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Design-Build Highway Projects and How They Change the Landscape for Landowners in the Eminent Domain Process

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Design-Build Highway Projects and How They Change the Landscape for Landowners in the Eminent Domain Process

BY MICHAEL SHANNON

Many lenders are affected by road expansion projects in Arkansas. Whether it be for their own branch or main location or for a commercial borrower like a hotel or shopping center, the use of eminent domain to acquire only a portion of property can substantially alter the ultimate value of the remainder of that property.

• THE AUTHOR •



Michael Shannon

Managing Member,
Quattlebaum, Grooms
& Tull PLLC, an ACB
Associate Member.

It Loss of access, reduced parking, increased proximity to public roadways and many other issues can transform an ideal site for your borrower into one that is minimally usable, if at all. Because the borrower's site is often the major piece of collateral supporting the loan, it is important to understand the right-of-way acquisition process for public projects.

In a partial takings case (i.e., where only a portion of an owner's property is taken in eminent domain), "just compensation" is the difference between the fair market value of the whole property immediately before the taking and the fair market value of the remaining property immediately after the taking. This formula is intended to account for both (1) the value of the land and improvements actually taken and (2) the

diminution in value of the remaining property after the project. In my experience handling hundreds of eminent domain matters, the real battle is the argument over "damage to the remainder" rather than the per square foot value of the land actually taken.

One of the best ways to minimize the possible damage to the remainder of an owner's property from a taking is to negotiate with the condemning authority before construction starts. Not all condemning authorities welcome such efforts, and even when they do, solutions are not guaranteed. It never hurts, however, to inform the transportation agency about the aspects of the project that will change the value of the property. Many litigation battles over the "damage to the remainder" have been avoided by meeting with the condemning authority and explaining how the proposed project changes the property's ultimate desirability.

In recent years, several government representatives have lamented to me the cost of acquiring right-of-way for projects is beginning to

outpace the cost of construction and is preventing projects from occurring at all. In this landscape, the incentive to reduce the cost to acquire right-of-way can be a strong motivator for the government to listen to concerns of the landowners ahead of actual construction. For example, sometimes small design changes to access points can mean millions of dollars of savings in acquisition costs. Without access, the site of a future shopping center can become merely a place to cut hay.

With decreasing public dollars available for transportation agencies, many are pursuing alternatives to traditional funding methods and new means of project development and right-of-way acquisition. One of those methods is the use of a "Design-Build" project delivery method. This method is likely to dampen the willingness and ability of government entities to agree to changes in design that can alleviate valuation concerns. Arkansas has recently allowed this method by statute.

Traditionally, highway projects have been done using a method called "Design-Bid-Build" where the governing authority designs the project, then solicits bids from construction companies, one of which ultimately builds the project. In the "Design-Build" method, the design and construction phases are combined into a single contract between the transportation agency and the private construction/design company. While the governing body produces a "preliminary" design, the actual and final design is done by a private contractor. Among the touted benefits of this approach are a reduced schedule, project cost savings, reduced litigation with the construction contractor and a transfer of risks and costs for design errors to the private company. However, the government entity loses control of many aspects of the project.

While Design-Build facilitates shifting of traditional design responsibilities to the private contractor, acquisition of the property necessary for the new right-of-way remains the responsibility of the government agency. Traditionally, right-of-way acquisition decisions and negotiations under the "Design-Bid-Build" process have occurred up to the point that the agency physically needed the property to

begin construction. Changes to the design could be made during that time to adjust the amount of property actually needed or the location of access points, for example. However, under the "Design-Build" model, right-of-way acquisition will generally occur prior to and during the selection of the private design-builder, meaning property will be acquired before the final design is determined thus lessening the time in which property owners can negotiate changes to the acquisitions. Only a "preliminary design" will exist when acquisitions occur. While the general corridor will be identified, the design details will not be in place at the time of the acquisition. Once property has been acquired, there is no process in place to "give back" any that ultimately proved unnecessary in the final design.

Acquisition prior to final design may also produce uncertainty in the litigation process. As noted above, the measure of just compensation is made using the value of the property after the project is complete and permanently in place. If there is a delay between the acquisition and the final design, the landowner may not know how the project will ultimately impact his property until much later than usual. The options are to (1) proceed to a jury trial over just compensation without knowing the final design or (2) to delay any trials (assuming the trial court is willing) until such plans are in place. Changes in plans could increase or decrease the just compensation needed to make the landowner whole.

In short, while the advent of the Design-Build model does not completely destroy the ability of the landowner to negotiate regarding the scope of the project and property to be taken, it will certainly make such efforts more difficult and it will complicate some aspects of the litigation process to determine just compensation.

The first true Design-Build project in Arkansas will be the "30 Crossing" project spanning the Arkansas River between Little Rock and North Little Rock. A number of commercial properties will be impacted by

the project on both sides of the river. If you or any of your clients have any questions regarding how that project or any other project will affect your/their property, please do not hesitate to call me or one of my law partners at Quattlebaum, Grooms & Tull PLLC.

¹ Arkansas Model Jury Instruction § 2002.

² Ark. Code Ann. § 27-65-107(c) gave the ArDOT "the authority to enter into contracts that combine the design, construction and construction engineering phases of a project into a single contract that shall be referred to as a design-build project contract."

³ Arkansas Model Jury Instruction § 2002.



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