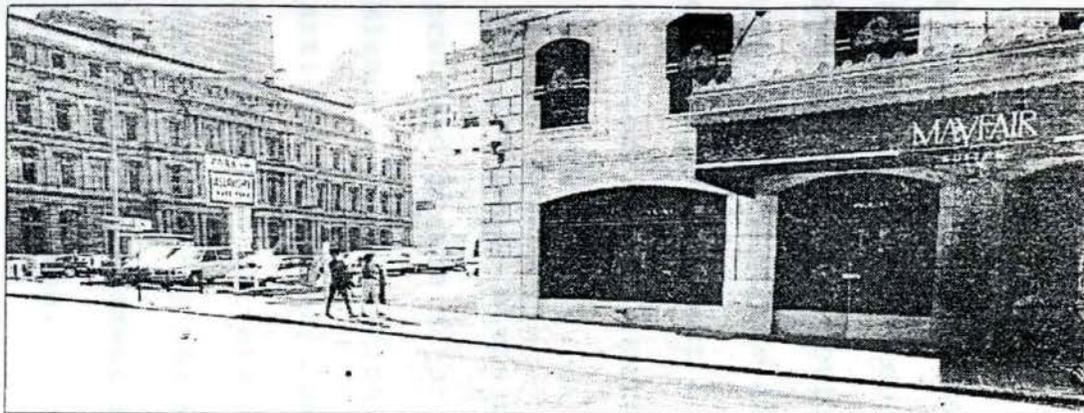
The city had agreed, on behalf of the owners of the Mayfair Suites hotel, to acquire the lot at the northwest corner of Eighth and Locust streets.

The lot, next to the hotel, would have been used for hotel parking, for the addition of a new kitchen and for the eventual construction of more rooms.

The city filed a successful eminent domain suit. But the lot's owner, the United States Steel and Carnegie Pension Fund, asked the Missouri Court of Appeals to stop the condemnation.

On Oct. 9, the appeals court ruled against the city, stating that the condemnation involved the taking of land for private use and therefore violated the Missouri Constitution.

In its appeal, the city's Land Clearance for Redevelopment Authority argues that the "public purpose" of taking land "does not turn on the end use of property but on whether the exercise of eminent



Ted Dargan/Post-Dispatch

The Eighth Street entrance of the Mayfair and the disputed parking lot.

domain will contribute to the redevelopment of a 'blighted area.'"

The parking lot is in a redevelopment district that the Board of Aldermen "validly declared 'blighted,'" LCRA states. "The redevelopment of blighted urban areas, in itself, is in the public interest and is therefore a public purpose."

LCRA charges that the appeals court opinion "ignores the realities of modern urban redevelopment."

If the opinion is upheld, LCRA says, the "detrimental impact" on "urban redevelopment throughout Missouri cannot be overemphasized."

In an opposing brief filed Wednesday, the pension fund calls it "ironic" that LCRA quotes a state law that affords "maximum opportunity" for redevelopment by private enterprise. The fund complains that the city denied the fund itself an opportunity to

redevelop its own property.

In its Oct. 9 ruling, the appeals court states that it's up to the courts, not the Board of Aldermen, to decide if a use is public.

If "the chief dominating purpose or use is private," the court reasons, "the mere fact that a public use or benefit is also incidentally derived will not warrant the exercise of eminent domain power."

The Mayfair reopened in early July after undergoing more than \$20 million in renovations. Ninety percent of it is owned by Carl Marks Realty Services Inc., part of a New York investment banking firm.

Last November, the Mayfair agreed to pay the city's costs in obtaining the parking lot. In January, the pension fund rejected the city's offer of \$1,264,000; the city filed the eminent domain suit in February.

prior owner of the property had asked for the City's approval to redevelop the property himself, and had been denied this option. In its ruling, the appellate court held that the City of St. Louis had exercised the concept of 'eminent domain' for a 'private use', so therefore, this entire action was a public condemnation for a private use, which was unconstitutional.

The basic steps dealing with condemnation are preceded by one major rule. This rule is found in the Missouri Constitution, Article 1, Section 28. This article absolutely "prohibits the taking of private property for private use." (Missouri Condemnation Handbook, p.1-1) As such, 'condemnation' allows the sovereign government the power to seize private land for a public use.

There are nine basic steps which must be followed in condemnation cases brought before the court in the State of Missouri. These nine steps are listed in the Missouri Condemnation Practice Book which is published by the Missouri Bar Association, and are as follows:

1. The Negotiation of an Offer To Purchase.
This step is necessary so that there are no undue problems in the acquisition of the land in question, eliminating the need to go

to court. This is accomplished by the condemnation authority making an effort to meet the legitimate demands of the owner of the property, and an agreement is reached through negotiations.

2. Venue and Jurisdiction. The Supreme Court Rule 86.02 establishes the circuit court as the only place that condemnation proceedings may be brought. The court in the county or city in which the land is located and has jurisdiction over the case.
3. Appointment of Condemnation. This establishes the people who will be responsible for the condemnation investigation and valuation of the properties or tracts to be condemned. It also provides for notification to the owner of record and his right to be represented by council in the proceeding.
4. Duties of Commissioners. The duties of the commissioners are to establish the value of the land or tracts of lands by viewing the land and estimating the price, or by gathering professional opinions as to the value of the land. Then "reporting under oath, to the clerk of the court, their findings. Sec. 523.040, RSMo,: S.Ct Rule 86.05"
5. Notice of Commissioners' Report. The clerk of the court is required to immediately post the report of the commissioners so that all parties involved in the condemnation proceedings are aware of the actions of the court.
6. Exceptions (When Filed). Any party to the condemnation procedure can file written exceptions with the court after

the Notice of Commissioners' Report has been made public. Also at this point in time, the court responsible for these proceedings is established.

7. Payment of Awards and Notice. When the public entity responsible for the condemnation suit has paid into the office of the circuit clerk the amount of damages assessed by the commissioners, the clerk is required to give the owners of the property written notice of the payment within (5) days.
8. Passing the Title and Right of Possession. Physical possession of the property is supposed to be delivered within ten (10) days after receipt of the clerk of court's notice and the public entity responsible for the condemnation suit is empowered to request the court to issue a writ of possession in the event the owner does not vacate the premises. The court has the power to grant to the owner an extension of time, not to exceed ninety (90) days.
9. Determination of Interest in Awards. This rule states that if there are several defendants involved as the recipients of an award, and they cannot decide how the settlement is to be divided, then the court will make the final decision for them. This action will be taken if no decision has been made within thirty (30) days of the decision by the court on the final award. (Missouri Condemnation Handbook, 1973, p.2-3 thru -7)

With these basic steps defined; however, it becomes quite apparent that the taking of private property for public use isn't difficult. it's just time consuming.

Furthermore, in these nine steps, almost any problem which might arise in the course of any 'taking' has been considered, so that a fair and just procedure is available to one and all. This reality supports the concept of openness and public for the proceedings and actions of the court. Anyone, who is interested in what transpires, can follow the procedure.

Chapter IV

'CONDEMNATION' AND THE COURTS

Condemnation is the process by which federal, state, and local government agencies acquire private land for a public use. This taking of land for public use is not an arbitrary act, perpetrated by the community at large without regard to the rights of the private individuals; on the contrary, this is a deliberate act, that is planned, and initiated to support a necessary and important function of government.

In support of this taking of land for a necessary and important function of government; there are a number of 'safe guards' written into the law which protect the individuals in his/her relationship to 'the state'. The first of these protection is the 'Fifth Amendment to the Constitution' which states, "nor shall private property be taken for public use without just compensation" (Schmutz, 1963, p.X). Furthermore, the 'Fourteenth Amendment to the Constitution', also guarantees certain rights to the individual. It states, "nor shall any state deprive any person of

life, liberty, or property, without due process of law." (Schmutz, 1963, p.X)

The Fifth Amendment specifically states that the owner of the land will receive 'just compensation' for his land. The Fourteenth Amendment reinforces the Fifth Amendment by mandating a procedure for addressing any grievances which might arise in the course of a 'condemnation proceeding'. As you can see, by the words, 'just compensation' and 'without due process of law' these are protection for all citizens of the community. These two amendments, do not stop the process of condemnation. What they do, is specify the legal justification for the taking of the land, and the legal protection available to the private citizen in these actions.

In any 'condemnation' case brought before a court of law, it is presumed that 'just compensation' means: fair compensation to the owner of record, for the worth of the land taken. This term, 'just compensation' is a little bewildering because in its legal application, this term means the land and any structure on the land, and does not take into account what the owner of the

land has put into the land; as such, grievances associated with 'condemnation' are fairly common.

These grievances arise because the owner's presumed worth of the land, and the public authority appraisal of the worth of the land are substantially different; and an inability to resolve these differences arises. However, there are several other problems which can arise, and which do complicate 'due process'. The most common cause for these other problems are 'damage to the remaining property in a partial taking', accessibility, 'building and zoning restrictions', 'covenants' (limited uses of property), mineral rights and exposure to danger (through the removal of levees, or firebreaks); and anything of special or unique character associated with the land. How these problems are resolved, are of importance to the community and the individual involved.

Explaining 'damage to the remaining property in a partial taking' will be explained later in chapter seven. So I will skip this important explanation for the present, and precede on with the next complication which arises in 'condemnation'.

'Accessibility', means having a way to enter and exit the property. This problem usually arises when highways are constructed with limited access. Since farmers cannot get to the property cut off by highway, some means of access must be provided by the state in these cases. A problem which can sometimes be difficult to address due to hazards or obstacles inherently associated with specific locations (rivers, creeks, quarries, airports, and railroads).

'Building and zoning restrictions' can become a factor in 'condemnation' as the diminished land may not meet minimum zoning requirements for residential and/or business use for the location of the property. This factor can also be a problem when extremely small lots are diminished by easements and right-of-ways. So the public entity exercising the right of 'eminent domain' has to exercise caution in some undertaking. Another problem which sometime arises in these cases concerns the types of uses for which a property is used. Sometimes, both not very often, the authorized use for a plot of land will change with condemnation. This happens when a community revises its zoning uses, and a

existing business is not in compliance, but has the right to continuous activities due to their being 'grandfathered in'. (Allowed due to the continued use, which originated prior to the zoning restrictions.) This problem becomes relevant when the size of the lot is substantially reduced by the 'condemnation' and its current use cannot be continued.

'Covenants' that reflects 'restricted land uses' are usually recorded with the plot, and they may be found in the Articles of Trusteeship, also recorded with the plot. Covenants as such, are restrictions on the use of the land, and if 'legally constituted' are legal and binding on the purchase of the land. A 'covenant' is a property restriction placed on the property by the seller, of the property, at the time of sale, and reflect a 'promise' by the buyer to respect conditions associated with the sale of the land demanded by the seller. At one time, 'covenants' restricted who could purchase property, and who could sell property, at the time of sale. (These 'covenants' reflect 'social or racial prejudices' and as a general

rule these types of covenants have been 'outlawed' by the U.S. Supreme Court).

Today most 'covenants' reflect the types of business which may purchase certain types of property. Supermarkets and drugstores are two types of businesses which presently include 'covenants' in their sales agreements, restricting the operation of 'like-businesses' on designated parcels of land. This condition usually arises when an established business moves to a larger facility. The owner of the business wish to restrict competition from any 'new' owner of its previous facility; so a 'covenant' is included in the sale contract to protect the sellers business franchise.

'Mineral Rights' are a problem in Missouri, as mineral rights are a part of the land, and when land is bought or sold these rights go with the land unless previously conveyed out of it, or withheld (reserved by grantor). However, in some states there is a real problem in 'condemnation' due to mineral rights.

In mineral producing states, mineral rights must be checked carefully, for they directly effect the

value placed on the land in condemnation and appraisal; thus mineral rights may include rights related to strip mining or underground mining. Furthermore, in mineral, coal, gas and ore producing states, the individual owner of property may be willing to part with the land, but he/she may not be willing to part with their mineral rights. In these cases, unusual and awkward solutions are sometimes found so that the condemnation procedure can go forward.

Finally, we come to 'exposure to danger', this condition for potential conflict has as its origin the safety of property from exposure to fire and flood. The origin of this problem, were the early railroads. Due to the privileged they were granted, associated with their use of 'eminent domain', there was a recurring problem caused by flying embers from the early locomotives which set grass land on fire during dry periods. To address this problem, the states were forced to include provisions in granting of right-of-ways which put a burden on the railroads to prevent or put out fires caused by their locomotives. Property damages could also be assessed against the railroad if

property damage was extensive; but in court cases associated with this problem, the proceedings were long and drawn out affairs.

Likewise, if the state removed a levee, or breached a levee, in the construction of a highway right-of-way; any and all individuals adversely effected by this action had a grievance against the condemning authority, as public safety was involved. So extraordinary efforts are called for in the consideration and implementation of any system which might endanger the public safety.

'Condemnation' is not something taken lightly by the parties involved. It is a serious and deliberate act, initiated for a public benefit, and subject to public approval. So everyone interested in these activities strive to serve the best interest of all parties involved, and to limit to the bare minimum any damage or animosity which may occur. In dealing with individuals and businesses, the public authority responsible for the 'condemnation' always strives to meet the legitimate claims of the individuals and businesses involved. However, the public authority

also has to represent the public, and in its capacity as representative of the people, it strives to meet the conservative demands of the individual's owning the property.

Finally, the courts in their capacity must judge the case on the merits of the information presented, and then decide what is a right and just, according to the prevailing legal code. A task that is necessary and relevant to the needs of the community, and one limited by time and circumstance. In these proceedings it is hoped that the public is always the winner, and there is no loser, as the owner of the property is compensated according to the worth of the property.

'JUST COMPENSATION'

'Just Compensation' is a vague concept at best, and a somewhat simplistic solution to a complex problem in its general application. In its legal context, this term implies that the owner of the land is given fair value or equal worth for his/her property. This, however, has to be conditioned by saying that 'fair' and 'just' are terms applicable to the court, and not necessarily to the private owner of the land. As custom, and precedent demand a conservative appraisal of the property being taken, is considered, in all 'condemnation suits'.

Furthermore, the court in its attempt to make the owner of the property 'whole' after the taking, always applies a concept of 'whole' that is a 'conservative whole'. A reality which definitely ignores some of the factors associated with the valuation of the property being taken. Specifically, in the appraisal of property, to determine the value of a plot of land on which a business is located, 'just' compensation is hazardous to the business, as its contribution to the

general welfare of its owner cannot be rationally valued condemnation. A reality that is obvious to the court, and for which no provisions have been made at the present time. Even though improvements to the land, made by the private owner of the land, may be considered at the time of the condemnation suit.

All land is unique, due to location and its topographical features. Also, all businesses are unique. When a court authorizes condemnation, the owner of the property may be made 'whole', at the time of the taking, but the compensation received for the property is a fixed compensation.

This fixed compensation has to be reinvested in order to generate income. The recipient of the income may choose to invests this compensation in securities, land, another business, or anything that he deems relevant. But whatever he does with the compensation received, it will not be the same as before, as something new has been created or acquired. Something the owner will have to nurture and manage, and hopefully it will replace that which was taken.

Chapter VI.

PROPERTY IN USE VALUATION

"The estimation of fair market value involves, essentially, a discounting of future potential and anticipated benefit and ascribing a present dollar value." (Schmutz, 1963, p.79) What is meant by future potential and anticipated benefits? Future potential is the enjoyment and pleasure that is derived from the property by the owner. It can be in the form of recreational benefits, income-producing benefits, or something as insignificant as saying, "it's mine".

How an owner uses his property is relevant to his personal needs. It may be income producing property which takes time to appreciate, or it may be a plot of land with sentimental value, and nothing else. The only way to determine the 'best use' for any property is to estimate its use potential. Other terms to describe the 'best use' for land are "highest and best use", "all available uses and purposes", "all capabilities", and the "most profitable use". (Schmutz, 1963, p.79)

The best method and approach to take in determining 'best use' is defined by the Federal Court

(U.S.) Boon Co. (Mississippi) v. Patterson (United States Report, Vol. 98, OTTO VIII., p.403-410, Oct. 1978). It states:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the use which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not deemed to be worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability to being made thus available gives it a market value which can be readily estimated... but, as a general thing: we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to existing business or wants of the community, or such as may be reasonably expected in the immediate future." (Schmutz, 1963, p.79-80)

While this is the view of a Federal Court, state courts may view this problem differently.

Calculating any property's 'best use' would be a interesting and complex undertaking, primarily because there are so many possibilities and options available for any given plot of land. The first and most obvious possibility is to do nothing, and let the land remain

in its 'virgin' form. Then as the land around the specified property appreciates and develops, this land will appreciate at an accelerated rate. Doing nothing sometimes has an advantage.

The next possibility calls for making improvements to the land. With this option a number of possibilities exist. However, the size and type of buildings incorporated onto the property are the critical decision factor. Large buildings have utility, but their demolition, should a change in use be required, is significant. So one is forced to consider the options of type of building to be constructed.

Then finally, one has to consider public services and utilities. With the inclusion of these necessities and important functions, property surrenders 'easements' and 'access'. A consideration that may be significant if another use for the property is considered, at a later date. One final point has to be emphasized, all land has value, the problem is in determining its value.

Chapter VII

LARGE PARCEL TAKING & PARTIAL PARCEL TAKING

What is meant by large parcel taking? The criteria set for large parcel taking may be defined as follows:

"(1) is all that property which belongs to the same property, who owns the part taken, (2) is contiguous with it, and (3) is used for a common purpose." (Schmutz, 1963, p.85)

A better general definition for any single taking of property is: (1) unity of ownership, (2) contiguity, and (3) unity of use; simplifies our understanding of what is meant in a complex 'condemnation suit'. This concept of unity is necessary if the property is to be 'taken and damaged by Constitution means' as is required by the Missouri Constitution.

To understand what is damage in a condemnation suit, another definition is needed. In the Condemnation Appraisal Handbook, it is stated, "to injure or to harm the property held in private ownership" (p.93) when a 'partial taking' takes place, the damage is to that portion of the property that remains, after the condemnation has become final.

Severance damage: "In some states like Georgia and Missouri severance damage is referred to as consequential damage." (Schmutz, 1963, p.93) Severance damage refers to the damages to be paid, when a loss of value is rendered to the remainder of a partial taking. In order for this to happen, some portion of the original property must remain with the original owner after the taking.

'Severance' is established when these conditions exist:

1. The whole property forms an economic unit.
2. A physical part of the whole property is being taken, by the condemnation suit.
3. The remaining property, as an economic unit, is worth less, after the taking of a part of the property.
4. And finally, the reduction in value of the remainder is a direct result of the taking of part of the property. (Schmutz, 1963, p.93-94)

These are the causes for 'severance damage' as listed in the Condemnation Appraisal Handbook, p.94-95:

1. A change in the 'use' of the residual property to a less profitable use, as evidenced by a decreased rental and consequent decreased market value. This condition may be brought about by:

- A. A resulting insufficiency in the remaining area to support (physically) the normal enterprises.
 - B. A resulting distorted shape, such as angularity of the lot lines.
 - C. A resulting loss of railroad trackage from a portion of the remaining parcel, in industrial property.
 - D. A change in the grade of the street, where a portion of the land actually is taken.
 - E. In general, any condition causing an injurious physical interference with the use of the remainder.
2. A 'burden' (with respect to cost) is imposed upon the residual property occasioned by the taking of a portion of it and the construction of the improvement in the manner purposed such as:
- A. The increased cost of construction of an irrigation system, if and when built, or the cost of making the necessary changes in an existing system.
 - B. The cost of fencing the residual land along the land taken, if necessary.
 - C. The increased cost of construction of a building because of (i) shape, and/or (ii) foundations.
 - D. The damage from flood waters backed up by an embankment, and damage by fire resulting from the operation of a railroad. (Schmutz, 1963, p.95)

The best way to state 'severance damage' is:

"the damage contemplates a physical interference with the most profitable use of the property and excludes such considerations as fear or unsightliness, which are not compensatable elements of damage." (Schmutz, 1963, p.95)

From this we see that, "by way of legislative enactment and through case law, the several valuation techniques have evolved in the various jurisdictions, both state and federal." (Schmutz, 1963, p.96) In the United States today there are three different valuation methods being used in the taking process. They are as follows:

1. Value of the entire property before the taking and the value of the remainder of the land after the taking. This is the so-called Before and After Rule.
2. Value of the property taken, plus damages to the remainder; measured by the difference between the value of the remainder of the property as calculated before the taking, and the value of the remainder of the property as calculated after the taking. This can be

called the Modified Before and After Rule.
(used by Missouri)

3. Value of the part taken, which is considered as Severed Land, ie., its value independent of the parent property and the remainder of the property. (Schmutz, 1963, p.97)

CURRENT 'VALUATION' PROCEDURES FOR MISSOURI

The State of Missouri requires a 'fair market assessment' for all real estate subject to taxation within this state. This state law has two requirements: the first mandates that all property be valued at its 'fair market assessment' for tax purposes, and that the taxes, assessed on each parcel of property, must be calculated at this 'fair market assessment'. So each county assessor, in Missouri, must keep his tax rolls current, as to the 'fair market assessment', for all property found within his jurisdiction. Therefore, a check of any county assessor's records will disclose the 'fair market assessment' for any parcel of land listed within a county's boundaries.

This 'fair market assessment' is determined by the selling price of like properties in any given county's jurisdiction. The key phrase here is 'like properties', for this is the only way a county assessor can value property, in an expedient and just manner. Also, due to the necessity to record the selling prices of property and the legal documentation for ownership

with the county recorder of deeds, a data base has been established and is available to the county assessor.

Chapter IX

VALUATION PROCEDURE FOR A FUNCTIONAL BUSINESS

When a public entity determines, that it is in the 'public interest' to file a condemnation suit to take possession of a parcel of land on which a functional business exists, several conflicting considerations effect the 'valuation process' for the condemnation, and the calculating of the property's 'fair market value'.

First of all, the parties to this action usually have a major disagreement as to the 'fair market value' of the 'functional business' prior to litigation, or during litigation if the parties cannot agree to a specific amount of compensation. So what factors are present and should be considered in the valuation process for a functional business? The first consideration, as always, should be the land and all of the buildings on the land. Next, the public authority should consider improvements made to the land, by the current owner. Both of these factors are usually taken into account by the judicial system now.

Two other factors which should be considered in the 'fair market assessment' of businesses are:

profitability (or lacking profitability), and hardship. For this is a reasonable and rational measure of loss or hardship that the owner of a business will suffer if he/she terminates the business. Other factors inherent in this assessment of hardship are: Image/Familiarity, Convenience/Accessibility/Uniqueness, Service/Product, and finally management style. One should consider the loss due to the individuals decision to terminate the business, as a direct result of the condemnation to procedure.

All of these factors are inherent in a condemnation suit directed at a functional business, and which have a significant impact on the community at large. For it's the community that authorized this action, and the community that will suffer due to the loss of a functional business. For too often in the past, this relevant factor has been ignored by the condemning public authority.

The general well-being of the community suffers when a functional business is force to cease its operation. Jobs are lost, people are displaced, and revenue to the community is lost, due to elimination of

taxable property. In the past, these considerations were discounted as irrelevant, and the condemning public authority went ahead with its plans, to the detriment of the community. The consequences of these irrational decisions can be seen in older urban communities. In these communities there is an obvious and socially expensive realization that these private entities, which are the life-blood of a growing and prosperous community, are missing and not likely to return, primarily due to condemnation, and the careless use of 'eminent domain'.

Profitability (as reported on a signed tax return) should be the basis for compensation in the valuation procedure for a functional business. No other measure of a business can be equated to a dollar and cents amount. If, which sometimes happens, a business has no 'profit' for its most recent fiscal year, an average of its last five year's operations profits should be used. If after this calculation, the business still has no profits, this factor should be disregarded. This is a statutory imposed restriction of the Internal Revenue Service, and is defined in Federal Tax Law. Usually

Next we must consider several innate characteristics of a functional business which are relevant but which defy valuation. The first of these characteristics is best defined by the two terms, image and familiarity. These two terms best describe a consideration and a necessary function of business which develop over time and should be valued by a successful business for the repeat sales, generated by customer satisfaction. Something significantly important, with regard to gross sales, but is nearly impossible to value in the assessment of a functional business.

Convenience, accessibility and uniqueness are characteristics of a functional business which are inherent to a specific location, and which cannot be duplicated or reproduced instantly, for any business forced to relocate. So, as before, location is a difficult quality to define, and even more difficult to legitimize in a legal proceeding, or in negotiations with its appraisal representative.

Now we must consider the Service/Product function that the business provides to the community. Usually

this factor is ignored in condemnation procedures. A court will sometimes consider this relevant fact, and encourage a functional business to relocate in the immediate vicinity of its former place of business. When this consideration is a part of the condemnation procedure, because the court deemed the business essential to the public interest, a premium will usually be paid for the 'encouraged' limited relocation of the business. One example of this was the St. Louis Airport Authority insistence that T.W.A. acquire or construct another 'airport hangar facility' at Lambert International Airport after the Airport Authority condemned the existing T.W.A. hangar.

The last consideration, which is extremely difficult to value, is the managerial style of the functioning business. Management style is fairly self-explanatory, but the age and capabilities of the manager of the functional business may or may not survive relocation; a 'burn-out' or 'aged' manager may elect to 'cease business activities', rather than relocate, and if this option is exercised, some special compensation may be demanded. 'Just compensation' for

the 'forced closing' of a business in a condemnation procedure is usually 'ignored' in the valuation process.

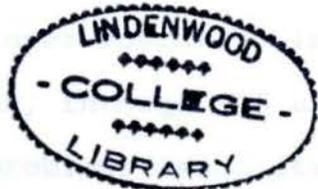
Another consideration, is compensation paid to the lessee for the forced relocation of a business. In cases where a lessee is forced to relocate, because of a condemnation proceeding, a lawsuit for damages may ensue, causing adverse legal problems for the owner, and which may cause property damages to the owner, not stipulated in the valuation of the property. Just as the time, number of months, or years, remaining in the lease may be a factor in the 'valuation procedure'. Any and all related 'contractual agreements' can and will enter into the proceedings and may impact on the 'final valuation' of the functional business.

In the definition of a functional business, farmland is easily included, as a product is grown for sale and the resulting profits are an integral part of the endeavors. So contracts, lease agreements, and all of the other complications associated with a functional business may apply to a functioning farm. The only difference is found in the settlement of the property,

either in its rural, urban, or suburban location. Another difference is land values are reduced, and the legal complications are seldom as complicated.

Important functions of government for any sovereign state must have the authority to provide for the citizens safety and well-being. Eminent Domain provides these important governmental functions. Furthermore, Eminent Domain has been used by the federal government to address economic problems beyond the scope of rural governments activities.

This power of eminent domain was used by the federal government on the basis for giving public lands to the railroad, as an incentive for the westward construction of a transcontinental railroad in the early Nineteenth Century, and this initiative generated a complex rail system for this country. In this same period the federal government established the "Land Grant Universities" through this power of Eminent Domain and ever since these institutions have become the basis for public higher education in this country. Today state governments use the power of Eminent Domain, not only for public works and with Urban Renewal.



CONCLUSION

The power of 'Eminent Domain' is a necessary and important function of government; for any sovereign state must have the ability to provide for its citizens safety and well-being. 'Eminent Domain' provides these important governmental functions. Furthermore, 'Eminent Domain' has been, and is being used as a tool of government to address economic problems beyond the scope of normal governmental activities.

This power of 'Eminent Domain' was used by the federal government as the basis for giving public lands to the railroads, as an incentive for the westward construction of a transcontinental railroad in the early Nineteenth Century, and this initiative generated a complex rail system for this country. In this same period the federal government established the 'Land Grant Universities' through this same power of 'Eminent Domain', and over time these institutions have become the basis for higher education in this country. Today state governments, through the use of 'Eminent Domain', are addressing problems associated with 'Urban Renewal'.

In each and every one of these endeavors, individuals were deprived of land, for the greater good of the society. Land that they were compensated for, according to the prevailing standard of governmental responsibility. In the short run, this compensation was an expediency, and necessity to achieve the designated public benefit intended by the government authority; in the long run this compensation was 'cheap' considering the benefits derived from these activities, and in present day realities, well worth the effort. However, as we progress into the Twentieth Century, certain questions and concerns should be voiced and debated by those associated with these activities. These questions concern 'public benefit' and 'individual rights of the citizen'.

Before entering into this presentation, I would like to say, that I have no problems with the unquestionable right of government to exercise the power of 'Eminent Domain' for a direct 'public-use', ie; roads, public buildings, airports, parks, and in conjunction with public utilities; but once these specific circumstances have been addressed, I have a

real problem with the use of 'Eminent Domain' to achieve some public advantage, through encouraged private development. Now for my questions:

1. What right has any government to force an individual to surrender property that he had worked and improved, so that the property can be given or sold to another private interest?
2. What valuation process, is just, when the power of 'Eminent Domain' is specifically used to acquire property for a private entity?
3. Where is the justice in any government taking property from one private citizen to give it to another private citizen?

If you remember my example concerning the City of St. Louis, you can readily see each and everyone of the concerns.

Urban Renewal may, or may not, be a valid governmental function; but the use of 'Eminent Domain' in these governmental activities is a real and present danger to our society. Governmental rights and responsibilities are being compromised in the pursuit of a questionable public good. Individual citizens in some cases are being granted the power of 'Eminent Domain' to acquire land for specific private developments. Why?

In this presentation, the one recurring and obvious justification for 'Eminent Domain' has been public safety or public benefit. With the emphasis that whatever was developed would be paid for and used by the public, through its legitimate representatives, and these actions were implemented and sanctioned by the courts.

So what is the justification for these activities? Does the 'right' to use 'Eminent Domain' for a private development come from 'higher law'? Not likely! The Great Legislator of the Universe never authorized the seizure of land for economic gain. Does this authority come from 'sovereignty'? Where is it written that a government has to make money, for its own benefit? To my knowledge there is no authorization for government to 'make a profit'! So, who authorized this right?

What is just, in the use of 'Eminent Domain' to force any private citizen to sell his property at a specific price, dictated by a private developer, with the sanctions of the courts? There can be no justice or fairness when anything is forced, everyone knows that! So when private individuals are given the power

of 'Eminent Domain', human nature dictates that they will pay as little as possible for the land that they want for their private venture. Furthermore, why do courts allow the private developer the same valuation process, as used by government, in these activities? In my opinion there is no justification for this privilege. How can justice be served, when private individuals are forced to sell their property for any economic renewal, when the value of their property will be increased three, four, or tenfold by these private activities. Furthermore the individual forced to sell their land will not benefit from these activities, only the private developer will prosper. I do not see any justice in a system that allows this unabated greed to prevail and prosper.

Now, to these objections to the use of 'Eminent Domain' and 'urban renewal', I will add my concerns and objections to the use of 'Eminent Domain' in the condemnation of a functional business. First of all, one must recognize the relevancy of business to the needs of a community. If a community is to survive and prosper, a healthy and vigorous business atmosphere

must exist. This consideration is evident in the overall prosperity of the community.

At the present time, when it becomes necessary for a government to condemn a business, the valuation process takes into account the land, any buildings on the land, and any financial hardships which will befall the owner of the land due to its condemnation. Everything else is ignored in the valuation process.

But this valuation ignores the contribution the business makes to the community at large. This contribution is jobs, income to the community, and taxes paid to the community. All of these facts are relevant and important considerations, and should be included into the valuation process; as businesses are necessary to the continued survival and well-being of the community. Just look at the disastrous effects that 'Urban Renewal' had on the City of ST. Louis when 'Eminent Domain' was carelessly and improperly used. Businesses left this enterprise zone, en mass, never to return, as business perceived this economic atmosphere to be anti-business.

I firmly believe that government has a right and a responsibility to its citizens to strive to improve the quality of life in the community. Successful businesses and prosperous private citizens attest to the success of government has made in this endeavor. Business serves the needs of the people, just as government does, and provides the community with goods and services which are important and essential to the survival of the community. Government on the other hand provides for public safety and public needs and establishes the laws and rules that everyone in the community must abide by. So both of these important functions should work hand in hand, at arm's length, to provide for and protect the community.

This is not to say that government should grant 'carte blanche' privilege to business, but government should consider the greater good to the community by considering the contribution made by business, and its legitimate demands for 'just compensation' in condemnation suits. Reason and public responsibility demand this consideration.

I hope that in the future, government in the exercise of the power inherent with 'Eminent Domain' will consider profitability and hardship in the course of valuing businesses. Both of these considerations are reasonable and should be considered. The only problem inherent with these assessments, is in the public's perception of 'fair market value'. One can easily understand this dilemma. However, with education and a public explanation of the services provided to the community by a functional business, both of these considerations can and should be justified.

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