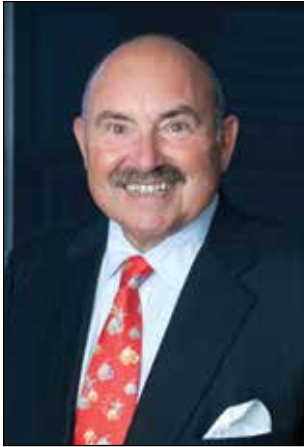


The Burden Of Proof In A Condemnation Case



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It's not an ordinary civil case, so the burden of proof is different.

IN A CIVIL CASE, the party with the burden of proof must prove the case by a fair preponderance of the evidence. But, an eminent domain case is not your ordinary civil case. Indeed, as has been repeatedly held in New York and other states, a condemnation action is not private litigation.

We often hear condemnor's attorneys state to the trial court that, "the claimant has the burden of proof to prove that our valuation is incorrect." That is simply not true. It would be fundamentally wrong to hold that a former owner, who involuntarily had its property taken, must disprove the valuation put on his property by a condemnor's appraiser.

There is one New York case that is frequently cited as authority for this statement: *Heyert v. Orange and Rockland Utilities, Inc.*, 218 N.E.2d 263 (N.Y. 1966). But this case was not about just compensation, rather the case involved an inverse condemnation claim pertaining to a subsurface gas main, where a claimant would have the burden of proof. A similar obligation of proof would be a case involving a reasonable probability of rezoning, or that the property should be valued as a specialty. As courts have firmly and repeatedly held, condemnation is not a private litigation. It is the court that has the primary burden in a

trial. That burden is to assure that the award of the constitutional requirement of just compensation is attained. As United States Supreme Court Justice Felix Frankfurter wrote, “[s]ince land and buildings are assumed to have some transferable value, when a claimant for just compensation for their taking proves that he was their owner, that proof is ipso facto proof that he is entitled to some compensation.” *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949). To hold that the claimant is responsible for the burden of proof for the value of the property taken is contrary to the well-established law that the court has the burden of proof. In the usual litigation, if the plaintiff fails in his burden of proof he is nonsuited and gets no recovery. That cannot happen in a condemnation proceeding. The worst that happens is that he or she receives the amount proven by the condemnor. Thus, there is no burden of proof, although there may be a burden going forward with the evidence.

One must bear in mind that the burden of proof is not evidence nor does it take the place of evidence. Once it is met, it disappears. For that reason, on the sole issue of value, as a practical matter in condemnation proceedings, who has the burden of proof is not quite so important, for it is difficult to conceive of a condemnation trial where both sides have not submitted appraisals. Assuming the appraisals are done with a reasonable amount of competence, had a burden of proof existed, it would have been met and disappeared.

CONDEMNATION IS NOT A PRIVATE LITIGATION • It is axiomatic that if the lower court finds both parties’ appraisal reports to be defective, a new trial should be ordered. Since condemnation is not a private litigation, but rather the enforcement of a constitutional mandate that just compensation is to be paid, an award must be premised on valid appraisals. See *Yaphank Dev. Co. v. County of Suffolk*, 609 N.Y.S.2d 346, 348 (N.Y. App. Div. 1994) (“a condemnation proceeding is not a private

litigation. There is a constitutional mandate upon the court to give just and fair compensation for any property taken.”). The term “just compensation” is intended to ensure that the owner receives “the full and perfect equivalent of the property taken” and “[i]t rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.” *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 304 (1923); *City of Buffalo v. J.W. Clement Co., Inc.*, 269 N.E.2d 895, 905 (1971). Thus, as set forth by New York’s Appellate Division, Second Department:

“[I]f the appraisals of both parties were defective, there should be a new trial to determine the proper theory of valuation. A condemnation proceeding is not a private litigation. There is a constitutional mandate upon the court to give just and fair compensation for any property taken. This means ‘just’ to the claimant and ‘just’ to the people who are required to pay for it. The rule is abundantly clear that property must be appraised at its highest and best use and paid for accordingly. Where we find it is not...we must remit for retrial upon the proper theory... Accordingly, we remit this case for the taking of testimony and a new determination of an appropriate theory of valuation upon which the court may derive a value of the parcel...”

Yaphank Dev. Company, supra, 609 N.Y.S.2d at 348.

As the determination of just compensation is a constitutional mandate, the lower court must apply the proper theory of valuation even if counsel refuses to apply the proper methodology itself. This does not mean that the court cannot, as it often does, rely on one party’s evidence exclusively. If a court finds that a party’s appraisal is erroneous as a matter of law, or does not conform to the highest and best use, it can completely disregard that appraisal.

A SURVEY OF THE STATES • The burden of proof varies from state to state. Mind you, I am only focusing on damages, not whether a taking is a public purpose or if there are offsetting special benefits, etc. We can divide the states into three groups, those that have no burden of proof on the issue of damages; those that place the burden on the claimant; and those that require the condemnor to prove its assay of damages.

Some of the states that have been reviewed, and are listed below, have no burden of proof on either party to establish fair market value. The clearest guidance on the issue is found in section 18-1A-153 of the Code of Alabama which provides, “No party has the burden of proof on the issue of the amount of compensation.” This is also the rule in Alaska, Iowa, Kansas, Maryland, Michigan, New Jersey,

Oregon, Pennsylvania, Virginia, and Washington. The next group places the burden of proof on the owner. These states include Arkansas¹, Arizona, Louisiana, Missouri, Nebraska, Nevada, North Carolina, South Carolina, South Dakota, Tennessee, Utah, and Wisconsin. The states which place the burden of proof on the condemnor to prove that compensation is just are: Florida, Hawaii, and Mississippi.²

¹ One Arkansas case provides, in condemnation action, “the burden of proof on issue of just compensation is upon landowner.” *Prop. Owners Imp. Dist. No 247 v Williford*, 843 S.W.2d 862, 867 (Ark. Ct. App. 1992)

² The burden of proof in an eminent domain case is unique because the government is depriving the citizen of his or her property. *Sarphie v Mississippi State Highway Comm’n*, 275 So.2d 381, 383 (Miss. 1973). Therefore, the state has the “non-delegable” burden to establish a prima facie case of the value of the property taken. *Id.*

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