



## **RVT30: Understanding and Reporting Market Values and Difference(s) in Value involving Conservation Easements, Partial Takings, DOT, Eminent Domain, & Federal UASFLA (Yellow Book)**

This applies to Appraisal "Best Practices" for the FEDERAL RULE in all cases and maybe some state rules depending on the jurisdiction. This is the ASFMRA best practices recommendation, and it is up to the appraiser to consider what liability they wish to incur. Remember The appraiser is not the judge, not the jury and not the trier of fact but they are the "responsible party" in the transaction of reporting the opinion of the "Difference".

### **Background**

When a governmental entity takes private property and its associated rights for public use, it is referred to as the process of "Condemnation" with its (the governmental entity) exercise of the Power of Eminent Domain. That governmental entity must pay at least Market Value for that taking, as reinforced by case law in both Federal and State decisions. When the taking is less than the whole property held by a private citizen, the taking is referred to as a "partial taking". The difference in the Market Value "Before" the taking and the Market Value "After" the taking is commonly the amount to be paid to the landowner, again as set out and reinforced by case law and precedent.

For clarity, appraisers report their opinion of Market Value "before project influence" of the taking and "after with project influence" with the taking. The appraisal education and methodology prepare an appraiser to determine his or her estimate (opinion) of Market Value. There is no accepted appraisal education or methodology within the profession to support or give guidance to an appraiser for making a determination of Just Compensation. Simply, the acquiring agency determines just compensation, and ultimately only the "trier of fact" can determine Just Compensation, being the:

1. Judge
2. Jury, or
3. Commission in some states.

The appraiser is not one of the three.

Most of the current controversy stems from a few States where their law says the correct "answer" should be labeled something other than the "Difference". States falling into this category are few, and that position should not be the norm for ASFMRA's education, nor should that dictate accepted methodology within the profession.



## Discussion

As stated in Eaton and subsequent texts (emphasis added):

*The ultimate objective of a condemnation trial is ascertaining just compensation, but this determination is not made by an appraiser. An appraiser is allowed to express an opinion, rather than testify only to factual matters, because the appraiser is an expert witness<sup>1</sup>.* According to Black's Law Dictionary, 10th Edition, an expert is "[s]omeone who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder." Both appraisers and attorneys must recognize that *appraisers are experts in estimating value, not determining just compensation.* The latter function rests with the trier of fact. While appraisers should recognize that there are occasions when market value is not the best measure of just compensation, those occasions are rare. The burden of determining whether there is a better measure of just compensation than market value should not be placed on an appraiser by the client or the client's attorney. If the client's attorney suggests that a type of value other than market value would be a more appropriate measure of just compensation under the circumstances of the case, the appraiser should reject the suggestion, unless it is converted into a written legal instruction with adequate supporting authority. *Appraisers who attempt to determine just compensation, instead of analyzing value, are usurping the right and responsibility of the trier of fact.* *Appraisers should make it clear that their opinions relate to value rather than to just compensation.* If an opinion of value is of an instructed type of value, rather than market value, the appraiser must make that clear in both the appraisal report and in testimony and specifically define that value. To do otherwise would be misleading.

The appraiser is providing a service and work product (appraisal) that is allowing the client and/or intended user(s) to make some sort of decision or support for an action. In the case of acquisitions of the defined property rights, in predominantly partial interests, the agency or trier of fact is considering the provided market values showing a difference between the two, to the affected owner.

Initially, just compensation is determined by the agency, if negotiations fail then a trier of fact will determine the amount based on a starting point of the fair market value of the property rights or interests being acquired or damaged. Just compensation can be the same as the reported opinion of market value or it can be something different depending on how the agency or trier of fact determines it.

UASFLA states:

1.2.3: the intended use of the appraisal is one of the most important elements of the problem identification process. In most assignments, the intended use of the appraisal

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<sup>1</sup> Real Estate Valuation in Litigation, J. D. Eaton, Appraisal Institute, Page 19



is to assist the client agency in its determination of the amount to be paid as just compensation for the property rights acquired or to be conveyed.

1.2.4: in all assignments for federal acquisitions under these Standards, the type of opinion to be developed is market value.

Just compensation is measured by the market value of the property taken based on case law. The appraiser's function is to assist the agency/trier of fact in the determination of just compensation by furnishing an opinion of market value.

Essentially (2.3.1.4) the appraiser does not certify items that are beyond the scope of the appraiser's assignment (e.g. certifying an opinion of just compensation).

Some local and federal jurisdictions suggest or maybe even require certification verbiage as follows:

*"that my opinion of just compensation for the acquisition as of the \_\_\_\_ day of 20\_\_\_\_, is \$\_\_\_\_\_ based upon my independent appraisal and the exercise of my professional judgment."*

In the case of the above, the appraiser is certifying the "just compensation" which an appraiser cannot do since they do not determine just compensation, the appraiser only determines a credible opinion of market value that will be used by the client to determine just compensation. The only item that the appraiser can certify is the before and after values and the difference between those values. The appraiser cannot certify the results of an unknown, such as just compensation.

In consideration of other valuations and appraisals, the appraiser does not certify for other uses, such as in lending. The intended use is usually for credit decisions, lending decisions, collateral determination, etc., yet the appraiser does not put in the report that it is "credit decisions" that is noted as the purpose, or in the case of litigation, wherein the intended use is for determining damages, if any, or determining compensation for one or more of the parties that are involved in the litigation. In most cases, the appraiser provides a credible opinion of market value or in some cases a different type of value, as noted and defined, besides market value. The appraiser is providing such market value, whether singular or showing differences between before and after values for the client and intended users to make a credit decision, mortgage, provide litigants or triers of fact a basis for decision(s), estate tax reporting, easement acquisitions, etc. If an appraiser is labeling the difference between market value as "just compensation" or any other similar type of verbiage other than the difference, they are deviating from the purpose of the appraisal which is providing a credible opinion(s) of market value.

For an appraiser to "give an opinion of just compensation" is tantamount to an appraiser giving an opinion to a lender that a certain loan amount should be made on the property or giving an opinion on an industrial building or rural property "as an opinion of price to pay" or giving an opinion of the damages inflicted by a third party on all or partial of the property rights impacted.



The appraiser has one assignment and that is under the purpose of providing a credible opinion of market value or other as defined value, so stated, that is credible, reliable, and accurate.

Therefore, when an appraiser labels the result of the two appraisals ("before" and "after") for a federal taking or acquisition, the UASFLA clearly states that exercise should be reported as follows:

Before Value:	XXXXXXX	first appraisal
After Value:	YYYYYYY	second appraisal
Difference:	ZZZZZZZ	mathematical difference

Most of the current controversy stems from a few States where their law says the correct "answer" should be labeled something else other than the "Difference". There are only a few states, and that position should not be the norm for ASFMR's education which should simply state that some states have a different requirement. There are two main points that need to be considered:

1. Any appraisal completed under the federal umbrella (UASFLA or "yellow book") must clearly use the "Difference" label (UASFLA Course Problem #29 Answer, The Appraisal Foundation), and
2. Most of the States have condemnation laws like federal taking procedures, i.e., there are some forms of "before" versus "after" procedure that are mandatory.
  - i. Some states have included additional requirements for components, e.g., temporary easements, or land improvements, and
  - ii. Some states have adopted positions like, "we have to pay the landowner something". **However, that is NOT the decision or responsibility of the appraiser.**

Based on the opinion of market value's difference; "an agency official must make the estimate of just compensation to be offered for the property, which amount may not be less than the amount established in the approved appraisal report as the fair market value for the property." The difference between a before and after opinion of market value is composed of several items; being the take (or acquisition), any damages (or depreciation), and special benefits (depending on jurisdiction).

Various jurisdictions, state and local governments, have additional requirements for consideration, whether it is with special benefits, temporary easements or use, that need to be considered. Clearly, valuation situations involving a partial taking are reflective of the difference between the before and after market value of the rights acquired.

Lastly, the allocation of the various impacts to the property rights being acquired, more so in the acquisition of partial interests in real property, usually has the client needing an allocation of the difference between the before and after value. The allocation or summary of conclusions



basically takes the items that make up the difference between the before and after market values which is more of an accounting tabulation that is not indicative of appraisal method employed.

In the end the appraiser only states an opinion of market values and the differences between them and certifies as such.

### Temporary Construction Easements/Permits

Temporary construction easements and permits (TCE/TCP) are temporary use of the property for a specific time period during construction along with an extended period of non-use due to needed repairs or reclamation at the site.

Most agencies have an accounting formula to address some minor TCE/TCP use with others needing more of an analysis based on further market supported rent and other data from the area market.

### Summary

For the ASFMR instructors and developers, the following apply:

1. The appraisal report shows the before and after values and the difference between each of the values labeled as "Difference"
2. The appraiser does not determine just compensation. The appraisal report should note that the intended use is to assist the client with an independent estimate (opinion) of Market Value to assist in determining Just Compensation in the described acquisition. The appraiser is only to report the difference, not just compensation.
3. The appraiser does not certify "just compensation", the appraiser only certifies the before and after values and the resulting difference between those two values.
4. No other verbiage besides the use of the word "Difference" will be connected with the appraiser's purpose of determining market values and the difference(s) between each.
5. Allocation of the components, as requested by the client, are to be labeled and noted as an "accounting tabulation".
6. Temporary construction easements and permits are outside, unless proven otherwise within the market for such rights, of the difference indicated by the before and after value.