

**Evidence: A Look At What You Need
And How To Present It**

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VI. EVIDENCE: A LOOK AT WHAT YOU NEED AND HOW TO PRESENT IT.

A. The Key Elements to Prove your Case.

Unless you attempting to prevent the government taking the property, the only issue that you are going to be presenting to a jury is the value of the part taken and any consequential damages.

1. Value. The sole issue for the determination of the jury is the value of the part taken, and whether there are any consequential damages to the remainder. O.C.G.A. §32-3-14; 22-2-62. In the event that there is no remainder, there are no consequential damages.

There are four (4) ways to determine value of the subject property. Normally value is defined as fair market value. Fair market value is the price a seller who desires, but is not required, to sell and a buyer to desires, but is not required to buy, would agree is a fair price, after due consideration of all the elements reasonably effecting value. Wright v. Marta, 248 Ga. 372 (1981). There are three (3) recognized methods of establishing fair market value of property, the market or comparable sales approach, the income approach and the replacement cost less depreciation approach. There is a fourth method that is recognized, but not typically utilized, which is the unique value to the owner test.¹ Housing Auth. of Atlanta v. S. R. Co., 245 Ga. 299; DOT v. Sharpe, 213 Ga. app. 549.

2. Leasehold.
3. Acts taken in anticipation of condemnation.
4. Business Loss Damages.
5. Consequential Damages.

B. Evidentiary Rules Unique to Condemnation.

1. The burden of proof. The burden of proof in a condemnation case to establish value rest upon the condemnor. Justice v. Ga. Power, 169 Ga. App. 599. This burden never shifts to the condemnee. Reed v. City of Atlanta, 136 Ga. App. 193. This is an important concept given the fact that both sides are entitled to present evidence as to value of the part taken in the value as to damage to the remaining property. In the event that the condemnee decides to put forth evidence of value either as to the part taken or to the consequential damages to the remainder, the

¹ A condemnee is not entitled to present evidence of both fair market value and unique value. Taylor v. Jones Co., 205 Ga. App. 628.

burden of proof never shifts to him, although there is authority out there that says that the burden of going forward rests upon the condemnee. Dawson v. DOT, 203 Ga. App. 158. However, it is error for the court to charge that the burden shifts to the condemnee. Glover v. DOT, 166 Ga. App. 512. This is different in the instance in which the condemnee pursues an inverse condemnation case where the burden of proof is on them since they are the plaintiff. The burden of proof also rests upon the property owner to establish a business loss. The condemnor is not required to recognize a business loss in a condemnation case. O.C.G.A. § 32-3-6(b)(3); Bowers v. Fulton Cty, 221 Ga. 731.

2. Daubert.

Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 established a two-part test for expert testimony. The Court must (1) determine whether the proposed expert's testimony setbacks valid "scientific knowledge" and if so, (2) whether the testimony will assist the trier of fact to understand or determine a fact in issue. Georgia adopted the Daubert standard in February 2005. O.C.G.A. §24-9-67.1.

a. Title 22

Daubert does not apply to a condemnation action filed under Title 22. O.C.G.A. § 22-1-14(b) specifically excludes Daubert from applying to a proceeding brought under Title 22.

b. Title 32.

Daubert appears to continue to apply, to a "quick take" proceeding.

3. Expert's reliance on hearsay.

When a witness is qualified as an expert, it is not necessary that the witness state the facts upon which his opinion is based prior to giving the opinion. O.C.G.A. §24-9-67.

Most expert appraisers base their opinions of value, in large part, upon statements by third parties, which would clearly be hearsay under the rules of evidence. While such hearsay testimony is not admissible as direct proof of value, it is generally admissible to show the basis of the expert's opinion as to value, to enable the jury to evaluate the expert's credibility, and to assist the jury in determining the weight to be given to the testimony. White v. Ga. Power Co., 237 Ga. 341 (3) (1976), overruled on other grounds, DeKalb County v. Trustees, Decatur Lodge No. 1602 B.P.O. Elks, 242 Ga. 707 (1978).; Department of Transp v. Schiffer, 178 Ga. App. 414 (2) 1986); McDaniel, 200 Ga. App. at 675-676.

4. Value witness testimony (use of comparative sales).

As direct evidence of value, the facts of and the amount paid in the sale of comparable tracts of property may be introduced without additional analysis. When such direct evidence of comparable sales is introduced, a proper foundation must be laid through a showing of the similarity of the properties. Whether such a foundation has been laid is left to the broad discretion of the trial judge since exact similarity is not generally attainable. Factors to be considered in determining similarity include the size, location, and physical characteristics of the property that is claimed to be comparable, and whether its sale was freely and voluntarily made at or reasonably near the time of the taking of the subject property. Any dissimilarities in the property or the circumstances of its transfer are generally matters that go to the weight of the evidence after its admissibility has been determined by the trial court. Georgia Power Co. v. Walker, 101 Ga. App. 454 (2) (1960); Fulton County v. Elliott, 109 Ga. App. 775(1) (1964), *rev'd on other grounds*, Elliott v. Fulton County, 220 Ga. 377 (1964).

On the other hand, evidence of comparable sales is often presented, not as direct evidence of value, but as the basis for a witness' opinion of value. When such explanatory use is made of evidence of comparable sales, no foundation need be laid concerning the similarity of the property. The jury may use this evidence in determining the weight to be given to the witness' opinion of value. See Jordan v. Dept. of Transp., 178 Ga. App. 133, (1986); Macon-Bibb Water, 165 Ga. App. 357 (3); Panos v. Dept. of Transp., 162 Ga. App. 55.

A written summary of the comparable sales to which a valuation witness testified is not admissible into evidence. Sackett v. L.L. Miner Co., 244 Ga. 375.

5. Lay witness testimony (basis of opinion).

A non-expert witness may give an opinion as to the highest and best use of property and as to its fair market value, but only if he states the facts upon which his opinion is based prior to giving his opinion. O.C.G.A. §§ 24-9-65, 24-9-66; State Hwy. Dept. v. Raines, 129 Ga. App. 123 (1) (1973). Condemnees may testify concerning their opinions of the value of their property if they have had an opportunity for forming a correct opinion." O.C.G.A. § 24-9-66; The condemnee cannot, however, testify to the value given by an appraiser. DOT v. Sharpe, 213 Ga. App. at 551. When an expert is qualified as an expert, it is not necessary that the witness state the facts upon which his opinion is based prior to giving the opinion. O.C.G.A. § 24-9-67.

6. Prior inconsistent statement (appraisal certificate).

The Condemnee cannot use the appraisal certificate and the affidavit attached to the condemnation petition to impeach the appraiser. The appraisal certificate is an opinion and is not an admission of fact or it is not an admission *in judicio*. DOT v. Mills, 197 Ga. App. 234; DOT v. George, 171 Ga. App. 270. Moreover, the amount of money originally deposited into the court registry is irrelevant. The condemnor is not bound by its original estimate of compensation in a *de novo* proceeding. Morrison v. DOT, 166 Ga. App. 144.

7. Demonstrative evidence.

A written summary of the comparable sales used by a value witness is not admissible into evidence. Housing Auth. of Atlanta v. Goolsby, 136 Ga. App. 156.

C. Using Courtroom Technology to Hold the Jury's Attention.

There are no "right" or "wrong" ways to try a condemnation case. Most trial lawyers have used techniques that they have come to rely upon in each case. "Tools" that you can use to hold the jury's attention are: passion and drama. Use "tools" to tell the jury what to do.

Normally the trial exhibits that you will use in a condemnation case are:

- Plan sheets depicting the take
- Aerial photographs of the subject
- Individual photos of the subject
- Land use maps
- Comparable sales summaries
- Photographs of comparable sales
- Compensation summary

These exhibits are usually blown up on foam boards and used on easels. Increasingly, metro courtrooms are using computers to show these exhibits.

I believe the true art in using any evidence is to resist the "more is better" temptation. You want to tell the jury what to do, but you don't to overwhelm them. You also don't want to look foolish; be sure that you know how to effectively and efficiently use the technology available.