

REAL ESTATE COUNSELING IN LITIGATION— EMINENT DOMAIN

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Growing Role Of The Real Estate Counselor In Litigation And Eminent Domain

The increasing complexities of both law and real estate, including its valuation, have created a growing need for real estate counselors in the litigation arena and particularly in eminent domain or condemnation. This article presents the combined perspectives and observations of two professionals who have worked together in eminent domain. To illustrate their perspectives, a specific case of litigation support involving condemnation is presented.

As professionals, real estate counselors have responded to the increased complexity in real estate. The Counselors of Real Estate (American Society of Real Estate Counselors) was founded in 1953 by real estate leaders seeking to enhance the quality of respected professional advice available on real property matters. The CRE designation, awarded to the members by The Counselors, recognizes the counselor's demonstrated judgment, integrity and experience in real estate. Acceptance of the designation commits the recipient to a strict Code of Ethics and Standards of Professional Practice.¹

There are many aspects of real estate subject to litigation which require the insight of experts. However, eminent domain has been a dominant field for the real estate counselor in support of litigation, usually as an expert witness.

To illustrate, in 1991 the St. Louis District Counsel for the Missouri Highway and Transportation Commission (MHTC) sought a real estate consultant to serve as an expert witness for a backlog of high dollar claim cases, many of which involved highest and best use issues or development aspects. The MHTC's District Counsel engaged a Counselor of Real Estate to focus on what eventually grew to be 18 cases. The results of the first 13 cases settled or determined in court with a CRE, appraisers and in some cases engineers supporting MHTC litigation attorneys, clearly demonstrated the benefits. Landowners who initially sought over \$25 million reduced their demands to over \$20 million by trial and were awarded or accepted in settlement less than \$4 million.

Historically, in eminent domain the legal system has relied upon the appraiser as the primary expert testifying to value or changes in value. A

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traditional example is the difference in values before and after a partial taking for highway right-of-way in order to determine just compensation. In an uncomplicated taking of an entire tract of ground, relying solely upon an appraiser may be satisfactory. Even then, highest and best use is always relevant and can complicate the valuation. Partial takings can become more difficult. Claimed changes from present use can drastically affect value. These and other complicating circumstances affecting valuation and analysis can call for more innovative thinking in order to address the overall challenge, going beyond appraisal and into the field of real estate counseling.²

The real estate counselor has surfaced with an enlightened and encompassing approach to current real estate complexities. While appraisers have rendered opinions of value and focused on the traditional three methods of valuation, their conclusions are sometimes based on a somewhat summary determination of highest and best use as a foundation for their valuation. The firmness of this foundation is a key. The real estate counselor can focus not only on an experienced and relevant approach to highest and best use, but also on the many other factors affecting value. These factors can include market and marketability, economic viability, developability, accessibility, traffic conditions and community wants and needs, to name a few.

The public and the legal profession have been exposed to appraisal concerns and questions of credibility as a result of the S & L debacle. Markets changed more rapidly than in the past. Widely divergent appraisals of the same property on opposite sides of a court case have not helped plausibility with the jury. These credibility factors are compounded by the changing litigation environment.

Attorneys, juries and judges, not satisfied with an oversimplified approach, share a need for lucid and simple explanations to facilitate their understanding of the facts and the issues. And the issues have broadened in perspective. For example, the courts in Missouri have held that it is proper to permit the juries to hear any testimony that a buyer or seller would consider or anything that affects value. Increasingly, our complicated economic and real estate issues require complementary litigation consultants and testimony from both appraisers and real estate counselors, as well as engineers, land planners, or architects depending upon the issues involved.

Why A Counselor Of Real Estate?

There are a number of reasons why an attorney should consider using a Counselor of Real Estate for litigation support and as an expert witness particularly in eminent domain cases involving complex real estate issues. Such an expert can bring to the attorney:

- Recognized and tested judgment;

- Ability to communicate and coordinate with other experts, e.g., appraisers, engineers, governmental agencies, attorneys;
- Credentials including designation as a Counselor of Real Estate, CRE;
- Integrity and dedication to a strict Code of Ethics and Standards of Professional Practice;
- Diversity and breadth of both talents and experience in the real estate industry, in some cases including development, managing, financing, and/or marketing;
- Credibility and presence within the real estate industry;
- Professionalism and expertise;
- Ability to focus as a real estate counselor;
- Access to a network of well respected professionals and other resources, all of which are invaluable treasures during discovery and preparation;
- Proficiency to perform complex economic analyses;
- Comprehension of the complex and interrelated aspects affecting real estate;
- Strategic insight as well as tactical ability;
- Experience presenting real estate concepts, ideas, and analyses to clients, lenders, governmental agencies, political bodies, assemblies, and juries; and,
- Ability to persuasively communicate his expertise to those outside of the field.

There are other ways to express these proficiencies and competencies, but the important concept is the totality of what can be available through a real estate counselor experienced in litigation support and as an expert witness.

While this article relies upon eminent domain for its focus and illustrations, the same characteristics of a real estate counselor which contribute so well to condemnation can offer similar advantages for other real estate litigation. The seasoned CRE's reputation, credibility and professional presence strengthen his role on the stand.

In using a Counselor of Real Estate, the attorney needs to pursue the following steps:

- *Determine the need for a real estate counselor*—the particular skills and knowledge needed, especially those which are not provided by traditional appraisers whose valuations are still a necessary part of the process;
- *Select and qualify the counselor*—not only in terms of past litigation support or reference checking with other attorneys, but also his real estate experience particularly in the issues likely to be encountered in the case;
- *Define the assignment*—customizing to the case and to the qualifications of the counselor, but also broadening to allow the counselor the flexibility to truly pursue avenues of knowledge and insight as they unfold, including full use of the counselor's network of resources;

- *Question and challenge the counselor*—not only to present the counselor and his insight and opinions, but also to learn and understand real estate from the perspective of developing and presenting the case in trial;
- *Seek strategic input from the counselor*—relating to the approaches being considered in presenting the case, the other witnesses on both sides, the strategy and possible testimony of the other side, and cross examination; and,
- *Confidently present the counselor as a key part of the case*—the real estate counselor can be the witness who can directly help the attorney tie the case together.

Attributes Of A Successful Expert Witness

The needs of the litigator dictate the attributes required or desired in a real estate counselor who serves as an expert witness. Expertise in the desired field for the particular litigation or property is essential, but that expertise alone is not all that is needed.

Not all real estate experts are well suited to being expert witnesses and not all are willing. Many experts do not want the exposure, potential conflicts, adversarial challenges of cross examination and schedules subject to the timing uncertainties of the judicial system. Many do not want to commit the time nor wish to appear in opposition to others in their own industry. Some cannot endure the frustration which sometimes results from the legal process. Litigation support is demanding work—detailed, thorough, tedious and frequently done alone during most preparation.

Credentials And Credibility

Obviously, credentials such as education, experience and professional acceptance and recognition provide a key foundation. They are the trappings and initial measures of the counselor's expertise. Such credentials must not be exaggerated or overstated.

Most important is an expert's true credibility when on the stand and the perception of that credibility by the judge and jury. The expert should be perceived as fair and unbiased. The opposing counsel will try to negate or damage that perception. However, it will be the ultimate measure of the counselor's expertise as far as the trial is concerned.

Preparation And Knowledge

Expert witnesses are committed to and comfortable with their role. They form firm opinions which are demonstrably supportable and defensible. Expert witnesses should prepare thoroughly. An opinion based solely upon an egotistical view of their own competence will not stand up before a jury. Real estate counselors must be qualified to understand and perform the detailed and analytical studies, research and investigations needed to form and support an opinion based soundly upon years of experience as well as the data discovered. Real

estate counselors are inquisitive, dig for more insight, and know where and what to look for in the investigation and preparation. They stay current through education, professional participation, review of the current literature, maintenance of a professional network in real estate and related fields, and a diverse practice which increases and broadens experience.

Experienced trial attorneys know the rules of litigation and the legal aspects of the cases they present. Real estate counselors who serve as expert witnesses also know their subject. The judge, jurors and attorneys are not likely to know as much about the technical and practical aspects of real estate. As real estate experts in the courtroom, counselors grasp and present the big picture as well as the needed detail. The expert witness recognizes that the attorney is the captain, the manager and the quarterback. Good expert witnesses are competent, knowledgeable and well prepared. These same attributes, in turn, help the attorney feel confident and well prepared. Rather than bluff, capable experts do not stretch a weak point; instead, they admit when they do not know an answer. Effective experts communicate with the judge and jury, demonstrating firmness in a courteous and nonabusive manner. They realize that perceptions of the jury and the judge can become reality. Expert witnesses teach, inform and persuade rather than sell.

Expert witnesses should not fear the challenges of the witness stand, including the adversarial questions during cross examination and the heat, abuse and hostility when they occur. Cross examination can be an opportunity to find beneficial openings and reinforce key points. Most helpful openings occur with questions aimed to refute the expert's actual testimony and challenge his opinions. The questions and the permitted answers deal with the facts and opinions in the case. The ability to recognize and capitalize on such openings will discourage further aggression from the opposing attorney. Other questions target the credibility and reputation of the witness, often inferring bias. Rates and compensation are often a prime target to imply prejudice. These are normal frontal challenges to expect and anticipate. The capable expert witness prepares for such attacks.

Ideally, the real estate counselor's expert witness fees are appropriate to his expertise and experience. Hourly rates for real estate counselors can range up to \$500, with higher rates commanded by senior counselors in major cities. Rates for court time and special services can run higher.³

The Assignment

Frequently, real estate counselors fill in the missing pieces of the puzzle, sometimes by taking the issues apart piece by piece and then putting them back together in a way which is easily understood. Counselors help the attorney tie together the overall picture, then portray a broader, more easily understood view. Counselors can serve as real estate mentors by teaching attorneys about unique real estate issues

such as the varied factors affecting value in a condemnation case. Attorneys should demand such a learning opportunity.

Usually the real estate counselor brings multiple areas of expertise and experience to litigation. Real estate counselors are not created from a single mold. Each applies his own education, experience and professional network to the needed thought processes. Many CREs are diverse in their backgrounds and abilities, enabling an attorney to customize available advice and testimony.

Evaluation And Valuation

Some CREs are also certified appraisers. Counseling can be conducted in conjunction with valuation testimony. In a complex case, however, some of the complementary benefits could be lost. It may be preferable to keep the real estate counselor as an expert witness who is not limited by the previously established rules of appraisal, some of which have been subject to challenge within the real estate industry.

Thus, in eminent domain cases a counselor's assignments may exclude valuation but include providing input for the foundation and support of an appraisal. Examples include highest and best use; factors affecting value, feasibility and economic viability of contemplated or proposed uses; and land or building economics, including challenges and costs to develop, and the likelihood of success if developed. The assignment can also include review of appraisals. "The counselor can help the attorney understand the premise on which an appraisal is based along with its strengths and weaknesses; the counselor also apprises the attorney of mathematical errors, unrealistic assumptions, etc."⁴

Counselors can contribute and suggest challenges to the other side, e.g., possible rebuttals and questions for cross examinations. These contributions can include critique and review of the other side's experts including their reports, depositions, testimony, designs and assumptions. The opposing testimony may suggest other countering witnesses for the counselor to recommend.

From a more positive perspective, the counselor can use his insight and knowledge to help develop strategies for negotiations and settlements which may save the costs of further litigation. The counselor often can provide an understanding of the other side's reasoning, motivations, concerns, strengths, weaknesses and even their mistakes. However, settlement also may require the counselor to provide a very candid evaluation that could differ from the client's present perceptions, e.g., suggesting values which may be higher or lower.

Approaches And Methods

A broad list of approaches and methods used to gather insight and draw conclusions reflects the comprehensiveness of investigation. A generalized list of resources and approaches used by a counselor in an eminent domain engagement might include the following:

Property visits	Engineers
Photographs	Networks
Studies/analysis	History
Ordinances & regulations	Property files
Consultants	Database search & review
Attorneys	Governmental agencies & officials
Area tours	Architects
Documents	Experience
Research	

To illustrate, repeated visits to the property and tours of the surrounding area will broaden discoveries and deepen knowledge. Some counselors prefer to shoot their own photographs as field notes and future exhibits to capture what is needed, significantly ease future introduction, support testimony and participate in exhibit selection and design. Candor and rapport with city and county officials, coupled with knowledge of what to seek in government documents and records, provide vital evidence and insight. The attorney and counselor may look for evidence of the community's propensity to allow a change in use or deny the development of a property. Although it may seem remote, history of the subject property and the surrounding area can be very enlightening and lead to further discoveries. Attorneys should encourage their experts to further investigate and pursue relevant evidence for preparation and trial. A final visit to the property and the surrounding area just before testimony at trial often results not only in reinforcement but also in additional discovery.

The Process—The Real Estate Counselor At Work As An Expert Witness

Obviously, the attorney and the expert need to temper the depth of the process and preparation to match the magnitude of the case, while ensuring sufficient information and preparation to draw valid and supportable conclusions. The attorney can gain from understanding the stages of a real estate counselor's approach to a litigation engagement involving eminent domain. Although the approach to each case is customized, the following are steps to pursue.

Stage I—Initialization: Starting the Process

Consideration

The attorney determines the applicability of a particular real estate counselor as an expert witness. This requires a candid discussion of the case, the basic issues, the expert's credentials and potential conflicts.

Engagement

A clear understanding is required on the objectives of engaging the expert; the working relationship between the attorney, the expert and other experts in the case; and the expert's compensation.

Assignment

Ideally, the assignment should be reasonably well defined but subject to further modification as investigation and discovery proceed.

Stage II—Basic Foundation: Gathering the Initial Insight

Assemblage of the basic facts

This should include a preliminary understanding of the subject property. This should incorporate the expert's basic real estate background, a property visit and inspection, an initial review of property descriptions and data available from the attorney, and a review of readily available documents. These documents could include such basics as USGS topographic maps, street maps, municipal or county ownership and zoning maps, agricultural soil maps and reports, and flood insurance maps.

Stage III—The Discovery Chain or Loop: Finding Facts and Reaching Opinions

Many of the most relevant facts and insights, as well as evidence and exhibits, come from this core part of the process.

Discovery of additional facts and insights

Information can come from a number of sources. Examples include depositions, appraisals, municipal or county documents regarding the specific property or surrounding area, interviews with planning and zoning officials, analysis of proposed development, demographic studies and reports, etc.

Revisits to the subject property

Subsequent revisits to and photographing of the property and surrounding area frequently lead to new discoveries. Sometimes such visits are needed to further verify, explore or expand upon insight gained elsewhere.

Review of and visits to comparable properties

Visiting and analyzing comparable properties used by the appraisers, especially comparables used by the adversaries, can shed light and produce real ammunition.

Networking

Networks of other professionals and officials usually produce new information relevant to the case or suggest other areas for further exploration. Attorneys find access to such networks of expertise to be an invaluable asset.

Solo brainstorming

Some may view this as mental gymnastics. The process needs to fit the individual expert and his mental style but great rewards can come from this technique. Personal computers with word processing, spreadsheet, and even graphic software can be most useful. Depending upon the case, this step could include calculations and analyses. After assembling as much insight as possible, often in outline format, the counselor can reorganize and rearrange such information to coincide with mental paths and look for connections or mental leaps. Highlighting what is most significant or returning to an outline helps discard that which may mislead or sideline direction. In this manner, a path to opinions and conclusions can be forged.

Group discussions

Sharing insight among the attorneys and other experts involved can help each participant understand, learn, confirm and challenge. However, the potential brainstorming should be done with the concurrence and guidance of the attorney.

Exploring new channels

The foregoing steps will point to other sources to pursue for insight.

Repeating the discovery chain

Repeat all or parts of the above-mentioned chain, as needed, in an iterative process but without prejudgment. Once armed with the broader and more complete picture, new details and insights become apparent.

Stage IV—Deposition Process: Being Discovered

The deposition

The opposing attorney will try to determine the expert's conclusions and the basis for those conclusions while also trying to box or confine the scope of later testimony at trial. Prior guidance from the attorney of the witness can be important. In response, the expert should limit the information disclosed in deposition to responses to the specific questions, while not volunteering added insights but at the same time trying to expand the dimensions of the assignment when the questions attempt to limit such scope. The witness should listen to the questions and avoid confirming any mischaracterizations of his testimony which may be offered by the opposing attorney in the form of questions which misleadingly restate the testimony. The witness can respond by carefully restating the testimony in his own words.

Review and correction

Recognizing that the transcript can be used to benefit the opposing attorney in trial, and even in subsequent trials, the expert witness normally should not waive signature but rather review and correct the record. Reviews of depositions also can become tools to learn more about the other side. (The witness should advise his attorney if his position subsequently changes so the attorney can conform to court rules.)

Stage V—Trial Preparation: Preparing for the Witness Stand

Repeating the discovery chain

If needed, this step can be beneficial.

Exhibit preparation

Visual aids can be great tools with which to inform or persuade the judge and jury and excellent reminders for the attorney and the expert. They may include photographs, lists, calculations, tables, graphs, etc. The attorney will make the final selection, sometimes altered during the trial, and will plan their introduction and acceptance by the court as identified exhibits for the record.

Organizing, outlining and highlighting thoughts
This list can be mental or written, depending upon not only the expert's preferences but, more importantly, those of the attorney. If the list is a written outline it should trigger key points but not cause canned answers or provide a discoverable treasure chest for the opposing attorney. The attorney may request a report to use in the trial. Whether using a report, outline or neither, the expert witness must know his subject thoroughly—an outline or report does not replace or relieve the need for the expert's knowledge. The opinions and their foundation need to be firmly blunted in the expert's mind.

Stage VI—The Trial: The Culmination of the Process

Discovery during trial

As a result of aspects brought out during other parts of the trial, the attorney can call upon the expert for counsel or for further pursuit and discovery.

Direct examination

The witness responds to the questions from his attorney. This is the expert's opportunity to use his expertise by presenting facts uncovered and opinions formed during the foregoing steps of this process. A firm and courteous manner creates positive perceptions in the judge's and jury's minds and reinforces credibility and believability.

Cross examination

The opposing attorney tries to refute the evidence offered by the expert or to damage the expert's credibility. The expert witness, aided by the attorney, should anticipate the areas of cross examination and possible lines of questioning. Calm, solid answers to opposing counsel enhance credibility. Again the expert listens carefully to the questions. Expert witnesses are entitled to explain their answers and should not compromise their concluded opinions nor accept any mischaracterizations of their testimony. From a positive perspective, reinforcement of key points through answers to questions from opposing counsel discourages further aggression. Cross examination may be followed by redirect examination by the client's attorney to help draw out and frame those answers and to take further advantage of openings which may appear.

An Illustrative Case

Several of the foregoing points and suggestions are illustrated with a recent Missouri Highway and Transportation Commission case, *MHTC v. Behle, exceptions of Roth*. The MHTC attorneys engaged a Counselor of Real Estate to support their litigation as an expert witness. Other experts testifying for the state included two senior real estate appraisers and a senior officer of a St. Louis engineering firm experienced in civil engineering and hydrology as applied to real estate development.

Missouri Highway 115 was being relocated and established as a limited access highway with a new bridge over the Missouri River from St. Louis County to St. Charles County. The right of way for this relocated Missouri Highway 115 required 20.6 acres of the 176-acre Roth parcel. The state had offered \$70,000. The owner presented a claim of \$6 million. The parties failed to reach agreement. The appointed condemnation commissioners awarded Roth more than \$1.47 million to which both parties filed exceptions and asked for trial, thus bringing the case before a jury in St. Louis County Circuit Court in March 1992. In the trial the owner presented a reduced claim of almost \$4.3 million. After a week-and-a-half trial, the jury found that the landowner was entitled to \$68,900. An appeal was filed by the attorney for the landowner, but it was later dropped as a result of a higher settlement agreement.

Property Location

The subject property was located in the alluvial floodplain of the Missouri River, a large part of it within the regulatory 100-year floodplain established by the Federal Emergency Management Agency (FEMA). (For reference, this trial took place before the famed flood of 1993.) The property had been farmed for decades. The bulk of the property was in unincorporated St. Louis County and had been zoned Non-Urban and Non-Urban Flood Plain, NU and NUF. However, St. Louis County had rezoned this land just prior to the taking—about two-thirds to M-3, Planned Industrial, for the portion claimed to be out of the 100-year FEMA floodplain, and the rest to FPM-3, subject to the overlying floodplain regulations, for the part within the 100-year floodplain. The much smaller part of the property that occupied frontage on Missouri Bottom Road was in the city of Bridgeton. It had been zoned for decades as M-1, Limited Industrial, even before the land was acquired by Roth in 1971.

The landowner's attorney presented as his key witnesses the landowner who was a local real estate developer, an appraiser and a landscape architect/engineer with a local engineering firm which developed and recorded a plan for a subdivided industrial park and flood protection system on the subject property.

The appraiser for the landowner presented industrial land values well in excess of \$1 per square foot, using some comparables within a reclaimed, flood-protected floodplain in the same general area. The state's retained appraisers reflected farmland values on the order of \$2,500 per acre (less than \$0.06 per square foot) based upon agricultural comparables in the floodplain.

Even though the property had been zoned industrial and platted, the issues focused primarily on the highest and best use and the land's value in the before condition. The owner also claimed damages to all of his remaining land while the state conceded loss of use for about eight acres which were severed from the balance. The state maintained agricultural

as the highest and best use both before and after the taking and the landowner claimed industrial in both instances. Major value differences resulted primarily from this disagreement. Much of the argument focused on the suitability of the land for industrial use and the demand for such use at that location.

Highest And Best Use Of The Property

The real estate counselor's assignment in this case was not only to determine the highest and best use but also to investigate and review the viability of this subject property as an industrial site or for industrial development both prior to and after the taking. The following describes some of the more pertinent discoveries, opinions and conclusions reached by the CRE as a litigation consultant. The MHTC attorney determined whether, when and by whom to introduce this material in the trial.

Based upon his review, the real estate counselor believed this subject property was not viable as an industrial property nor for industrial development before the taking, nor would he recommend such use after the taking, zoning notwithstanding. Before the highway taking, the highest and best use of this property was clearly agricultural, which is what the majority of the property had been. After the highway taking, the basic agricultural nature of the land would not have changed, despite the zoning.

Road Access

A significant objection to the industrial use of this property was inadequate truck access in the before condition. This was easily portrayed photographically. Routes to the property were all narrow rural roads, most of them clearly subject to flooding except for Missouri Bottom Road which dropped into the floodplain from the higher ground and passed through an indisputably residential area with limited visibility. One route through the floodplain, which the landowner highlighted as his anticipated major truck access to his "industrial" park in the before condition, included a very narrow bridge over descriptively named Cowmire Creek which was next to a difficult 130 degree turn—an impassable turn for full-sized highway rigs. This challenge was illustrated by the CRE's still photographs, by drawings of truck-turning radii and most vividly by a video developed by MHTC attorneys of a truck driver-instructor unsuccessfully trying to maneuver a tractor trailer around this turn.

St. Louis County files disclosed their Planning Department's written comments regarding this property, explaining the reasoning for some of the conditions proposed for and included in the 1989 rezoning. They flagged the unsuitability of then present Missouri Bottom Road as it existed prior to the taking. The professionals in the Planning Department believed that the relocation of Highway 115 and construction of the accompanying outer road system would be essential to industrial development of any site in the area including the subject property. After the taking and completion of the highway improvements, this subject property would enjoy highway visibility and frontage previously lacking and

would have simplified and improved access as a result of the new local service road constructed above the regulatory floodplain.

Floodplains And Levees

The flat topography of the subject property unquestionably was within the floodplain of the Missouri River, as confirmed by visual inspection, aerial photographs, topographic maps of the U.S. Geological Service, St. Louis County Mapping, and Flood Insurance Rate Maps of FEMA. Most sources showed a majority of the site subject to the 100-year flood. Various agricultural levees had been built along stretches of Cowmire Creek but, based upon the CRE's inspection, such levees in the area affecting this subject property were not designed for industrial use.

The proposed development of this property contemplated a future levee to protect against the projected elevation of a 100-year frequency flood. In the CRE's opinion, this would continue to be inadequate for a business and industrial park in this area. Industry would be concerned not only with flood damage to real property, equipment and inventory, but also with production interruption and loss of income resulting from flooding of access roads. Existing nearby levee-protected areas, which had hundreds of acres of land already zoned for industrial use, are protected against a more severe 500-year flood. Rather than accept the lesser calibre 100-year frequency flood protection, industrialists should and would seek these better protected, available locations.

The proposed design for this flood protection system for the subject property had not been approved by the Corps of Engineers, as required by the St. Louis County specific zoning ordinance or by Bridgeton. The CRE's review raised concerns over and above the issue of adequacy of 100-year protection compared to 500-year protection, including the adequacy of designed freeboard, pump size, needed easement across adjoining property for the stormwater outflow to reach Cowmire Creek, and alternate sources of pumping power.

Soil Conditions

Recognizing concern over alluvial soil conditions in a floodplain, the Missouri Highway and Transportation Department previously made a subsurface investigation on the Roth tract to verify earlier estimated settlements and foundation stability before placing the fill to elevate the highway above the 100-year flood. Examination of these tests indicated settlement on the order of 0.5 feet under 14 feet of fill. The soil problem was aptly represented to the jury by sharing the results of four power auger test borings taken along the Highway 115 alignment to bedrock 24 to 25 feet below the surface. For three of the borings the drillers noted "PAWT" (pushed augers without turning); in other words, they did not need to turn the drill to penetrate below the first 6 to 10 feet until they hit bedrock. These soils could effect compaction, foundations, pads and paving.

Photo Evidence

The surrounding area, even that zoned industrially for decades by Bridgeton, was primarily occupied by farms with a few exceptions—an idled sewage lagoon, an unsightly auto storage yard, a small isolated industrial building elevated on fill in the floodplain and accessed by boat during major floods and the nearby Bridgeton Municipal Athletic Complex, partly protected by a levee. Some scattered industrial uses could be found above the floodplain, for example, the Bridgeton Industrial Park which had taken more than 20 years to market and then develop 10 small buildings on 20 acres. The non-industrial surrounding uses were portrayed photographically, including flooded roads, soybean fields and pumpkin patches—highlighted by high water markers and signs hawking farm products and riding stables.

The CRE shared some observations resulting from review of the landowners' proposed development, market insights and his own experiences. The costs to develop and flood-protect this property would approach the retail price of already subdivided and better-located sites, leaving no room for marketing costs or interest expense, much less suggesting any residual value attributable to the raw land.

The CRE's first-hand knowledge of transactions which had occurred and their timing led to discovery that several comparables used by the opposing side's appraiser either were simply erroneous or not truly comparable to the subject property and not arms-length transactions. In one, the appraiser had reported a land-sale price which, in reality, was the price for which an investor bought land and a new building with a netted lease in place, but with an erroneous placement of the decimal point. An aerial photo at the time of the purported sale clearly showed the presence of the building. In another of his comparables, a lawsuit had been settled between the seller and the buyer relative to the particular parcel.

At several points during presentation of the trial, the real estate counselor's field photographs provided easily understood evidence demonstrating the inadequacy of industrial access, the flooding of access roads and the agricultural nature of the subject property and the surrounding area. The lead MHTC attorney reviewed these photos in his closing arguments. The opposing attorney attributed much of the state's victory to the convincing evidence provided by these photos and the aforementioned video showing blocked truck access.

Why A Counselor Of Real Estate?

The Roth Case clearly illustrates the benefits of a complementary combination of experts and particularly the contribution of a real estate counselor.

The growing need for real estate counselors in litigation, especially eminent domain, results from the expanding infrastructure and redevelopment of our cities coupled with the increasing complexities

of modern day real estate and its valuation. An experienced counselor provides added flexibility to customize the preparation and presentation of a case. However, the counselor must be disciplined to the challenges and rigors of such litigation and comfortable with that role. Ultimately, credibility becomes the real key in the courtroom.

NOTES

1. The Counselors of Real Estate (American Society of Real Estate Counselors) *1993 Member Directory*, pp. 5-6.
2. Schwethelm, A.C.: "Counseling and Eminent Domain," *Real Estate Issues*, (American Society of Real Estate Counselors) Vol. 14, No. 1, (Spring/Summer 1989): pp 25-27.
3. Shlaes, Jared: *Real Estate Counseling in a Plain Brown Wrapper*. (Chicago: American Society of Real Estate Counselors, 1992.)
4. Schwethelm, A.C., *ibid*, pp 25-27.