G|K

REAL ESTATE

VOLUME 3 | AUGUST 2014

MEDIATING THE CONDEMNATION CASE

Condemnation cases, like other types of litigation, almost always settle rather than go to trial. Mediation is used frequently as the vehicle for settlement discussions. So, what is mediation, why is it useful and how does it work?

What is Mediation?

After a condemnation lawsuit is filed, there are generally only two ways for it to be resolved: by trial or by settlement. Because condemnation trials are costly and unpredictable, it is becoming increasingly common for parties to mediate condemnation cases. In fact, for years Arizona judges have required litigants to attempt mediation before scheduling a trial date. This informal practice was recently codified by changes to the Arizona Rule of Civil Procedure, which now require the parties, shortly after a civil case has been filed, to discuss the possibility of alternative dispute resolution and report back to the court with a deadline by which they will engage in some formal settlement process. There's good reason for this rule since nearly all cases settle before trial, and a trained mediator can often help the parties settle even the most difficult lawsuit. This is no less true in eminent domain cases, where the complexity of the issues and the costs of litigation can make mediation a much preferred method for dispute resolution.

So what is mediation? In contrast to arbitration, in which one or more arbitrators act as decision makers in lieu of a judge or jury, mediation is consensual. The parties typically must agree to mediate, agree to a mediator and agree to a compromise. The role of the mediator, who almost always is a lawyer, is to facilitate a mutually agreeable settlement, not to decide who wins or loses. At the end of mediation, the outcome may be a deal neither party may like, but one they are willing to live with.

Why Mediate?

In modern litigation, the parties may not have a choice but to engage in some form of dispute resolution. Even setting aside the court requirement, mediating a condemnation case is worth the time and expense. The benefits of mediation, in general, fall into two categories. First, a successful mediation allows the parties to manage their risk, influence the outcome and control the costs of litigation. Second, if mediation is not successful, selection of a qualified mediator can give the parties and their attorneys an assessment of their legal and factual positions and the range of a likely verdict. Let's look at each of these benefits in more detail.

Risk Management

Condemnation trials, as with any litigation, are not very predictable. A jury will be exposed to complex issues such as date of value, highest and best use, fair market value, severance damages and cost to cure, and can be faced with even more arcane issues such as leasehold value, project influence or discounted cash flow value. Trials are getting shorter as court dockets expand, so there often is limited time to fully educate the jury on any of these areas. Jurors will bring their own biases into the courtroom to resolve issues that may be unfamiliar to them and will be forced to assess the credibility of experts, each of whom most often will have valid credentials. And let's face it, while

FOR FURTHER INFORMATION, PLEASE CONTACT:

Jennifer Cranston (602) 530-8191 jennifer.cranston@gknet.com
Jeff Gross (602) 530-8390 jeff.gross@gknet.com

Gallagher&Kennedy
2575 East Camelback Road | Phoenix, Arizona 85016-9225
Phone (602) 530-8000 | Fax (602) 530-8500

condemnation attorneys may think their area of the law is fascinating, most jurors are not enthralled by a battle of experts over property values. Although juries most often try to do the right thing, these factors create risk and uncertainty. Mediation allows the parties to avoid these risks.

Outcome Influence

In addition to having a say in the amount of money received as just compensation, mediation allows the parties to control the timing of payment. It can take years to get a fully litigated result, but a relatively short time to fully resolve a case through mediation. In addition, there may be other terms that can be creatively negotiated in mediation. For example, there may be times when an apportionment between compensation for the portion of land acquired and severance damages may have tax or business advantages. A landowner may also be able to negotiate terms for use of easements, provision of access, timing of payment and other non-monetary terms that would not be available if a case was decided at trial.

Cost Control

Litigation is a lengthy and expensive process. Condemnation cases involve attorneys and one or more experts, such as appraisers, engineers, realtors or economists, all of whom must be paid. In Arizona, such costs are typically not recoverable no matter how well the landowner does at trial. Mediation can result in a quicker, less costly resolution for both sides than trial.

Case Assessment

An ideal mediator in a condemnation case will not just be skilled at the process of bringing the parties to a resolution, but will have the background necessary to assess each side's case and provide valuable feedback in the event the mediation is unsuccessful. Many condemnation lawyers like to use other condemnation lawyers with mediation experience or retired judges who have presided over mediation trials. These knowledgeable mediators can evaluate the strengths and weaknesses of the parties' positions and even offer opinions about how judges will rule on issues or the likelihood of success in front of the jury. This ability serves not only to "beat the parties up" to bring them closer to settlement, but offers real insights that can strengthen a case before trial if the parties cannot settle.

What is the Mediation Process?

At some point, usually after exchange of appraisals and other expert reports, and perhaps after depositions of important witnesses, a case is ready for formal settlement discussions. The next step is choosing the type of mediation. In most Arizona courts, the parties have the option to participate in a free court-sponsored settlement conference, at which the mediator is randomly selected by the court from a pool of lawyers of all types. Alternatively, the parties may engage a private mediator. Unlike court-sponsored mediation, private mediators charge an hourly rate. Many knowledgeable litigants and lawyers would rather use a private mediator, despite the expense, because hiring someone with condemnation experience generally is more effective than going with the luck of the draw. Plus, a mediator with condemnation experience is more likely to offer valuable information that can be used in preparing for trial if the mediation is unsuccessful.

Once the parties select a mediator, the mediation is scheduled, usually at the mediator's office or another

FOR FURTHER INFORMATION, PLEASE CONTACT:

Jennifer Cranston (602) 530-8191 jennifer.cranston@gknet.com
Jeff Gross (602) 530-8390 jeff.gross@gknet.com

Gallagher&Kennedy
2575 East Camelback Road | Phoenix, Arizona 85016-9225
Phone (602) 530-8000 | Fax (602) 530-8500

mutually agreeable location. In preparation for the mediation, the mediator typically requests each party to submit its appraisal and other expert reports and a confidential mediation memorandum describing the party's position, key contested issues, the history of settlement offers, and other information that would assist him or her to understand the case and issues to be resolved.

On the day of the mediation, the parties arrive at the scheduled location and are typically shown into separate rooms. Most mediators have dispensed with the traditional approach of assembling the parties in a single room to present their side in a mini opening statement/closing argument format. While a group presentation can educate the other side, by the time mediation occurs the parties should have a good idea of their opponent's case. And an adversarial beginning may polarize the parties, which is not a fertile ground for compromise. Instead, most mediators start the day by either meeting with all the parties in a large group or separately to introduce himself or herself and describe the process.

After the introductions, the parties then return to or remain in their separate rooms for private caucuses with the mediator, who will shuttle back and forth to talk to the parties about their cases and carry settlement offers. Discussions in the private caucuses are confidential and the mediator will not disclose information discussed unless authorized to do so. In addition, statements made in mediation generally are inadmissible at trial and confidential under Arizona law. This gives the mediator and the parties an opportunity to have frank discussions about the strengths and weaknesses of each party's case, the risks of trial, the potential outcomes and settlement strategy.

What is true in life is true for most mediations – the work expands to fill the time available for its completion. Participants should not be discouraged by the slow pace of the mediation process. Initial caucus sessions may be used to "feel out" each side as to their goals rather than discuss dollars. More often than not, actual settlement offers aren't conveyed until later. Mediations scheduled to last all day tend to settle late in the day, or even after business hours. If settlement is reached, the mediator generally will write up the basic deal points to be signed by the parties, and then the attorneys will prepare a more comprehensive settlement agreement or court order later. If no settlement is reached at the mediation, the parties are free to continue to negotiate, with or without the services of the mediator.

One of the most important principles to remember in a mediation is the goal of the process – to facilitate a *mutually agreeable* settlement. This means that the mediator cannot force either party to agree to a particular settlement offer. Either party can end the mediation if the process is not helpful. However, even if the parties ultimately are unable to reach a settlement, the mediation should provide other benefits to the parties such as learning more about the strengths and weaknesses of their own case as well as the key issues driving their opponent.

FOR FURTHER INFORMATION, PLEASE CONTACT:

Jennifer Cranston (602) 530-8191 jennifer.cranston@gknet.com
Jeff Gross (602) 530-8390 jeff.gross@gknet.com

Gallagher&Kennedy
2575 East Camelback Road | Phoenix, Arizona 85016-9225
Phone (602) 530-8000 | Fax (602) 530-8500