

# ASSESSING AND MITIGATING THE ZONING IMPACTS OF A PARTIAL TAKING

By Carol Lansing and Mark Savin

Condemnation for transportation projects is increasingly utilized for the expansion and improvement of existing highway systems within developed urban and metropolitan areas. Often, the need for these improvement projects is related in part to the growth of commercial development along urban corridors and the concomitant increase in traffic congestion. At the same time, many cities have enacted increasingly extensive and prescriptive zoning regulations that seek to control highway commercial development and manage its environmental and traffic impacts. Additionally, cities with such controls have become increasingly stringent about compliance with these ordinances. As a result, zoning non-compliance has become an increasingly significant issue, impacting properties subject to partial taking for roadway projects. This noncompliance may be a direct result of the physical taking (e.g., parking stalls that are actually taken for right-of-way) or may be triggered by the physical taking because of the need to reconfigure site features on the property to comply with local zoning regulations (e.g., taking of required setback areas that cause adjacent parking to become nonconforming).

Lawyers, for both the condemnor and the landowner who are not well-versed in land use law may overlook or substantially underestimate the impact of zoning noncompliance on the property. They should carefully analyze the interplay between the taking and existing land use controls; understand the differing interests of the condemning authority and the land use authority; and recognize and consider the substantial impact on value that may result from such nonconformance.

## Impacts of Nonconformities Created by a Taking

A property is nonconforming if the uses, structures, or lots do not comply with the requirements of the zoning

ordinances of the governing jurisdiction. Uses, structures, and lots that were in compliance with the zoning ordinances in effect at the time they were established but that became nonconforming due to a change in the zoning ordinance itself, are considered “legal” nonconformities. Legal nonconformities are protected as vested property rights and may be continued (often referred to as having “grandfather” rights). Generally, however, nonconformities that are created by circumstances other than ordinance amendments, including partial takings, do not have legal nonconforming status; municipalities can require that the property be brought into compliance with current ordinances.<sup>1</sup> As noted in *Rathkopf’s The Law of Zoning and Planning*, some jurisdictions depart from this general rule, but departure is less common than generally thought.<sup>2</sup> It is a mistake to merely assume that a taking creating nonconformance will be grandfathered. Thus, it is critical to determine what legal status the local zoning authority will assign to any nonconformities created by the taking.

Even if nonconformities created by a taking are deemed by a particular municipality to have legal status, nonconforming status can have several practical impacts on the property, as the following points illustrate:

- Although legal nonconformities can continue, they are subject to significant restrictions on whether or how they may be expanded or otherwise altered. Further, a nonconformity that is damaged or destroyed to a substantial degree generally loses its nonconforming rights and must be rebuilt in compliance with current ordinances. These restrictions may limit the useful life or development potential of the property. And, in the case of property impacted by eminent domain, if reconfiguration or reconstruction on the site is

required, the regulations may prohibit such work unless the post-taking property is brought into conformance with current ordinances.

- Nonconformities may reduce the marketability and hence the value of the property compared to its pre-take conforming condition.
- The ability to obtain financing may be impaired because lenders may not accept a nonconforming property as security due to the development restrictions and the risk that nonconforming rights may be lost. The importance of this issue in the current economic climate is obvious.

Thus, even in a jurisdiction where there is no immediate legal obligation to bring the property into zoning conformance, the owner may conclude it is in its best interest as an economic matter to attempt to do so. Further, because an owner in some jurisdictions may be required to mitigate the damages of the taking, whether any land use remedies for the nonconformity exist, and whether such remedies are cost efficient, must be determined. For example, a variance, if obtainable, for a nonconforming setback would make the condition fully legal and “conforming” (as opposed to “legally nonconforming”) and would free it from the development restrictions imposed upon nonconformities.

## Evaluate Pre- and Post-Taking Conditions for Compliance with Zoning Requirements

In order to assess the zoning impacts of a partial taking, the first step is to determine how the property before the taking complied with zoning regulations in effect at the date of taking. If the property was fully conforming at the date of taking, the analysis of its pre-take zoning status will be relatively straightforward. Changes in zoning ordinances since the property was developed, however, may have made

the property nonconforming prior to the taking. If the pre-take property was nonconforming, the ability to alter site features to mitigate the effects of the taking may be limited or even prohibited, depending upon how the zoning authority regulates nonconforming uses and structures. Information about the pre-take zoning status of the property is, of course, also relevant to valuation.

How an existing nonconformity will impact value depends upon the particular facts of the case. A right to continued operation of a nonconforming use in a particular location may be a benefit to a property that increases value. The nonconforming use may generate higher value than uses allowed under current ordinances or may have a competitive advantage because similar uses could not be established in the same zoning district.<sup>3</sup> However, structural and dimensional nonconformities existing before or created by partial takings are unlikely to have a beneficial effect on value.

The second step is to determine the physical impacts of the taking on the property and its zoning status, and require the following actions:

- Obtain records of prior zoning approvals for the property. For many large commercial properties, regulation will occur under “planned use development” concepts that create controls specific to that property. These records will identify what site features were the basis for or conditions of zoning compliance for the pre-take property development. For example, a variance may have been granted to allow a sign that is taller than the general standard or to reduce the amount of parking required on the zoning lot. A certain percentage and location of landscaped areas and specific types of vegetation will frequently be specified conditions for site plan approval.
- Determine whether the taking may impact contiguous or noncontiguous parcels that relied on the take parcel for zoning compliance. For example, did the take parcel provide off-site parking to fulfill zoning requirements for another parcel or fulfill open-

space set-aside requirements?

- Obtain copies of relevant portions of the current zoning code. These codes outline what zoning requirements apply to the property and help determine whether the taking will result in any areas of noncompliance or whether changes in zoning ordinances since the property was originally developed have resulted in some legal nonconformity that is not a result of the taking. Further, consulting current zoning ordinances will identify the zoning permits and reviews that will be required to make changes to the site to mitigate the impacts of the taking (e.g., conditional use permits, variances, site plan review).
- Obtain or prepare scaled and dimensioned site plans that show the pre- and post-take conditions, depicting building footprints, driveways and parking areas, yards, impervious areas, landscape features, sign locations, fences, stormwater management features, utilities, and adjacent rights-of-way. The property owner or the zoning authority may already have these records for the pre-take condition. Surveys and right-of-way plats created to document the taking will provide information about the post-take condition.
- Compare the site plans to the zoning code requirements to identify areas of noncompliance in both the pre-take and post-take conditions.

In a number of recent cases, we have seen condemning authorities fail to do the necessary analysis of how the highway project would impact land use controls governing properties taken for the project. In one instance, this failure caused the suspension of the project for more than six months. The condemnor’s error was assuming that the local municipality that controlled zoning would grant a variance from its ordinances so that no setback would be required between the new post-taking property line and the adjacent parking field. The city, however, had no intention of permitting such a deviation from its ordinance requirements. The condemnor apparently was accustomed

to assuming that variances would be granted or local controls otherwise be disregarded in light of a significant highway project by a superior government entity. It was unprepared for the city’s refusal to disregard its own ordinances, which did not allow for setback variances of the extent required for the post-take conditions.

Only when the controlling city, at the urging of both the landowner and the condemnor, modified its ordinance was the project able to go forward. The property owner’s interest in modifying the ordinance was in protecting its ability to modify the post-taking site so as to retain its ability to operate a large retail center; the condemnor’s interest was in allowing such mitigation so as to reduce its economic damages. Put simply, by persuading the local municipality to change its ordinance, the property owner was able to protect its business, and the condemnor was able to reduce what it would have to pay in damages. Nonetheless, had the condemnor recognized the nonconformance issue in its original design analysis, the entire problem might have been avoided.

#### Determine How the Proposed Site Plan Complies with Land Use Regulations and Identify Required Land Use Approvals

At this stage, it is important to consult with the planning and zoning staff for the municipality that has zoning authority over the property. Municipalities have considerable discretion in how they implement their zoning authority. It is important to learn the policies, principles, practices, and preferences that planning staff, commissioners, and council members will apply to determine what site improvements or alterations, if any, will be required or allowed by the zoning authority. Some jurisdictions may be particularly rigid in requiring full compliance with current zoning regulations. Others may be more sensitive to adverse operational impacts that can result from a partial taking and will make accommodations in order to support their local businesses. The municipality may also be willing to be flexible in how it applies its zoning authority where its decisions will impact

the costs of condemnation to the road authority exercising eminent domain. The following steps should be followed:

- Request that the zoning authority staff review the post-taking site plans to confirm or revise the analysis regarding areas of noncompliance.
- Determine whether and how state statutes and municipal ordinances and policies address noncompliance resulting from eminent domain. Will the local jurisdiction require compliance with current zoning requirements?
- Identify what site modifications, variances, or other zoning and regulatory approvals will be required by the municipality. Ask staff for a preliminary assessment of their position regarding the required zoning approvals.

### Site Planning to Mitigate the Taking and Respond to Other Project Impacts

Reconstruction of and changes to site features of the property may be required to restore areas disturbed by the road project, to reconfigure the site to maximize post-taking parking, to realign site features in response to changes in access points, or to bring the post-take property into compliance with zoning requirements. Site revisions may also be desired to mitigate the adverse impacts of the taking on business operations and property value. Further, the property owner may want to take advantage of the mobilization for site work required in response to the taking (often involving professional site planners, surveyors, engineers, or landscape architects) to implement additional, non-taking-related improvements to the property in a cost-effective manner.

- Determine the work necessary to maintain the basic functionality of the site. Examples include reconstructing curbs, pavements, and landscaping to restore areas of the site disturbed during the road construction; reconfiguring and re-striping drive aisles and parking lanes to accommodate changes in driveway locations; relocating signs from the take area; and

reconstructing lost building area on another part of the property.

- Evaluate whether additional site modifications could mitigate the adverse impacts of the taking on business operations or property value. For example, can the net loss of parking spaces be reduced by re-striping the parking lot or converting landscaped setback areas to parking spots? Would remodeling the building to change entrance locations improve visibility lost due to road reconfigurations?
- Evaluate the changes and improvements that would be necessary to achieve compliance with current zoning ordinances or other regulatory requirements. For example, what would full compliance mean with respect to parking setbacks and number of spaces, building setbacks and materials, sign setbacks and design, landscaping and screening, or stormwater treatment?
- Prepare one or more site plans depicting the site with the mitigation options.

### Consult with and Advise the Client

Before deciding which zoning approvals to seek from the municipality, if any, review the options for mitigation and assess the costs and benefits of each with the client. An analysis of damages will typically look like this:

Value of the property before taking	\$20 million
Value of the property after taking (without mitigation)	\$14 million
Damages (without mitigation)	\$6 million
Value of the property before taking	\$20 million
Value of property after taking (with mitigation)	\$18 million
Cost of mitigation (“cost to cure”)	\$1.5 million
Damages including cost to cure	\$3.5 million

In this instance, an expenditure of \$1.5 million on cost to cure mitigation will reduce the overall damages from \$6 million to \$3.5 million. This is

obviously advantageous to the condemnor; it is also, however, advantageous to the owner who is interested in protecting the business operated on the real property. If the property owner attempts to mitigate damages in this way, not all costs to cure may be compensable. The cost to mitigate damages cannot exceed the severance damages that would be incurred without mitigation. By way of example, if the loss in value to a property resulting from the loss of five parking spaces is \$100,000 but the cost to mitigate that loss by reconfiguring the site is \$150,000, only \$100,000 will be compensable in the condemnation.

To recap, the options for site restoration or reconfiguration will generally fall into the following categories:

- Site restoration required to maintain basic functionality of the site for the business.
- Site work required by the zoning authority in order to legally continue the present use of the property.
- Site work that will mitigate the impacts of the condemnation on property value.
- Variances or other land use approvals that grant conforming status to nonconformities created by the taking.
- Site improvements that are not legally required or necessary to mitigate the taking but are desirable from a business perspective. The cost of these improvements will not be compensable in the condemnation, but the owner may want to seek the requisite zoning approval for them concurrent with proposed land use approvals required to address the taking.

### Submit Land Use Applications and Advocate for Approvals Before Decision-Making Bodies

If the site impacts of the taking are not extensive, planning staff may be able to approve the site modifications administratively. Modifications that require conditional use permits, variances, and, sometimes, site plan approval, however, will involve public hearings and decisions by a board of adjustment, planning commission, and/or city council.

In some cases, mitigation may involve an application for rezoning to make a nonconforming use conforming. If a municipality's ordinances do not provide the authority to approve the site plan as proposed (e.g., where the extent of setback variance that may be granted is limited or where the ordinance prohibits the relocation on the zoning lot of structures housing nonconforming uses), amendment to the zoning ordinances may be necessary.

- The narrative statements submitted in support of the zoning applications should include an explanation of the impact of the taking on business viability—the “business case” for the requests—to appeal to the interest of the local jurisdiction in maintaining commercial vitality in the community.
- Critical to the application is the explanation that the need for a modification results from the actions of the condemning authority. Throughout the process, and particularly in documents and presentations that become

part of the public record, take care to document how the need for the site changes for which approval is being sought is a result of the taking and how the proposed actions mitigate the adverse impacts of the condemnation.

- Evaluate whether it is appropriate and beneficial to contact other local officials, such as the city manager or the city's elected officials, to inform them about the issues and impacts and seek their support.

### Conclusion

An analysis of the impact of a partial taking on zoning compliance and zoning approvals needed for site mitigation should be initiated as early as possible in the eminent domain process. The site planning, administrative, and public zoning review processes that may be required can take several months. Early and expeditious efforts to address the zoning and other land use impacts is necessary to maintain a functioning site that is accessible to and convenient for customers. It is also important to have resolved the land use issues with the

municipality before concluding a settlement or beginning the hearings in the condemnation case so that the costs of mitigation can be fully and accurately addressed. Although the focus of this article is the zoning analysis required for mitigation, similar analyses should be conducted to determine the impact of a partial taking on the potential for expanded development, options for redevelopment, and the reasonable probability of a zoning change to establish and maintain the site's highest and best use.

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1. See generally 4 Edward H. Ziegler Jr., *Rathkopf's The Law of Zoning and Planning*, § 75:10 (2008).
2. *Id.* note 2; cf 4A Julius L. Sackman, *Nichols on Eminent Domain*, § 14.02[2][b][iv] (3d ed.) (*Nichols* asserts that the majority of zoning jurisdictions treat nonconformities created as a result of condemnation as legal nonconformities).
3. See *supra* note 1, §75:9.

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