

“ROUND UP THE USUAL SUSPECTS”
Captain Louis Renault, *Casablanca*, Dir. Wallis, MGM, 1942

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In any eminent domain matter, some or all of the usual suspects will be encountered. To effectively represent your client, you need to know the common witnesses and issues.

“You never really understand a person until you consider things from his point of view...until you climb inside his skin and walk around in it.”
Atticus Finch, *To Kill a Mockingbird*, Dir. Mulligan, Universal, 1962.

The Usual Suspects include:

1. A Board, Council, or Commission, with the responsibility to:
 - a. Faithfully administer the public’s power and money;
 - b. Provide needed public improvements; and
 - c. Abide by the Constitutional requirement of paying “just compensation” for the private property upon which those improvements will be placed.

2. Design Engineers, with the responsibility to:
 - a. Design a project that meets the public need; and
 - b. Design a project that is affordable.
 - i. Estimate the construction costs.
 - ii. Estimate the property acquisition costs.
 - iii. Get the job done efficiently at the least reasonable cost.

3. Appraiser for the public agency, with the responsibility to:
 - a. Independently reach an opinion as to fair market value of the property to be acquired and the loss of fair market value of the remainder as a result of the taking;
 - b. Follow the Uniform Standards for Professional Appraisal of Property (USPAP), adopted and published by the Appraisal Standards Board of The Appraisal Foundation, as authorized by Congress. However, in some states, full time government employed appraisers are exempt from USPAP.
 - c. Follow the Uniform Appraisal Standards for Federal land acquisitions, known as “The Yellow Book”, if Federal money is involved for any aspect of the project, and
 - d. Not lose their employment or major source of income. Full time government employed appraisers are typically supervised by the director of right of way acquisition, who also approves the payments to the property owners and supervises the right of way negotiators.

4. Negotiators for the public agency, who tend to become conditioned to think that property owners are just looking for a lot of money.

“As God is my witness, I’ll never be hungry again”.
Scarlett O’Hara, *Gone with the Wind*, Dir. Fleming, Loew’s, 1939.

They have the responsibility to:

- a. Conduct good faith negotiations with property owners;

- b. Obtain signatures from property owners; and
- c. Not give away too much money or make too many promises.

5. Relocation agents, with responsibility to:

- a. Determine which owners/tenants will be required to move;
- b. Assist in finding places to relocate;
- c. Assist in organization of the relocation effort; and
- d. Pay the costs of relocation within the framework of the Relocation Assistance Act.

“One morning I shot an elephant in my pajamas. How he got in my pajamas, I don’t know.” Captain Geoffrey T. Spaulding, *Animal Crackers*, Dir. Heerman, Paramount 1930.

6. The property owner, with no real responsibility, but who:

- a. Is typically not a willing seller, and who just wants the public agency to go away;
- b. Understands that the agency will not go away;
“I’ll be back.” The Terminator. *The Terminator*, Dir. Cameron, Orion 1984.
- c. Likely has the primary goals of being treated with respect and compensated fairly.
- d. May not know anything about the process or the measure of compensation;
- e. Is intimidated by the process, and
- f. Has no control of any part of the process:

- i. Cannot say “no, it’s not for sale.”
- ii. Cannot say what property or how much property to sell or encumber;
- iii. Cannot say when to sell;
- iv. Cannot say when the decision will be made.
- v. Cannot establish the price for which he or she is willing to sell;
- vi. Cannot establish the terms and conditions of the sale;
- vii. Cannot even say when they will have time to deal with the matter.

“I am gonna make them an offer they can’t refuse.” Vito Corleone, *The Godfather*, Dir. Coppola, Paramount, 1972.

- g. May be skeptical when told, “I’m from the government and you can trust me.”
- h. May strongly dislike any contact with lawyers and the legal system;
- i. Likely needs at least some legal advice, but may be reluctant to spend the money for a lawyer;
- j. Has an opinion as to the fair market value of their property;
- k. Doesn’t wish to spend the money to obtain an appraisal;
- l. Doesn’t want to pay capital gains tax or seek advice from a tax accountant;
- m. In some cases, is over-whelmed by the logistics of moving their home or business (see a. above).

“Of all the gin joints, in all the towns, in all the world, she walks into mine” Rick Blaine, *Casablanca*, Dir. Wallis, MGM ,1942.

7. Tenants, lenders, holders of other property interests such as easements, reversionary interests and ad valorem tax authorities.
 - a. Lenders will usually partially release, but they may want some or all of the proceeds.
 - b. Tenants may not have a legal right to receive a significant amount of compensation, but they may have a good argument for reduced rent or termination of the lease.
 - c. Remaindermen and easement holders, etc. What percentage of the property value is allocated to the reversionary interest or easement?
 - d. Ad valorem tax authorities may become involved for purpose of payment of any unpaid taxes on the property to be acquired.

8. Appraiser for the property owner.
 - a. Often cannot provide a report in time to avoid court proceedings;
 - b. Most property owners would rather avoid the expense;
 - c. In some states, may be paid by the public agency; and
 - d. Is often not trusted by the public agency.

“Louis, I think this is the beginning of a beautiful friendship.”
Rick Blaine, Casablanca, Wallis, MGM, 1942.

9. Engineers, architects, irrigation experts, contractors, and other expert witnesses.
 - a. These are most likely to be involved in partial taking cases, where the loss of value to the remainder is an important issue.

- b. They can provide foundational testimony or support for the appraiser's opinions, such as the lack of ability to enter and exit the property with a long truck after the taking, or the ability to irrigate a field before the taking.
- c. They can establish the cost to cure the problems created by the acquisition of part of the property, such as the cost to move an advertising sign, or the cost to grade and pave a new driveway.

"I don't know. I got fed this job by some lawyer."
Redfoot the Fence, *The Usual Suspects*, Dir. Singer, Spelling, 1995.

10. The law:

- a. **The Fifth Amendment to the United States Constitution:**
"nor shall private property be taken for public use, without just compensation".
- b. Your state Constitution, which likely adds the words "or damaged" to the protection: "The property of no person shall be taken or damaged for public use without just compensation therefore." Nebraska Constitution, Section 1-21.
- c. Applicable statutes.
 - i. Condemnation procedures;
 - ii. Public hearing requirements;
 - iii. Agency approval requirements;

d. Case law.

Just compensation “means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily ... as he would have occupied if his property had not been taken”

United States v. Miller, 317 U.S. 373 (1943).

- e. State land acquisition guidelines or regulations, promulgated by the lead agency. All local public agencies must have a federally approved Right of Way Manual, or must use the state’s lead agency guidelines, whenever any federal dollars are used. Those guidelines may apply to all projects. The Nebraska Dept. of Roads Right of Way Acquisition Guide for Local Public Agencies states that the main goal is for local agencies to not jeopardize federal aid funding, but also states that the guidelines must be followed at all times, regardless of funding.
- f. USPAP was originally developed in the 1980s as a result of the savings and loan crisis and the lack of standard appraisal practices that contributed to that crisis. FIRREA required all valuation work for federally regulated institutions to comply with USPAP. Most states and territories require virtually all valuation work to comply. Brokers’ price opinions, government employee appraisals and testimony by non-appraisers on the witness stand are typical exceptions.
- g. Uniform Appraisal Standards for Federal land acquisitions, the “Yellow Book”.

- h. Uniform Relocation Assistance and Real Property Acquisition Act;
codified in 1971 at 42 USC §4601 et seq., implemented at 49 CFR Part 24.

Among the requirements of the Act, an agency carrying out a project under the Act must:

- i. Follow the Act's appraisal and negotiations requirements;
- ii. Provide relocation advisory services to displaced occupants; and
- iii. Reimburse for moving and reestablishment expenses.

It is sometimes mistakenly overlooked when displacement and relocation are not involved. Any state or local project using any federal money is covered by the Act's appraisal and negotiations requirements.

- i. Internal Revenue Code;
- j. Jury Instructions (if applicable in your state);
- k. The elusive fair market value. "In an effort ... to find some practical standard, the courts early adopted, and have retained, the concept of market value ... (or) fair market value of what is taken." *United States v. Miller*, at 374

11. The Judge(s), who makes decisions of the law, and who may make factual findings and decisions on preliminary matters other than the amount of compensation.

12. Fact finders, such as a Board of Appraisers, a jury, an arbitrator, or judge.

"Mama always said life was like a box of chocolates. You never know what you're gonna get." *Forrest Gump*, *Forrest Gump*, Dir. Zemekis, Paramount, 1994.