This Land is Your Land, This Land is My Land: A Case Study on Eminent Domain and Under Compensation

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Abstract
The Fifth Amendment of the United States Constitution states “private property [shall not] be taken for public use, without just compensation.” Land is deemed viable for eminent domain when it will be used by the public or if the public will have the opportunity to use the property taken. Such uses can include public access for a post office, airport or highway. Since its inception there is often debate about the interpretation of just compensation. Both federal and state constitutions have a public use clause, however not all states have a just compensation clause.

Keywords
Cornell, real estate, Eminent Domain, under compensation, constitution, land valuation, development, landowners, public use, private use, North Carolina, Porttown, Cape Fear, Cape Fear River, just compensation, historic district, regional planning, zoning, restaurant, lease renewal, strip mall, occupancy, Effective Gross Income, EGI, land seizure, Metropolitan Planning Organization, MPO, traffic planning, Strategic Transportation Investment Law, North Carolina Department of Transportation, NCDOT, holdout, land assembly, highway, fair market value, grandfather clause, subjective premium, consumer surplus, subjective value, permitting, 3J tax credit, business grant, vehicle capacity ratio, comparable sales, parcel layout, traffic pattern, traffic volume, lease, renewal

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This Land is My Land:
A Case Study on Eminent Domain and Under Compensation

By: Annamaria Lookman
This case study incorporates the following real-estate themes and issues:

- Due diligence process
- Underwriting
- Land valuations
- Eminent domain
- Just Compensation

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A Case Study on Eminent Domain and Under Compensation

**Abstract**

This case introduces students to issues regarding real estate and eminent domain. Through the prism of a small business owner named Joe Shoe, this case study will examine the following topics: due diligence and its process, underwriting, land valuations, eminent domain and just compensation.

Shoe’s experience will begin with his purchase of a shopping center. As the case progresses, Shoe learns that the city intends to seize a portion of his newly purchased property to widen a highway. Students will evaluate what Shoe’s choices are when faced with an eminent domain declaration, as well as consider the city’s point of view.

The implications for the development project on Shoe’s business, neighboring businesses, and the city at large will all be considered and evaluated with regard to the economic and social costs imposed. Shoe’s commercial, financial and legal options as well as the decisions he makes will be examined each step of the way during the city’s process of acquiring his land via eminent domain.

This case will pose and enable readers to evaluate the following questions, particularly in the case of Mr. Shoe:

- Are the policies of eminent domain enacted with a sufficient level of consistency?
- Do state and local governments consider the full scope of the impact of eminent domain on business owners and society?
- What differences exist in legal interpretations of eminent domain across state borders?
“Nor shall private property be taken for public use, without just compensation.”
- 5TH AMENDMENT, U.S CONSTITUTION

Executive Summary

- The following discusses eminent domain and the issue of just and under compensation.
- Additionally, land valuation calculations and potential development considerations are presented.
- The case suggests that government compensation to landowners in eminent domain cases is at best inadequate.

The master plan concept supports the following potential development program:

- Residential Flats: 210 units
- General Office: 73,800 sq. ft.
- Medical Office: 124,800 sq. ft.
- Mixed-use Buildings: 649,600 sq. ft.

Perspective illustration looking southwest along Market Street at Kerr Avenue

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Author

Annamaria Lookman graduated from The University of North Carolina at Chapel Hill with a Bachelor of Arts in Management as well as a Bachelor of Arts in Psychology. During her undergraduate tenure and after graduation, she managed the multimillion dollar commercial and residential real estate holdings of Johny kite LLC, including the redevelopment of shopping centers and development of mixed used retail space. Annamaria simultaneously started her own small business, a jewelry and accessory boutique named Mod. Most recently, she has renovated a retail space into a bar. She served as the contractor and designer for the project and helped establish the business. Annamaria has also been active in philanthropic endeavors as a member of her local Rotary International chapter and is a Paul Harris Fellow. This has included spearheading an international service project that brought potable water to a remote village in the South American country of Guyana. As the leader of this project, Annamaria secured the largest financial commitment for an international project in her chapter’s history. Upon completion of a real estate master degree at Cornell University, Annamaria plans to continue her career in real estate investment and development.
Eminent Domain

The Fifth Amendment of the United States Constitution states “private property [shall not] be taken for public use, without just compensation.” Land is deemed viable for eminent domain when it will be used by the public or if the public will have the opportunity to use the property taken. Such uses can include public access for a post office, airport or highway. Since its inception there is often debate about the interpretation of just compensation. Both federal and state constitutions have a public use clause, however not all states have a just compensation clause.

One of the main controversies surrounding these interpretations is the true meaning of just compensation and how that is determined. Supreme Court decisions concerning eminent domain have become increasingly confusing and often inconsistent. As a result, the amount offered as “just compensation” has reduced significantly over recent decades and has all but forced citizens to seek legal representation to navigate the confusing process.

History of Just Compensation

The concept of “just compensation” in the United States dates back to the Seventeenth Century. However, the first federal court case involving eminent domain did not appear until 1875.

Property may be obtained almost immediately through eminent domain. Its use avoids the time and resources involved in bargaining versus purchasing land through the open market. Although seizure can take place immediately, the date of use or construction can be ambiguous and inconclusive. This ambiguity adversely affects the value of the surrounding land.

Porttown Background

Citizens have flocked to Porttown, North Carolina for the beach, mild climate, and historic downtown riverfront, and it has become the epitome of New South. It is a coastal town bordered by the Atlantic Ocean on the East and the Cape Fear River on the West. It retains small town character while simultaneously attracting global corporations such as GE Hitachi Nuclear Energy, Corning, Verizon Wireless and Pharmaceutical Product Development (PPD).

The greater Porttown area generates more tourism revenue than any other city in North Carolina. It has a historic downtown district and is close to many Civil War sites, such as Fort Fisher. It is home to the battleship USS North Carolina and has three pristine beaches within a twenty-minute radius. USA Today also voted its riverfront ‘Best American...."
Riverfront’. Hundreds of film and television productions have been filmed in the area, and the city is also host to an internationally acclaimed film festival.

**Market Street Background**

Market Street, one of only three thoroughfares that go North-to-South through Porttown, was first paved as an 18 foot wide road in 1927. It was later widened to 36 feet in 1940. Today, approximately 2.5 miles of the road remain only 36 feet wide, while the remaining length has been expanded to 59 feet wide. The 4300 block leading towards Kerr Avenue now serves over 47,000 vehicles daily.

The majority of Market Street is a five-lane major arterial with two travel lanes in each direction, and a center lane used as a two-way turn lane (Exhibit 1). According to studies in 2004, all of Market Street functioned at an unacceptable level of service (LOS) of F based on federal standards for volume to capacity ratios (Exhibit 2).

Market Street functions as an entrance corridor to a historic downtown and leads to major commercial and service destinations for both city residents and regional shoppers. Additionally, it functions as a thoroughfare between two neighboring counties. It also connects two roads that lead to a state university, as well as Portville Beach, a popular tourist destination.

The land use patterns along the road are varied and include historic residential neighborhoods with homes dating to the 1910s, aging suburban strip developments, big box super centers and heavy commercial. It also holds the highest concentration of hotels in the county along the road.

The zoning along Market Street contains approximately 4.4 miles of continuous Regional Business (RB) zoning. No other zoning district makes up more than 15% of zoning along the road. The city believes that this is the most inappropriately zoned area in Porttown because it allows for the most intense and greatest variety of uses. Voluntarily downsizing on RB zoned properties in the area seemed unlikely. Property owners who would not want to give up redevelopment options for their land would heavily oppose changes to this zoning.

In 2005 and 2006, Martin Luther King, Jr. Parkway and I-140/US 17, were respectively completed and helped to significantly reduce through-traffic on Market Street. The city, however, still believed traffic to be a problem.

**Owner Background**

Joe Shoe was the epitome of the American Dream. He and his wife immigrated to the United States in the 1980s when they were teenagers. He worked three jobs and put himself through university, graduating top of his class. He left a well-paid corporate career for the opportunity to open an Italian restaurant in North Carolina with his brothers-in-law. The restaurant opened its doors in Porttown in 1986 in a shopping center situated at the intersection of Market Street and Kerr Avenue. It became a local staple and fixture of the community. His brothers-in-law went on to open fifteen other family-owned restaurants across the state.

Shoe had always been on good terms with Frank Farrish, the owner of the shopping center where Shoe’s restaurant was located, and over time the two developed a friendship. Farrish was aging and decided to sell the shopping center and move to California to be closer to his children and grandchildren. In 2006, Farrish told Shoe that he planned to sell the shopping center and would give Shoe the right of first offer.
The shopping center had a 5% vacancy rate and had not undergone major renovations since its construction in the late 1960’s. The set price was $2.31 million and seemed in line with comparable building sales (Exhibit 3). Shoe did not have much time to make a decision. He had never made such a large purchase. Was this a fair price for the property? Should he risk making a counter offer? Shoe was also worried about how he would finance such a large purchase. Bank lending terms seemed to be loose; should he try to get a loan? Would Farrish provide seller financing? Would that option allow more flexible loan terms? Perhaps Shoe could finance the purchase with his savings? (Exhibit 4)

Besides the financial aspect, Shoe had to consider what would happen if he decided not to buy the property and what impact a new landlord would have on his business. The predictability of his business supported him and his family; should he pass on buying and risk a potentially adverse relationship with a new owner? Shoe currently had five years remaining on his lease, what if the new owner would not renew his lease?

The adjacent parcel (B) was also for sale (Exhibit 5). The strip mall on the parcel abutted Farrish’s strip of retail, had a larger footprint, greater leasable square footage and had a 17% vacancy. The seller of Parcel B was asking for $2.5 million. Shoe was conflicted. Though he would get more property for the money, much of the leasable square footage of Parcel B was hidden from the main road. If tenants in the back units did not renew their leases, releasing the backspaces would be difficult. Which parcel should he purchase? Should he purchase both properties and merge the parcels?

Life After Purchase

Shoe decided to pay the full price with owner financing and became a landowner. The purchase was finalized at the end of 2007. Shoe began renovations and spent hundreds of thousands of dollars to “put lipstick on a pig”. Soon the shopping center was fully leased and was able to realize a 30% Effective Gross Income (EGI) increase.

Four years later, in 2011, Shoe received a notice for an exploratory meeting to expand Market Street, the highway where the shopping center was located. The city government had identified the corridor for potential expansion to seven lanes, including a median. In order to widen the road, the government would need to seize a portion of Shoe’s property.

The new routing and expansion of Market Street posed big problems for Shoe. After the condemnation, he would no longer have enough space on his property to expand his building and comply with the 30-foot setback requirement. The proposed median would also cut off all direct access to the shopping center. Drivers would have to go a mile up the road to the nearest turning point and drive back up the other side (Exhibit 6). Additionally, if there was ever a fire that damaged the shopping center, Shoe would not be able to build to the same footprint.

It was not the first time that Shoe had heard the city’s plans for expansion. The Market Street expansion had been included in the city’s long-term development plans for over two decades. Thus, when almost a year passed without any city correspondence, Shoe assumed the exploratory and planning meetings had once again failed, until Shoe received attorney letters in the mail. The city never made Shoe or neighboring business owners aware of the process or intentions and often shared inaccurate information about the timing of the project.

The city announced an official expansion in 2011 but had not sent a North Carolina Department of Transportation (NC DOT) representative to appraise the property in over a year. Shoe received a check for $263,007 with virtually no say in the amount of land seized, explanation of the process, or timeline for construction.

Shoe sought legal representation and the appraisal was disputed. Shoe ordered a new appraisal and found just compensation to be almost three times the original offer.
Porttown’s Point of View

Mike Kelly was the transportation-planning manager of the city Metropolitan Planning Organization (MPO). The MPO looked at the North-South capacity in the city and region. The North-South capacity was an indicator of the number of those driving from the northern part of the city to the southern part of the city. Based on current capacity it was clear the city needed to develop solutions to solve the North-South capacity problem.

Currently, there were only a few continuous routes that went from the Northern section of the city to the Southern region: College Road, Third Street, and Kerr Avenue to a certain point. Looking at the travel demand model and how cars move throughout the region he had identified a need for the additional North-South capacity. To achieve this, Kerr Avenue would have to be widened. When Kerr Avenue widened to the projected 2035-level measurements, there would still be a need to expand in order to meet traffic demands.

The model is used to forecast traffic in the region over a twenty-year period and is updated periodically. It examines volume on existing roadways and projects growth over a given period. It also focuses on land use and where anticipated growth will occur, while travel and traffic varies in given areas. Kelly projects where the city anticipated growth to occur. That information is compiled and put into the model, which shows what traffic levels are projected to be in 2035.

North Carolina recently enacted the Strategic Transportation Investment Law in which projects identified as high priority and fiscally constrained for the long-term are submitted to the NC Department of Transportation. The NC DOT then prioritizes the projects for funding and constructs the project. The MPO does the long-range planning. The NC DOT implements planning efforts and incorporates public involvement through the design process.

The Market Street Corridor plans were formalized in 2004 in the city’s development service report. The report stated the city’s desire to make the road more attractive, less congested, and to reduce generic strip commercial developments. However, they knew change would be gradual, and that strategies for public investment toward the enhancement of corridor aesthetics were costly.

Without financing tools such as tax increment financing, state and federal grants, and revenues, the city would have to pay for many of these improvements. The NC DOT agreed to provide funding for road improvements in the area, although the city knew that it could not expect the NC DOT to fully fund all of the improvements.

The city began controversial regulatory approaches along the corridor: the elimination of pole signs, architectural standards for buildings, and downzoning strips between commercial nodes. These regulations created significant challenges to older commercial areas along Market Street, built under older, more lenient regulations. The City used the Future Land Use Plan to ensure that such concessions would not be made again and depended on the private sector to drive redevelopment.

In the past, the city had experienced halted projects due to public outcry. However, these projects were under different laws and an outdated formula for fund allocation. Kelly said, “It was a different day in North Carolina.” New laws would not allow a similar outcome.

In order for construction to take place, the State must identify a preferred corridor. Once identified, a record of decision must be signed and a road redesign must be completed. The State then partners with utility companies to relocate and adjust utilities. Once all of these steps are met, construction can commence.

Shoe understood that the intersection and roadways needed improvement. He also knew the effects of the project would be devastating on neighboring properties.
A Necessary Evil?

Eminent domain contests the “holdout problem” caused by strategic holdout sellers. The state would confront a holdout problem in cases involving the assemblage of multiple pieces of land for a single project, such as a highway. Shoe knew his property was necessary for the entire project, and could “hold out” on selling it in order to secure an inflated price for it. This strategy often occurs in private acquisitions and could prevent the transaction and, consequently, the entire project, from occurring.

Since there is no standard mechanism for determining how much existing owners actually value their property, courts routinely ignore actual value, and instead rely on the “fair market value” of damages to determine “just compensation” for the condemnee’s loss. However, market value does not calculate nor compensate the actual value to the existing property. The State often undervalues property or does not take into consideration the effect on value of the remaining property when a section is taken by eminent domain.

Under-compensation

Eminent domain is coercive in nature. Its power exists to prevent individuals from thwarting theoretically beneficial projects by forcing those individuals to sell when they otherwise would not, either because they wish to retain the property for personal reasons or because the condemner is offering less than the owner’s asking price.

The coercive nature of eminent domain is sometimes justified on the grounds that the government must pay “just compensation” when it takes property. As a result of the just compensation requirement, eminent domain, in theory, represents “an equitable compromise between the needs of the public and the rights of the individual.”

The Supreme Court has decided that just compensation equals “fair market value,” that is, “what a willing buyer would pay in cash to a willing seller at the time of the taking.” However, a major shortcoming is that Shoe, by definition, is not a willing seller.

5 Richard A. Epstein, Holdouts, Externalities, and The Single Owners: One More Salute to Ronald Coase, 36 J. L. & E. 553, 572 (1993) (stating that eminent domain is used “typically to prevent holdouts”); Thomas Merrill, Rent Seeking and the Compensation Principle, 80 NW. U. L. REV. 1561, 1570 (1986) (book review) (pointing out that eminent domain “traditionally has been employed to promote a more efficient allocation of resources by overcoming holdouts and free riders”); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 41-42 (2d ed. 1977) (maintaining that eminent domain power is justified in economic terms only in the context of certain holdout situations); see also infra note ___ (citing cases).

6 Steve P. Calandrillo, Eminent Domain and Economics: Should “Just Compensation” Be Abolished and Would “Takings Insurance” Work Instead?, 64 OHIO ST. L.J. 451, 468 (2003) (“The dilemma stems from the fact that the state may need to buy multiple small properties, all of which are essential for full development of a single large-scale project. However, public knowledge of this fact puts the government at a severe disadvantage when it steps up to the negotiating table.”); see also EUGENE SILBERBERG, PRINCIPLES OF MICROECONOMICS 288 (2d ed. 1999) (describing the classic “hold-up maneuver” if existing homeowners discover the developer’s plan).

STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124-25 (2004) (“[T]he problem of an impasse in bargaining may become severe when there are many private owners who own parcels and when, if any one of them does not sell, the whole project would be seriously affected or halted.”).

8 Glen O. Robinson, On Refusing to Deal With Rivals, 87 CORNELL L. REV. 1177, 1994 (2002) (“By assumption, subjective value has no reliably objective measure, which is the conventional justification for excluding it from eminent domain compensation.”); Steven M. Crafton, Comment, Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation, 32 EMORY L.J. 857, 891 (1983) (noting that it is “virtually impossible for a court to ascertain objectively the condemnee’s subjective valuation of the property in order to award just compensation”).


10 Matter of Larsen, 616 A.2d 529 (Pa. 1992) (“Because value is an inexact, highly subjective concept, the Supreme Court has adopted the relatively objective concept of market value at the time of the taking as the just and equitable guideline for measuring just compensation.”); see also Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4, 62 (1987) (“Ideally, the state should be required to pay not the market value, but the subjective value that the individual attaches to the property. Because the latter is difficult to determine, courts have moved to the market value standard.”).

11 Munch, supra note 1, at 474 (stating that eminent domain “is effectively a reassignment of property rights: the seller is deprived of his right to refuse to sell and constrained in his right to bargain over price.”).

12 Gideon Kanner, Condemnation Blight: Just How Just Is Just Compensation?, 48 NOTRE DAME L. REV. 765, 772 (1973) (stating that “the open use of the power of eminent domain is involved to deprive the owner of an otherwise legally protected economic advantage”).


16 Krier & Serkin, supra note 21, at 866; see also Fennell, supra note 149, at 963 (“Most property owners value their property above fair market value.”).
Further, in North Carolina, if only a portion of a property is seized, just compensation is determined by establishing the difference in value between the fair market value at the time of seizure and the property value after the project has been completed. Shoe received $263,007 for his property but the true appraised value is three times that amount.

In this case, after construction, the land may be worth more but the building lost considerable value. The shopping center would lose one-fourth of its parking spaces and the building would no longer be up to code. Though the property would be grandfathered, it would prevent Shoe from carrying out any potential renovations or expansions. The loss of parking made the shopping center less desirable to new tenants. Additionally, eminent domain fails to compensate a property owner for his loss of the autonomy to refuse to sell at any price, even at a price exceeding his own valuation of the property.17

Subjective Premium

The terms “subjective premium” and “consumer surplus” refer to the value an owner places on his property that exceeds its opportunity cost.18 This premium may include sentimental attachment, unique suitability of the property to the owner’s needs, relocation costs, attorneys’ fees, lost business revenue, and a number of other considerations. For Shoe, there was unique suitability of the property to his needs; Shoe’s restaurant, and main source of income, was located in the shopping center. This was one of the main reasons he bought the shopping center.

Additionally, Shoe did not receive an “average reciprocity of advantage” on neither a narrow nor broader level.19 This term refers to the possibility that Shoe may derive some reciprocal benefits from the condemnation. In other words, this is the measure of whether Shoe might directly or indirectly benefit from the taking.

The compensation requirement is said to provide an essential check on government power: by forcing local officials to internalize the cost of a taking, the just compensation requirement must prevent abuse20 and overconsumption of property.21

Under-compensation allows the government to avoid internalizing the full cost of a taking, operating under the “fiscal illusion” that the property is worth less than its true value.22 For example, because the government need not consider subjective value in

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17 Fennell, supra note 149, at 966–67. Fennell analogizes this autonomy to “holding an option—the capacity to wait on unfolding conditions to decide when one wishes to sell.” Id. at 967.

18 Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 735 (1973) (“There is a minimum price at which any person would voluntarily exchange any item of his property. The excess of this subjective value over market value is termed ‘consumer surplus.’”) (quoting Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 349 (2000)); Kochan, supra note 90, at 79–80. As a result, governments may not internalize any of the costs in acquiring property by

19 333. See Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. REV. 741, 768 n.84 (1999) (noting that the term “average reciprocity of advantage” was first used by Justice Holmes in Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922), and later in Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

20 Heller & Krier, supra note 30, at 999 (contending that “the obligation to pay compensation can constrain government inclinations to exploit politically vulnerable groups and individuals’); see also Garnett, supra note 294, at 951; Glynn S. Lunney, Jr., Compensation for Takings: How Much Is Just?, 42 CATH. U. L. REV. 721, 723 (1993).

21 William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law, 17 I. LEGAL STUD. 269, 269–70 (1988) (arguing that the compensation requirement has the effect of “disciplining the power of the state, which would otherwise over expand unless made to pay for the resources that it consumes’); see also Garnett, supra note 294, at 951; Christopher Serkin, The Meaning of Value: Assessing Just Compensation for Regulatory Takings, 99 NW. U. L. REV. 677, 725 (noting “the assumption that forcing the government to pay compensation will have some deterrent effect on its willingness to act’”). Public choice theorists, however, contend that the compensation requirement does not deter overconsumption of property. Under public choice theory, legislators are said to respond to political incentives, including political support, votes, contributions, and less legitimate benefits, rather than fiscal constraints. See Garnett, supra note 294, at 956 (quoting Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 349 (2000)); Kochan, supra note 90, at 79–80. As a result, governments may not internalize any of the costs in acquiring property by eminent domain. This is particularly true given the intense competition among municipalities seeking to attract developers. See Garnett, supra note 294, at 956–57. The desire to lure investment may more than overcome any brake imposed by the prospect of compensation. If so, this suggests even greater risks of abuse and inefficiency, as even the minimal limitations imposed by the present undercompensatory scheme would seem to have little impact on land acquisition.

22 Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CAL. L. REV. 569, 621 (“Fiscal illusion arises because the costs of governmental actions are generally discounted by the decision-making body unless they explicitly appear as a budgetary expense.”).
determining its cost for acquiring a given property, it may embark on projects in which the wealth created in the hands of the transferee pales in comparison to the subjective value of the property in the hands of the original owner. Because subjective value is by definition non-transferable, it is destroyed upon transfer. Thus, a government entity disregarding subjective value may actually destroy more wealth than it produces.

Local Law Perspective

The law of eminent domain, especially in North Carolina, does a poor job of meting out justice. When a property owner of any property type realizes that they are going to have to deal with eminent domain, most believe they will receive just compensation. Shoe believed that he would be made whole; he would be in as good of a position at the end of the process as he was before the eminent domain process began. Many contest that just compensation rarely happens and there are major shortcomings in the law of eminent domain.

North Carolina is one of the only states that does not have a “just compensation” clause in its state constitution. The State, however, has a “law of the land” clause and the North Carolina courts have interpreted that as requiring just compensation in the event of a government taking.

The government determines the need of property for public use (i.e.: transportation, school, hospital or park). This can also be done by a quasi-governmental entity such as a public utility company. The government or entity is expected to take the least amount of land necessary for public use. Property must be appraised and the owner must be paid for the land’s highest and best use. This payout, however, fails to recognize real losses incurred by the property owner.

To determine just compensation, property is valued at one instance before seizure through eminent domain and again after its completion. The difference between these values is the amount of just compensation awarded. This method is problematic because it disregards all of the damages and costs the property owner is responsible for while the project is under construction. Project completions are notoriously behind schedule and can span a decade from start to finish. In North Carolina this can mean profit loss for a property owner that cannot be recouped. To date, only Texas and Florida require that a business have been in existence at the same location for a minimum of five years to be compensated for a loss in profits. This clause, known as “damages to a going concern,” is limited to these two states, but would likely serve property owners well across the United States.

The Next Step

Utility relocation started in 2014 and construction began in 2015. Shoe was forced to make the best of an inevitable situation. He sued for the full appraised value of his property and began thinking about his options for the future. He knew that Porttown’s master plan preferred the redevelopment of Shoe’s entire lot. Shoe thought again about buying the adjacent property. Perhaps now was the time to buy.

Shoe thought if he waited until construction began to place a bid, he might be able to make a below market offer the seller would likely accept. Combining both parcels would allow Shoe to tear the buildings down and construct the type of new development the city

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23 Fennell, supra note 149, at 964; Merrill, supra note 129, at 83–84.
24 Fennell, supra note 149, at 964.
25 See id. at 964–65; see also Merrill, supra note 129, at 83–84.
wanted to see. This would also make the permitting process easier, and if he timed it right he could even get city financing. The city actively engages in offering financial incentives to promote desirable development, such as 3J tax credits, community development block grants, and minority business development grant.

New ground-up development would be a huge undertaking and Shoe was not very experienced in development. Shoe needed to decide if he should try to tackle the development by himself or partner with the neighboring landowner as a joint venture.

Seeking legal action to support his appraisal, and considering financial incentives from the city to support his decision-making, afforded Shoe the opportunity to obtain an outcome that he deemed fair. Unfortunately Shoe’s case is all too common among small business owners in North Carolina regarding eminent domain. Shoe’s case illustrates the need for clarification and legal reform, specifically for just compensation.
V/C ratios can be correlated to roadway Levels of Service (LOS), which place roadway segments into six letter grade levels of the quality of service to a typical traveler on the facility. An “A” describes the highest level (least congestion) and level “F” describes the lowest level (most congestion). Levels of service can be grouped into the following categories.

- **LOS A or B** – Well below capacity (V/C = less than 0.5) – Roadways operating with a V/C ratio less than 0.60 operate at optimal efficiency with no congestion during peak travel periods. This level of service usually occurs on rural or local streets.

- **LOS C** – Approaching capacity (V/C = 0.50 to 0.65) – As the V/C nears 0.8, the roadway becomes more congested. A roadway approaching capacity may operate effectively during non-peak hours, but may be congested during morning and evening peak travel periods.

- **LOS D** – At Capacity (V/C = 0.65 to 0.8) – Roadways operating at capacity are somewhat congested during non-peak periods, with congestion building during peak periods. A change in capacity due to incidents impacts the travel flow on corridors operating within this V/C range. LOS D is the MPO target service level.

- **LOS E** – Slightly Over Capacity (V/C = 0.80 to 1.0) – Roadways operating with V/C ratios between 1.0 and 1.2 experience heavy congestion during peak periods and moderate congestion during non-peak periods. Changes in capacity can have major impacts on corridors and may create gridlock conditions.

- **LOS F** – Well Over Capacity (V/C = greater than 1.0) – Roadways in this category represent the most congested corridors in the study area. These roadways are congested during non-peak hours and most likely operate in stop-and-go gridlock conditions during the morning and evening peak travel periods.
### Exhibit 3. Comparable Building Sales

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<td>1538</td>
<td>US 17</td>
<td>Oct-03</td>
<td>$1,500,000</td>
<td>36,100</td>
<td>10</td>
<td>Arms Length</td>
<td>Construction 0%</td>
<td>$61.21</td>
</tr>
<tr>
<td>1649</td>
<td>College</td>
<td>Sep-03</td>
<td>$3,600,000</td>
<td>70,100</td>
<td>14</td>
<td>Arms Length</td>
<td>Condition 0%</td>
<td>$61.31</td>
</tr>
<tr>
<td>1885</td>
<td>S. 17th St</td>
<td>Feb-05</td>
<td>$1,700,000</td>
<td>29,110</td>
<td>6</td>
<td>Arms Length</td>
<td>Access/Exposure 0%</td>
<td>$62.18</td>
</tr>
<tr>
<td>1844</td>
<td>College</td>
<td>Jul-04</td>
<td>$1,287,500</td>
<td>17,302</td>
<td>5</td>
<td>Arms Length</td>
<td>Retail/Warehouse 35%</td>
<td>$73.17</td>
</tr>
</tbody>
</table>

**Adjustments For**

<table>
<thead>
<tr>
<th>Location</th>
<th>Construction</th>
<th>Condition</th>
<th>Access/Exposure</th>
<th>Retail/Warehouse</th>
<th>Size</th>
<th>Age</th>
<th>Sprinklers</th>
<th>Composite Factor</th>
<th>Indicated Price</th>
<th>Indicated Price/SF</th>
<th>Value Indices</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>-10%</td>
<td>0%</td>
<td>25%</td>
<td>$2,090,651</td>
<td>$52.27</td>
<td>Minimum Price/SF $52.27</td>
</tr>
<tr>
<td>25%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>-20%</td>
<td>0%</td>
<td>30%</td>
<td>$2,209,644</td>
<td>$61.21</td>
<td>Maximum Price/SF $73.17</td>
</tr>
<tr>
<td>0%</td>
<td>0%</td>
<td>-5%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>-15%</td>
<td>0%</td>
<td>0%</td>
<td>$4,297,808</td>
<td>$61.31</td>
<td>Mean Value Per SF $62.03</td>
</tr>
<tr>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>5%</td>
<td>0%</td>
<td>-5%</td>
<td>0%</td>
<td>0%</td>
<td>$1,810,151</td>
<td>$62.18</td>
<td></td>
</tr>
<tr>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>$1,266,053</td>
<td>$73.17</td>
<td></td>
</tr>
</tbody>
</table>

**IMPROVED SALES SUMMARY TABLE**

<table>
<thead>
<tr>
<th>No.</th>
<th>Location</th>
<th>Sale Date</th>
<th>Price</th>
<th>Building Size (SF)</th>
<th>Price/ SF</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>414 South College Road</td>
<td>07/04</td>
<td>$1,275,000</td>
<td>40,000</td>
<td>$31.88</td>
</tr>
<tr>
<td>2.</td>
<td>15597-A U.S. Highway 17 North</td>
<td>10/03</td>
<td>$1,500,000</td>
<td>36,100</td>
<td>$41.55</td>
</tr>
<tr>
<td>3.</td>
<td>3514 South College Road</td>
<td>09/03</td>
<td>$3,600,000</td>
<td>70,100</td>
<td>$51.36</td>
</tr>
<tr>
<td>4.</td>
<td>833 S. 17th Street</td>
<td>02/05</td>
<td>$1,700,000</td>
<td>29,110</td>
<td>$58.40</td>
</tr>
<tr>
<td>5.</td>
<td>1005 College Road South</td>
<td>07/04</td>
<td>$1,287,500</td>
<td>17,302</td>
<td>$74.41</td>
</tr>
</tbody>
</table>
Exhibit 3. Comparable Building Sales

Terminal Capitalization Rates Comparables. To reflect the risk of estimating a rate ten years in the future, 50 basis points should be added to the Ro. This indicates a terminal rate for the subject of 9.56 percent (9.06%+0.50%), has been adopted. Coincidentally the average TRC for strip centers in CBRE survey at the time was 9.50 percent. (Source: Ingram, McKenzie and Associates, Inc.)

<table>
<thead>
<tr>
<th>No.</th>
<th>Location</th>
<th>Sale Date</th>
<th>Price</th>
<th>NOI</th>
<th>OER</th>
<th>Ro</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>15597 US 17</td>
<td>10/03</td>
<td>$1,500,000</td>
<td>$13,857</td>
<td>29%</td>
<td>7.59%</td>
</tr>
<tr>
<td>3.</td>
<td>3514 S. College</td>
<td>09/03</td>
<td>$3,600,000</td>
<td>$322,052</td>
<td>6%</td>
<td>8.93%</td>
</tr>
<tr>
<td>4.</td>
<td>833 S. 17th St</td>
<td>01/05</td>
<td>$1,700,000</td>
<td>$160,092</td>
<td>20%</td>
<td>9.42%</td>
</tr>
<tr>
<td>5.</td>
<td>1005 S. College</td>
<td>07/04</td>
<td>$1,287,500</td>
<td>$132,527</td>
<td>18%</td>
<td>10.29%</td>
</tr>
</tbody>
</table>

| Avg. | 9.06% |

Exhibit 4. Financial Information of Shopping Center

Table 1: Parcel A- Farrish Shopping Center

<table>
<thead>
<tr>
<th>Lot Size</th>
<th>1.6 Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Square Footage</td>
<td>72,039</td>
</tr>
<tr>
<td>Leasable Area</td>
<td>36,752</td>
</tr>
<tr>
<td>Zoning</td>
<td>RB-Regional Business</td>
</tr>
<tr>
<td>Building to Land Ratio (%)</td>
<td>53%</td>
</tr>
<tr>
<td>Gross Monthly Rent</td>
<td>$19,684</td>
</tr>
<tr>
<td>Yearly Expenses</td>
<td>$24,368.24</td>
</tr>
<tr>
<td>Year Built</td>
<td>1954</td>
</tr>
<tr>
<td>Class</td>
<td>C</td>
</tr>
<tr>
<td>Vacancy</td>
<td>8%</td>
</tr>
<tr>
<td>Expense Increase</td>
<td>2.5%</td>
</tr>
<tr>
<td>Discount Rate</td>
<td>11.10%</td>
</tr>
<tr>
<td>Single Tenants</td>
<td>12</td>
</tr>
</tbody>
</table>

Table 2: Parcel B

<table>
<thead>
<tr>
<th>Lot Size</th>
<th>5.1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Square Footage</td>
<td>222,155</td>
</tr>
<tr>
<td>Zoning</td>
<td>RB-Regional Business</td>
</tr>
<tr>
<td>Building to Land Ratio (%)</td>
<td>53%</td>
</tr>
<tr>
<td>Gross Monthly Rent</td>
<td>$19,684</td>
</tr>
<tr>
<td>Yearly Expenses</td>
<td>$24,368.24</td>
</tr>
<tr>
<td>Year Built</td>
<td>1965</td>
</tr>
<tr>
<td>Class</td>
<td>C</td>
</tr>
</tbody>
</table>
### Table 3: Seller Financing Terms

<table>
<thead>
<tr>
<th>Loan Amount</th>
<th>$2,000,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest Rate</td>
<td>7% Fixed</td>
</tr>
<tr>
<td>Length</td>
<td>240 months</td>
</tr>
<tr>
<td>Down Payment</td>
<td>$310,000.00</td>
</tr>
<tr>
<td>Refinancing Option</td>
<td>Possible after 7 years</td>
</tr>
</tbody>
</table>

### Discount Rate
The average Class C rate of 11.10 is accepted for the DCF analysis.

<table>
<thead>
<tr>
<th>Investment Type</th>
<th>Rate Range</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Strip Centers</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class A</td>
<td>8.00% - 11.25%</td>
<td>9.39%</td>
</tr>
<tr>
<td>Class B</td>
<td>9.00% - 12.00%</td>
<td>10.21%</td>
</tr>
<tr>
<td>Class C</td>
<td>9.50% - 12.50%</td>
<td>11.10%</td>
</tr>
<tr>
<td><strong>CBRE Estimate</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: CBRE National Investor Survey

### Estimated Value of Farrish Property
(Source: Ingram, McKenzie and Associates, Inc.)

<table>
<thead>
<tr>
<th>Interest Type</th>
<th>Date</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee Simple &quot;As Is&quot;</td>
<td>May 30, 2006</td>
<td>$2,560,000</td>
</tr>
<tr>
<td>Lease Fee &quot;As Is&quot;</td>
<td>May 30, 2006</td>
<td>$2,110,000</td>
</tr>
</tbody>
</table>
Exhibit 5. Parcel Layout

Exhibit 6. New Market Street/Kerr Avenue Traffic Pattern
The top image is the current Market Street and Kerr Avenue intersection. The bottom image is the new intersection with solid medians.