

CONDEMNATION OF EASEMENTS
20TH Annual ALI-ABA Course of Study
Eminent Domain and Land Valuation Litigation
Coral Gables, Florida
January 9-11, 2003

INTRODUCTION

The condemnation of easements by public agencies and privately owned public utilities presents a series of special legal and appraisal problems for the property owners and their counsel. It is important to understand the nature of easements and the differences between the acquiring agencies (the condemners) in the easement area. This paper will explore some of the problems and possible solutions when easements are condemned and created for the benefit of the condemner and also when pre-existing, privately held easements are condemned or interfered with by the condemning authority. Issues unique to easements plus valuation and apportionment will be considered as well as strategic and trial issues that are impacted in this process. This discussion will cover some of the various phases involved in the taking of an easement from the point of view of the landowner's attorney.

The numerous types of easements that become involved in the condemnation process are extraordinary. Some include: aqueduct easements; avigation (air space) easements; beach front easements; building height/view easements and negative covenants; cable television easements; canal easements; clearance easements; conservation easements; flowage easements; light and air easements; mass transit/street railway easements; overflow rights easements; pipeline easements; power transmission line easement; private street easements; scenic easements; slope easements; temporary easements; and all manner of utility easements.

Some of the leading cases that illustrate these easements include: Speir v. United States, 202 Ct. Cl. 1020, 485 F.2d 643 (1973) (temporary avigation easement); East Haven v. Eastern Airlines, Inc., (CA.2) 470 F.2d 148 (1972); Illinois C.R. Co. v. Tennessee Valley Authority, (CA.6 Ky.) 445 F.2d 308 (1971) (easement to transport coal to generating plant); Honolulu v. Plews, (Hawaii) 516 P.2d 1259 (1973) (sewer easement in land already dedicated as roadway); Dolezal v. Cedar Rapids, (Iowa) 209 N.W.2d 84 (1973) (obstruction easement); Spears v. Kansas City Power and Light Co., 203 Kan. 520, 455 P.2d 496 (1969) (underground electric transmission lines); Minneapolis Gas Co. v. Dahle, 285 Minn. 166, 171 N.W.2d 813 (1969) (underground gas storage); Board of Levee Comrs. v. Wineman, (Miss.) 222 So.2d 683 (1969) (levy); and Leshner v. American Tel. & Tel. Co., 1 Pa. Cmwlt. 522, 276 A.2d 325 (1971) (coaxial cable). More recent cases demonstrate some of the complexity of these cases: Exxon Pipeline Co. v. Zwahr, 45 Tex. Sup. Ct. 691 (2002) (pipeline easement/separate economic unit valuation precluded by project enhancement); Cordones v. Brevard County, 781 So.2d 519, Fla. App. 5th DST. (2001) (temporary anti-erosion easements for 50 years re: beach front property).

DEFINITIONS

The definition of easements and the understanding of how they work and whom they benefit is critical in the condemnation context. Nichols on Eminent Domain, §5.07(2)(a), defines easements for condemnation purposes in a clear and succinct manner:

“An easement is a non-possessory acquired interest in land of another. The purpose of an easement is to permit an individual, individuals, the public or other specified parties the right to use the land of another for a specific purpose, such as the laying of pipelines or cable under or over another’s land.

Easements are interests in land and not contractual rights to land. An easement is to be distinguished from a lease, the latter of which is an exclusive right to possess another’s property for a fixed duration of time. Easements should also be distinguished from licenses, which are not interests in land. Generally, easements are also expressed in writing, while licenses are generally oral.

Land subjected to the burden of an easement is the servient tenement or estate, while land that benefits from an easement is labeled the dominant tenement or estate. In the latter case, the easement is then referred to as appurtenant to the dominant estate.

Easements are created expressly, implied, established by prescriptive use, or acquired by custom, public trust, estoppel or condemnation.

A private easement in real estate is property in the constitutional sense; it may be taken for valid public uses through the exercise of the power of eminent domain. When one parcel of land is subject to an easement in favor of another and the servient tenement is taken for or devoted to a public use that destroys or impairs enjoyment of the easement, the owner of the dominant tenement is entitled to compensation. Here it makes no difference whether the servient tenement is taken by eminent domain and the owner of the easement is awarded a share of the compensation as one of the owners of the land. Nor does it make a difference that a corporation having the power of eminent domain and owning or controlling the servient tenement makes a use of his property destructive of the easement and the owner of the easement is the only person damaged. An easement is an interest in land, and it is taken in the constitutional sense when the land over which it is exercised is taken. But if it is only destroyed and ended, a destruction for public purposes may also be a taking as would be an appropriation for the same purpose.

To entitle the holder to compensation, the easement must be an enforceable one and not a mere privilege enjoyed at the will of the owner of the servient tenement. In this case, there is no easement, only a license to use the property, and the license confers no interest that requires compensation.

When the servient tenement is the subject of a condemnation proceeding that is judicial in character, the owner of the dominant tenement is a necessary party. Where the taking of the servient tenement is for a purpose that will not interfere with the exercise of the easement, the owner of the dominant tenement need not be joined.” (Footnotes omitted).

This short definition and discussion is useful for this course of study. However, if one wants encyclopedic information on easements, consideration should be given to the Law of Easements and Licenses in Land, (Revised Edition, Warren, Gorham and Lamont) by John Bruce and James W. Ely, Jr., an entire treatise on the subject covering the nature and classification of easements plus the creation of easements by express provision, by implication, by prescription, by estoppel, custom, public trust or condemnation. It also discusses the utilization and maintenance of easements, transferability of easements, termination of easements, licenses on land and evolving and prospective issues. These distinctions may be very important to an attorney representing a property owner where, for example, the holder of the easement substantially increases the use of the easement over the servient tenement (e.g., the holder of electric transmission easement installs fiber optic cable and additional transmission lines not contemplated in the scope of the original easement) or where the easement is really a license and not compensable.

Easements also need to be classified within the definition section of this discussion to see how they impact the property and the valuation process in condemnation. Msrs. Bruce and Ely provide excellent guidance in defining “easements appurtenant” and “easements in gross” in §2.01 of their treatise.

“The most important classification of easements differentiates between easements appurtenant and easements in gross. Profits may also be appurtenant or in gross. In order to be deemed appurtenant, an easement must be created to benefit the owner of a dominant estate and must in fact help the owner with respect to physical use of the land. An easement appurtenant requires both a servient and a dominant tenement. One owner’s land must be burdened in favor of the estate of another.

* * *

An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate. Hence, an easement in gross may be described as an irrevocable personal interest in the land of another.

Courts sometimes characterize an easement in gross as a “mere personal right” or “mere personal interest”. This could obfuscate the nature of an easement in gross. The term “personal” may be employed simply to heighten the contrast between rights in gross and rights appurtenant to a dominant estate. On the other hand, to the extent that the term “personal” suggests that an easement in gross ceases on the death of the grantee, it is potentially misleading. Today, many easements in gross are held by corporations or are deemed transferable. It is more accurate to view an easement in gross as personal “in the sense that it was not an incident of ... possession of a dominant tenement.”

Although easements in gross are recognized throughout the United States, they evolved in a climate of judicial distrust. Anxious to avoid undue or novel burdens on land, English law has long required that easements without a profit be linked with two parcels of land. “An easement cannot exist in gross,” two English commentators declared, “but only as appurtenant to a defined area of land.” A consequence of this heritage is that courts in the United States traditionally have viewed easements in gross as unassignable and noninheritable. These rules have been eased in many jurisdictions, but it remains necessary to classify easements as either appurtenant or in gross for the purposes of assessing transferability and determining the rights of successors in interest.” (Footnotes omitted). Law of Easements and Licenses, Classification of Easements, §2.01(1)-2.01(2).

Finally, the definition of easement ought to be broad enough to include restrictive covenants that run with the land. Often, restrictive covenants or negative easements become involved in the condemnation process. See, Washington Suburban Sanitary Comm’n v. Frankel, 57 Md. App. 419, 470 A.2d 813 (1984) (vacated on other grounds). This was a case of first impression in Maryland, which recognized that restrictive covenants or negative easements are property rights which, if taken, result in compensation to the holder. Here, WSSC had condemned 151 acres of a 385-acre industrial park for a dump for sewer sludge without joining the dominant estates. The court permitted adjacent owners in the industrial park (and the adjoining property owners outside the park itself) to enforce the prohibition about using the land as a dump against WSSC, in a separate action. If WSSC wanted to remove these negative easements, it would need to file a second condemnation suit to acquire them naming all of the dominant tenements. This case, which is a scholarly opinion well worth reading, discusses the majority rule, minority rule and the law generally and then observes, at page 433:

“It is no doubt true that at one time property was conceived of as tangible. But in the latter part of the 19th century, the Hohfeldian notion of property as a bundle of rights, some tangible and some intangible, began to gain currency. Kanner, 1976 Institute of Planning, Zoning and Eminent Domain at 239-41. The constitutional concept of property for eminent domain purposes now addresses itself to every sort of interest the citizen may possess. United States v. General Motors Corp., supra, 323 U.S. at 378, 65 S. Ct. at 359; Bureau of Mines v. Georges Creek Coal and Land Co., 272 Md. 143, 321 A.2d 748 (1974). This concept has long been recognized in Maryland. The term property “extends to easements and other incorporeal hereditaments which, though without tangible or physical existence, may become the subject of private ownership.” Delauder v. Baltimore Co., 94 Md. 1, 6, 50 Atl. 427 (1901).

CONDEMNATION TO CREATE PUBLIC EASEMENTS

There are some differences involved in the condemnation of easements which distinguish them from other eminent domain cases. Consider the measure of just compensation for acquiring a public easement or the special defenses which can be effectively raised in easement cases that make the acquisition process more difficult for the condemnor. A lawyer representing a property owner should understand these differences in order to represent the client effectively.

Also, one should consider the economic limitations here before getting into one of these cases. Ordinarily, the condemning authority acquires the easement rights from the owner's fee simple interest and the owner retains the remaining rights in the property. If the owner's residual rights retain substantial value, then the just compensation for the easement will be very modest, often being only the difference. Usually, condemnation for public easements does not produce substantial verdicts in eminent domain cases unless large areas of land are involved or severance damages can be documented and proved. Consider the gas transmission cases where the owner retains the right to use the easement area for farming operations or cattle grazing.

The type or classification of the condemnor also raises potential defenses. In many states if the state or a public agency initiates condemnation, there is a conclusive presumption of necessity when a duly passed resolution by the governing body declares that the public improvements are necessary to the public good. However, privately owned public utilities with power to condemn are not granted this presumption and must establish necessity as well as public use unless the issues are conceded by the property owner. This makes the defense of lack of public necessity one that should be considered. The absence of a presumption also arises in connection with compatibility issues. Most states conclusively presume compatibility for condemnation by public bodies. However, where lands outside their territory, or where easements are condemned by privately owned utilities, compatibility must be proven as an element of the case. Consider this --- can the private condemnor lay coaxial cable across your client's property for the financial benefit of his corporation? What issues are raised? If the cable utility/improvement must be located in a manner which is the most compatible with the greatest good and least private injury, has this been done? This can be a hotly debated issue and one which counsel for the owner should carefully consider in defending the property owner who wishes to avoid condemnation or get top dollar for interference with his land.

Since condemning authorities in easement cases often must prove the right to condemn, these trials have a dual character. First, the legal issues concerning public use, necessity and compatibility must be resolved and then, the trial turns to the issue of just compensation. In addition, in cases where the easement is carved out of the fee by the condemning authority, interesting valuation questions occur. Typically, the measure of damages is the difference between the market value of the land free of the easement, and the market value as burdened with the easement which has been imposed. See, Nichols, §12(d).02[2]. However, if an existing easement (e.g., transmission line) is widened, the measure of damages is the difference between the before value of the property (as burdened by the existing easement) and the after value (as burdened by the additional easement that has been imposed). See Louisville Gas and Electric Co. v. Scott, 563 S.W.2d 746 (Ky. Ct. App. 1978). Often, particularly in the state courts, the owner is entitled to the value of the easement taken plus any severance damages, sometimes called the State Rule. However, in the event there are severance damages, the condemning authority is entitled to prove special benefits (benefits which tend to increase the value of the remaining property as a result of the construction of the planned improvement) as an off-set against severance damages. This is sometimes contrasted with what some commentators call the Federal Rule which uses the before and after approach --- whereby the value of the whole property is appraised before the imposition of an easement and then valued again after the easement is imposed. The difference between those two values is estimated as just compensation.

The valuation of easements can be a very complex issue. Nichols on Eminent Domain, in Chapter 32, discusses in some detail the different valuation tests that may be applied depending upon the type of easement, the term of the easement and the extent of its interference with the property owner. Sometimes, the before and after approach does not adequately demonstrate the value of the easement taken and often, appraisers do not have reliable market data upon which to appraise the easement. This is particularly true when valuing temporary easements. In these cases, appraisers frequently state the value of the permanent or temporary easement as a percentage of the fee simple value. For example, a temporary construction easement might be worth 10% of the value of the fee simple interest or a permanent slope easement might be 25% of the value. Some call this the deductive percentage method. Others might call it speculation. See, e.g., Baird, Easement Condemnation and State v. Doyle: Fair Market Value Without a Market, 6 Alaska L. Rev. 199, 212 (1989). The before and after rule and the deductive percentage approach are often hard to apply in valuing temporary easements since these methods normally measure permanent reductions in fair market value. Hence, appraisers sometimes utilize a rental approach as if the easement area were being rented for the duration of the temporary easement. Nichols discusses a series of these approaches to valuation of temporary easements in §32.08 and the attorney for the property owner is admonished to review this carefully. Some include: fair and reasonable rental value of the land subject to the easement (probably most popular); loss of use; diminution in rental value of the property adjacent to the temporary easement; diminution of the rental of the property as a whole; diminution of the fair market value of the property during the period of the taking; and fair rate of return. In the final analysis however, all of the authorities and the law support the proposition that the property owner should receive just compensation for the taking and consequent damage to the property. Notions of equity, coupled with the appraisal guidelines in USPAP also have a role in this process. In valuing easements which are not readily bought and sold in the market place, appraisers are not always limited to the market approach. Standard Rule 1-1 of USPAP requires that an appraiser be aware of, understand and correctly employ those recognized methods and techniques necessary to produce a credible appraisal. The complexity of this issue was touched upon in the recent case of Cordones v. Brevard County, op. cit. supra at page 523 (where temporary anti-erosion beach easements were taken) when the court said in 2001, “no Florida case definitively speaks on the issue of valuation of easements.”

Finally, property owner’s counsel in evaluating condemnation of easements by public agencies should consider: the “reasonable necessity rule”. The condemnor may take only that estate reasonably necessary to accomplish the purpose for which the property is to be taken and an easement, as opposed to a fee, is to be taken unless absolutely necessary. Also, in particular uses or special use cases, such as railroads or school sites, there is a presumption that the condemnor acquire an easement, not a fee, unless a fee is absolutely necessary.

CONDEMNATION OF PRIVATE EASEMENTS

The law in this area was defined by the case of United States v. Welch, 217 U.S. 333, 30 S. Ct. 527 (1910). Here, Mr. Welch, the owner of a farm, held an easement which consisted of a private way that crossed the land of his neighbor and connected to a public road. When the government constructed a dam nearby, resulting in the permanent flooding of the neighbor’s

property, it also extinguished Mr. Welch's easement. The issue before the Supreme Court was whether this amounted to a taking of property or was merely collateral damage which did not amount to a taking. Justice Holmes, in speaking for the Court, stated:

“A private right-of-way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United State as incident to the fee for which it admits that it must pay. But, if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end [citations omitted]. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right-of-way taken in the same manner; and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached.” Id., at 339.

Justice Holmes held that the easement holder is entitled to compensation when his easement is taken through condemnation and the valuation of the easement was determined by reference to the diminution in value of the dominant tenement.

Unlike the situation where the condemning authority is acquiring a public easement, these cases have the potential for substantial damages, particularly where the condemning authority, as in Welch, cuts off the dominant tenements' access to public roads. What is the loss in value to a farm which has lost its access to public roads and is landlocked? The valuation of these interests varies depending upon the circumstances. Where the easement supporting the dominant tenement has been taken, the just compensation is the difference between the value of the dominant estate with the easement and its value without the easement. See Nichols, op cit supra, §12(D).02(1). Nichols go on to articulate additional rules for valuations:

“If both the easement and the dominant estate are taken, the easement owner will be entitled to the full award based on the value of the estate including the easement. If it is only an easement or right-of-way established by grant or use and appurtenant to the land condemned, that is taken into consideration in fixing the value of the property taken. An easement in gross, not being appurtenant to the other property, has market value all of its own and may be so evaluated.”

In addition, where easements are interfered with, the value of the damages depends upon the amount of interference with the existing easement. However, courts and commentators have stated that the damages must be actual and not remote or speculative in character. This is sometimes difficult to prove.

If one applies these lessons to the myriad of private easements, negative easements and restrictive covenants, the damage potential is significant. Consider the impairment or loss of: easements for light and air; waterfront view easements (permitting hotels to charge “view rates” for rooms); access easements to public roads; air right easements; and scenic easements.

Clarity of thought is very important in this area and reasonable minds sought to codify the rules in eminent domain generally and easements as well. The Uniform Eminent Domain

Code, drafted by the National Conference of Commissioners on Uniform State Laws in 1974, addresses several of these valuation issues. Although it is not the “law” in most states, it presents a well-articulated analysis and solution to many of the issues regarding valuation and condemnation of easements --- issues which many state courts have not really addressed in a consistent or coherent manner. In the case of a partial taking for an easement, the measure of compensation is the greater of: 1) the fair market value of the property taken; or 2) the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking. See §1002(b) of UED Code. Where there is no relevant market to establish “fair market value”, then the Code suggests that the property’s valuation is determined by any method of valuation that is just and equitable. Also, since the taking of an easement involves divided interests, situations arise where the “unit rule” is implicated. The unit rule or “undivided fee rule”, as articulated by the courts, holds that the fair market value of each of the several divided interests cannot exceed the fair market value of the undivided fee. See, e.g., People v. S & E Homebuilders, Inc., 142 Cal. App.2d 105, 298 P.2d 117 (1954), Nichols, op. cit. supra §32.07. However, there are instances where the application of the unit rule does not provide just compensation to the several parties. Consider where the servient tenement is taken in fee simple and the dominant tenement (the adjacent property) loses its only access to public roads. In this case, the amount of compensation for the fee simple interest of the servient estate will not adequately compensate the dominant estate which has lost its access since ordinarily an access road (a non-exclusive easement) will not diminish the value of the servient estate by the amount it benefits the dominant estate. The Uniform Eminent Domain Code, §1012, official comment at 98, as well as several courts, have recognized that, where strict adherence to the unit rule will not provide adequate compensation for all interests taken, it may be unconstitutional to apply it strictly, or the “aggregate interests” rule should be applied instead. See, e.g., Alabama Electric Cooperative, Inc. v. Jones, 574 So.2d 734 (Ala. 1990) (Alabama has adopted the Uniform Eminent Domain Code). Also, in the case of United States v. Gossler, 60 F. Supp. 971 (1945), land was taken which was subject to a right-of-way leading to a gravel pit. The court held that the owner of the dominant tenement was entitled to compensation for his interests separate from the fee held by the owner of the servient estate. The condemnor claimed that the owner of the right-of-way could only share in a single award made for the fee but the court stated:

“The fallacy of the reasoning which lies at the basis of these motions arises from the concept of the title of real property as a thing with physical attributes, whereas title is a conglomerate of jurisdiction and substantive legal rights fused with the residuals of equitable remedies all developed historically out of feudal notions and medieval conditions. By this proceeding, the United States does not acquire a physical thing by taking the fee simple of the Gossler’s, but sets up another title by extinguishment of all interests inconsistent with use by the government. Since the United States is investing itself with an utterly new title, and extinguishing the whole aggregate of rights connected to this piece of ground by condemnation, the Fifth Amendment requires compensation for all property rights so erased.” Id., at 973.

This leads to a discussion of apportionment when there are multiple property owners interests being taken in connection with a condemnation of easement rights. See generally,

Nichols, op. cit. supra §5.07(2)(a), §12.05(4)(g), §12D.02(1)(2); see Orgel, op. cit. supra §113 to 127. If the market value of the land as a whole taken in fee happens to approximate the amount of damages suffered by the owners of the separate interests in that land, then apportionment is not a problem. The condemnation award should be apportioned “in proportion to” the damages suffered by the various claimants who are entitled to share in the proceeds. However, apportionment of the several interests which can be involved in a condemnation proceeding including the claims of secured parties/mortgagees, lessors/lessees, life tenants and remainderment and easement holders can get complex. Orgel observes that holders of security interests have a priority insofar as the condemnation award is concerned, and they are typically paid the face value of their debts per the case law. The courts usually assume that the sum of the values of the divided interests is exactly equal to the value of the fee as embodied in the award. Frequently, this is not the case, particularly where the award is based on the value of the fee simple in the condemned real estate rather than by use of the summation of the values of the separate interests --- the aggregate interest rule. Hence, unless the summation approach is utilized, the owners of the easements are not likely to receive just compensation and, in many states, the summation approach is not applied.

TRIAL CONSIDERATIONS & QUESTIONS

As one approaches the trial of an easement condemnation case, it is critical to evaluate the reality of severance damages, since they provide the major economic return in the condemnation of public easements and are also heavily implicated in the condemnation of private easements. An assessment should be made at the outset as to which severance damages are compensable and which are not. In most jurisdictions, neither interference with business nor aesthetic damages are regarded as compensable in determining the existence of severance damages. Likewise, severance damages often do not include damage to the property that results from the construction of improvements on adjoining land, even though a portion of the right-of-way which serves the facility is constructed on the subject property. Several annotations discuss cases in these areas such as: Eminent Domain: compensability of loss of view from owner’s property – state cases, 25 A.L.R. 4th 671 (1983); Eminent Domain: compensability of loss of visibility of owner’s property, 7 A.L.R. 5th 113 (1992); Eminent Domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R. 4th 308 (1988).

Some of the cases in these annotations suggest new avenues for severance damages. What about view damages? Consider a hypothetical case in the Inner Harbor in Baltimore, Maryland. Your client owns a hotel two blocks from the Inner Harbor where the rooms on floors 5 through 12 have a direct view of the waterfront and the Bay. There is a four-story building between the hotel and waterfront, but your client has secured a negative covenant precluding development of that property above the 4th floor. The State of Maryland condemns the servient estate for purposes of building a 15-story flagship office building to house the numerous state agencies in the executive branch. In the process, it extinguishes the negative easement held by your client, but otherwise, it takes no other portions of your client’s property. Since acquiring the negative easement, your client has charged “view rates” for hotel rooms in the front of the hotel with desirable views of the Inner Harbor. These room rates are 10 to 15% higher than the

rates for similar rooms which do not have the view. Using this hypothetical, how would you, as the client's attorney, develop a case for severance damages?

As a trial lawyer, ask these questions:

1. Are these severance damages compensable under Maryland law or the law of your jurisdiction?
2. How will your appraiser value these severance damages --- will he use the standard before and after approach? Can he develop market data which supports the diminution in value once the harbor view has been terminated?
3. Will the State file a motion in limine to exclude this evidence or a motion to strike these damages?
4. Can you and your appraiser document the client's loss of ownership rights and convince a trier of fact that the property will sell for less in the open market in the after condition than it would have sold for in the before condition?
5. How would your answers have been different, if the client had not secured a negative covenant from the servient property owner but only a license?

This evaluation process can be repeated in a variety of different fact scenarios. Consider the condemnation of an electric transmission line, a gas line or other power line with easements running through a residential area. Can fear of the proposed transmission line (fear of cancer, explosion, etc.) diminish the value of the residential properties adjacent to the power line and result in compensable severance damages? The case of Stinson v. Arkla Energy Resources, 823 S.W.2d 770 (1992), (Tex. App. Texarkana) addresses some of these issues and suggests a threshold test. Fear of a proposed pipeline may be admissible when it appears that there is a basis in reason or experience for fear and that fear entered into calculation of persons who deal in buying and selling similar property with the result that market value of the property has depreciated because of the existence of the fear. The property owner must establish a basis in reason or experience for that fear and must show either that actual danger forming a basis for the fear exists or that fear is reasonable, whether or not based on actual experience. In the Stinson case, the property owner failed to meet that test and the court excluded several hundred reports of gas pipeline failures where plaintiffs neglected to introduce evidence of fear in the minds of the buying public.

However, there are a number of similar cases where the test was met by trial lawyers with creativity and perseverance. See, for example, see Fear of power line, gas or oil pipeline, or related structure as element of damages in easement condemnation proceedings, 23 A.L.R. 4th 631, or A disability and effective evidence of electromagnetic fields generated by power lines or public perception thereof, in action to value land or to recover personal injury or property damage, 2002 A.L.R. 5th. Several recent cases in the condemnation context have held that evidence concerning public fear or opposition to power lines due to electromagnetic fields was admissible. See, e.g., San Diego Gas and Electric Co. v. Daley, 205 Cal. App. 3d 1334, 252 Cal.

Rpt. 144 (4th Dist., 1988) (disapproved on other grounds) (held evidence regarding buyer's fear of potential damages associated with overhead power lines was admissible in condemnation of property for use by electric utility to assist jurors in assessing severance damages); Florida Power and Light Co. v. Jennings, 518 So.2d 895 (Fla. 1987) (condemnation of perpetual easement to construct power lines where public fear which impacts the market value of land is admissible); Ryan v. Kansas Power and Line Co., 249 Kan. 1, 815 P.2d 528 (1991) (condemnation concerning easements taken for erection of high voltage electric transmission lines, evidence that fear exists among members of the public is admissible).

These cases reflect the great potential that severance damages can have in the condemnation of easements. There are myriads of other issues which arise in these cases, both procedural and substantive, such as:

In the event the condemning authority condemns in fee simple the servient tenement, and does not name the dominant tenement owner to the suit, should that party intervene, or, should that party file a separate proceeding against the condemning authority in another action? See, e.g., WSSC v. Frankel, op cit. supra.

If the property owner's severance damages are weak or hard to prove, and the special benefits are substantial, should the property owner eliminate this claim prior to trial to protect his award of just compensation for the taking without consideration of severance damages?

Because of the sophistication of these issues and many others, it is extremely important for the lawyers who do eminent domain work to exchange ideas and discuss the appropriate way to handle these matters. ALI-ABA and the Planning Committee, including Toby Prince Bringham, Leslie A. Fields, Gideon Kanner and Joseph T. Waldo, should be commended for planning this program.