

EMINENT DOMAIN ALERT

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New Ohio Decision Clarifies Role of Judge and Jury in Eminent Domain Cases

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As a general rule, injuries that are shared in common with the general public are not compensable under Ohio eminent domain law. Ohio's 4th District Court of Appeals recently ruled that the question of whether an injury is shared in common with the general public, and therefore non-compensable, is an issue of law for the judge to decide, rather than an issue of fact for the jury to decide.

In *Wray v. Wessell*, 2016-Ohio-8584, a highway project by the Ohio Department of Transportation (ODOT) resulted in the appropriation of a part of the property at issue. The property owner's appraiser based his opinion of the value of the part of the property remaining after the appropriation, known as "the residue," on — among other things — increased noise and diminished view caused by the project.

ODOT objected to the introduction of evidence relating to these factors on the basis that any damages caused thereby are consequential in nature, which the law provides are non-compensable because they relate to injuries shared in common with the general public. Under well-settled Ohio law, items such as noise, dust, vibration, circuity of travel to access a property, and loss of traffic volume in front of a property are not compensable because a property owner is considered to share those inconveniences in common with the general public.

In response, the property owner argued that the jury could properly hear evidence of increased noise and diminished view because those injuries were directly related to the actual taking of the property. The property owner further argued that it was proper for the jury to hear the disputed evidence in the course of calculating the fair market value of the residue after the taking because the law provides that the jury may consider every factor that a prudent businessperson would consider in determining whether to purchase the property.

The trial court ruled in favor of the property owner, permitting the introduction of the disputed evidence. However, the court of appeals reversed, finding that relevant Ohio eminent domain jurisprudence supported ODOT's position that the trial judge, rather than the jury, must be the one to make the determination as to whether a particular injury to the residue is shared in common with the general public.

The 4th District's decision is likely a just result. In an eminent domain case, the jury's function is only to assess the value of the property taken. If the jury were to hear evidence that the taking imposes on the property an injury that may be non-compensable under the law, there is a risk that the jury's assessment of value might be inflated, even if the jury were to ultimately determine that the injury is non-compensable.

A business affected by eminent domain should consult with qualified counsel prior to finalizing and producing its appraisal report to an appropriating authority, such as ODOT, in order to ensure that the report does not improperly rely upon non-compensable factors.

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