A Cost to Bear—Environmental Contamination and Eminent Domain

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INTRODUCTION

Washington State is in the process of "building the most ambitious transit expansion in the country" by extending the "Link" light rail throughout the Puget Sound area.[1] While many Seattle commuters are eager to cut their daily commute, this expansion is only possible by using eminent domain.[2] Commonly referred to as condemnation, eminent domain is an accepted constitutional process that allows a sovereign, like the State of Washington, to take private property for public use by paying the property owner just compensation.[3] However, eminent domain becomes more controversial when the government takes environmentally contaminated property because of the dispute over who bears the cost and burden of dealing with the environmental contamination. For example, if a dry-cleaning business occupied a property for a long period of time, and dry-cleaning chemicals contaminate the property by seeping into the ground, it is unclear whether the condemning authority or condemnee property owner bears the burden of dealing with this contamination during eminent domain.

Few people doubt Sound Transit Authority's (STA) authority to exercise eminent domain powers writ large. But a number of nuanced complications exist in that exercise, including, for example, whether STA can factor environmental contamination into its valuation of the taken property; whether just compensation is satisfied if STA deducts the expected remediation costs from the pre-contamination discovery fair market value of the property; and whether STA can take a property without substantive compensation if the effect of the discovered environmental contamination is that the fair market value is near zero or that the expected remediation costs exceed any value the property still has. Jurisdictions around the country have wrestled with these issues, but Washington State has not yet taken a position on whether these costs are allowable in the eminent domain analysis.

Given Washington's strong policy favoring environmental reporting and remediation,[4] Washington courts should adopt a system that

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1. *System Expansion*, SOUND TRANSIT, https://www.soundtransit.org/system-expansion [https://perma.cc/CZ78-7YM7].

2. *See* Imants Holquist, *Eminent Domain: Sound Transit's Impact on Seattle Property Owners*, HOLMQUIST & GARDINER (Oct. 2, 2019) https://www.lawhg.net/news-and-insights/eminent-domain-seattle [https://perma.cc/SKE7-35KA] (noting "increased the frequency of eminent domain cases in Seattle-area neighborhoods").

3. *See* U.S. CONST. amend. V.

4. *See* Model Toxics Control Act, WASH. REV. CODE § 70A.305.010(1) (2020) (declaring a clean environment a "fundamental and inalienable right."); *see also* WASH. REV. CODE § 70A.305.010(6) (2020) (stating reporting environmental contamination is "in the public interest").

universally allows evidence of environmental contamination on the private property taken in eminent domain proceedings. While this may result in less compensation than if the evidence were ignored, just compensation does not require the government compensate a private owner more than the private market would.[5] STA should only spend taxpayer dollars in the amount of the fair market value that well-informed private parties would agree to.

Part I of this Note discusses the history and progression of eminent domain and the broader constitutional roots of the Takings Clause. Part II explores Washington's environmental remediation statute. Part III details the various approaches jurisdictions around the county have formulated to deal with this issue. Part IV argues Washington courts should adopt the inclusionary approach, which allows introduction of environmental evidence in eminent domain proceedings.

I. EMINENT DOMAIN AND THE TAKINGS CLAUSE

The U.S. Constitution allows a sovereign to take private property for public use; in return, the sovereign must pay the property owner just compensation.[6] While the federal government has this uncontroverted power, it is limited by two constitutional requirements: 1) the taking must be for public use, and 2) the sovereign must pay the property owner just compensation.[7] These two limiting principles were extended to the states around the turn of the twentieth century[8] and have been codified in nearly every states' constitution.[9]

Washington's eminent domain principles differ from the national standard for three primary reasons. First, Washington's Constitution extends these protections to property that is "taken *or damaged*."[10] Second, while the U.S. Constitution does not guarantee a jury will determine just compensation,[11] Washington's Constitution specifies such "compensation

5. *See* WASH. PATTERN JURY INSTRUCTION 150.08.

6. Interestingly, the U.S. Constitution does not directly mention the power to take private property; however, the Fifth Amendment's clause stating, "private property [shall not] be taken for public use, without just compensation" is a "tacit recognition of a preexisting power to take private property for public use . . . ." United States v. Carmack, 329 U.S. 230, 241 (1946); *see also* Boom Co. v. Patterson, 98 U.S. 403, 406 (1879) (recognizing condemnation as "an attribute of sovereignty").

7. *See* U.S. CONST. amend. V; Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

8. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); *see also* Chi. Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

9. *See, e.g.*, WASH. CONST. art. I, § 16.

10. *Compare* U.S. CONST. amend. V (pertaining only to property "taken"), *with* WASH. CONST. art. I, § 16 (applying to property both "taken or damaged") (emphasis added).

11. United States v. Meyer, 113 F.2d 387, 393 (7th Cir. 1940) ("A jury trial as at common law preserved by the Constitution is not guaranteed in [eminent domain] proceedings.").

shall be ascertained by a jury."[12] Third, while local government agencies do not inherently have the power of eminent domain, the Washington State legislature has delegated the power to counties,[13] cities,[14] school districts,[15] and even certain corporations.[16]

A. The Process of Eminent Domain in Washington

In Washington, eminent domain requires the court to enter three judgments: 1) "a decree of public use and necessity;" 2) a judgment determining the amount of the condemnation award; and 3) a judgment transferring title.[17]

1. Public Use

Authorized governmental agencies initiate eminent domain proceedings by filing a petition and serving a notice on the required parties. Once filed and served, the court will hold a hearing to decide whether the government is, in fact, taking the property for a public use.[18]

Jurisdictions around the country are split on what satisfies the public use requirement—with some states following a far more inclusive interpretation than others. For example, the Michigan Supreme Court allowed the government's taking of private property even though the government did so to grant the property to General Motors to use as an assembly plant.[19] Similarly, the Connecticut Supreme Court allowed the condemnation of a private home to transfer the property to Pfizer for a private research facility.[20] The Connecticut court reasoned that the public use language translates loosely to use for the "public benefit."[21] In a surprising move, the U.S. Supreme Court affirmed the Connecticut court's ruling and substituted the historically used "public use" standard with the novel standard of use for a "public purpose."[22]

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12. WASH. CONST. art. I, § 16.

13. WASH. REV. CODE § 8.08.010–.130 (2020).

14. WASH. REV. CODE § 8.12.010–.560 (2020).

15. WASH. REV. CODE § 8.16.010–.150 (2020).

16. WASH. REV. CODE § 8.20.010–.170 (2020). Historically, corporations allowed to use this provision include private water companies to secure riparian rights, *State v. Superior Ct. of Spokane Cnty.*, 91 P. 968 (Wash. 1907), and railroad companies to condemn private ways of necessity, *Taylor v. Greenler*, 344 P.2d 515 (Wash. 1959).

17. City of Des Moines v. Hemenway, 437 P.2d 171, 176 (Wash. 1968).

18. *Id.* at 176–77.

19. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* City of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

20. *See* Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, Kelo v. City of New London, 545 U.S. 469 (2005).

21. *Id.* at 547–52.

22. Kelo v. City of New London, 545 U.S. 469, 478 (2005).

On the other hand, the Washington State Supreme Court has a stricter interpretation of the term, focusing instead on the historical intent "that 'public use' means 'use by the public.'"[23]

2. Just Compensation

The second step in the eminent domain process requires a judicial determination of the amount of the condemnation award.[24] Most disputes during eminent domain proceedings arise from this second requirement.[25]

The concept of just compensation dates back to the inception of the United States. John Locke and William Blackstone theorized the primary purpose of government was to protect property rights; if government takes private property, "it must be accompanied by the payment of just compensation."[26]

At the federal level, just compensation follows the fair market value standard, which values real property in terms of "[t]he highest and best use" for which the property is suitable.[27] Washington also follows a fair market value standard but allows for a more subjective valuation than a strict, objective highest and best use standard.[28]

In Washington State, just compensation is measured in terms of the property's fair market value, and the condemnee has the right to have such amount determined by a jury.[29] Specifically,

> [f]air market value means the amount in cash that a well-informed buyer, willing but not obligated to buy the property, would pay, and that a well-informed seller, willing but not obligated to sell it, would accept, taking into consideration all uses to which the property is adapted or may be reasonably adaptable.[30]

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23. *See* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 9.20 (2d ed. 2021) (detailing how Washington courts have relaxed this interpretation but have not overturned it). While Washington's public use doctrine and consistent jurisdictional approaches nationwide are not a primary part of this Note's analysis, it serves to illustrate the Washington Supreme Court's commitment to determining its own standards regardless of, and in the face of, differing national trends.

24. City of Des Moines v. Hemenway, 437 P.2d 171, 176 (Wash. 1968).

25. STOEBUCK & WEAVER, *supra* note 23, § 9.21.

26. Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25, 39–40 (1998) (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT, AND END OF CIVIL GOVERNMENT, IN TWO TREATISES OF GOVERNMENT 323 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); 2 William Blackstone, COMMENTARIES 4 (4th ed. 1876)).

27. *See, e.g.*, United States v. An Easement and Right-of-way Over 1.58 Acres of Land, 343 F.Supp.3d 1321, 1344–45 (N.D. Ga. 2018) (citing Olson v. United States, 292 U.S. 246, 255 (1934)).

28. *See* State v. Rowley, 444 P.2d 695, 699 (Wash. 1968).

29. WASH. CONST. art. I, § 16.

30. WASH. PATTERN JURY INSTRUCTION 150.08.

Stated differently, the jury should "take into account those factors that would affect value in the judgment of the mind of the buyer, to the same extent the buyer would take them into account."[31] Contrary to the federal standard, which several states have adopted, Washington uses a more subjective test than only the "highest and best use and that use which will yield the greatest return in dollars."[32]

Ultimately, "[t]he responsibility of the jury [i]s to determine the fair cash market value of the property, taking into consideration any and all uses to which the property [is] adaptable" at the time of the condemnation.[33] Washington's broader definition of fair market value allows the jury to consider more information than other jurisdictions, because of its focus on the subjective private market participant behavior, rather than the alternative objective highest and best use standard's exclusive focus on a hypothetical, most profitable use of a property.

B. Limitations on Eminent Domain in Washington

Washington places certain limits on exercises of the eminent domain power. Broadly, eminent domain is limited to actual property,[34] and the compensation must be paid in money.[35] Juries are also barred from hearing certain evidence of increases in property value ancillary to the value of the property itself.[36] Moreover, compensation is measured by what "an owner has lost at the time of condemnation, and not what the condemner has gained."[37]Additionally, the evidence cannot be speculative; when the evidence reaches "the point at which a buyer would no longer take it into account"[38] it is no longer permissible for juries to consider. For example,

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31. STOEBUCK & WEAVER, *supra* note 23, § 9.30.

32. *Compare* Olson v. United States, 292 U.S. 246, 255 (1934) ("The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered . . . ."), *with* WASH. PATTERN JURY INSTRUCTION 150.08 (see text accompanying *supra* note 30). *See also* State v. Rowley, 444 P.2d 695, 699 (Wash. 1968) (finding no error in failure to give a highest and best use instruction).

33. *Rowley*, 444 P.2d at 699.

34. *See* WASH. CONST. art. I, § 16; *see also* Greenwood v. City of Seattle, 440 P.2d 437, 441 (Wash. 1968) (denying a private property owner certain construction costs incurred prior to and during the city's exercise of eminent domain).

35. *See, e.g.*, WASH. REV. CODE § 8.04.010 ("compensation [paid by State] to be made in money"); *id.* § 8.08.010 (compensation [paid by County] to be made in money).

36. State v. Corvallis Sand & Gravel Co., 416 P.2d 675, 679 (Wash. 1966) (holding it was improper to consider, "in the evaluation of property in condemnation cases, the possibly enhanced value of the land by reason of its possible use in conjunction with land or rights owned by the condemnor").

37. State v. Larson, 338 P.2d 135, 137 (Wash. 1959).

38. STOEBUCK & WEAVER, *supra* note 23, at § 9.30. See Paul W. Moomaw, *Fire Sale? The Admissibility of Evidence of Environmental Contamination to Determine Just Compensation in Washington Eminent Domain Proceedings*, 76 WASH. L. REV. 1221, 1226 (2001) for a more thorough discussion of how evidence of environmental contamination might be considered speculative.

potential future zoning amendments are impermissibly speculative unless the proponent can show the amendments are "reasonabl[y] probab[le]."[39]

C. Evidence of Minerals on the Land

A distinct (but relevant) line of cases in Washington, turns on whether evidence is admissible regarding the value of minerals on the land and whether evidence on "the value of the mineral per unit" can be introduced for condemnation valuations.[40] Similar to the inclusionary approach's allowance of environmental evidence's effect on value,[41] Washington allows evidence of the value of minerals on real property in eminent domain proceedings.[42]

Washington has long held that, while it would be impermissible to calculate the value of a parcel of land solely by multiplying the value of a mineral by the number of units of that mineral on the land, it is entirely permissible to factor the mineral valuation in the overall valuation of the parcel of land.[43] Put simply, mineral value is admissible as one of several factors, not as the sole factor.[44] This view is justified because what a well-informed buyer is willing to spend on a property would necessarily be affected by, though not determinatively so, the value of minerals on the land.

D. Washington's Preferred Methods of Valuation

In Washington, the most commonly accepted forms of property valuation include: the comparable sales approach, the capitalized rental value approach, and the depreciated replacement cost approach.[45] The capitalized revenue approach values land in terms of the income it produces.[46] The depreciated replacement cost approach requires evidence of the replacement cost of the structures existing on the land to determine the parcel's value as improved.[47] Lastly, the comparable sales approach allows for comparison of similar properties sold near the time of taking, and the judge has vast discretion in addressing the comparability of

39. State v. Motor Freight Terminals, Inc., 357 P.2d 861, 862 (Wash. 1960).

40. *Id.*

41. *See* discussion *infra* Section III(b).

42. *See* State v. Mottman Mercantile Co., 321 P.2d 912, 914 (Wash. 1958).

43. *See, e.g.*, *id.* ("[I]t is improper to arrive at a conclusion concerning the value of property which has a mineral content by multiplying the assumed number of cubic yards of material available times a given price per unit.").

44. *See id.*

45. *See* State v. Wilson, 493 P.2d 1252 (Wash. 1972).

46. Moomaw, *supra* note 38, at 1226.

47. *See* STOEBUCK & WEAVER, *supra* note 23, § 9.30.

properties used.[48] The comparable sales approach is the most common to determine the value of a parcel of land in eminent domain proceedings.[49]

E. Procedure of Establishing Fair Market Value

As long as the valuation testimony is based on a valid valuation methodology,[50] such testimony may be presented by several types of witnesses, including lay witnesses, such as the property owner, an expert witness, or even neighboring property owners. Witnesses testifying about the value of their own land is fairly common and will be allowed because the owner "is particularly familiar with it and, because of his [or her] ownership, knows of the uses for which it is particularly adaptable."[51] Allowing neighbors to testify follows the same logic.

Most common, and most important, is the use of experts in determining the fair market value. While juries are not required to adhere to an expert's opinion of value, it is often the most helpful to juries in determining fair market value. "Indeed, courts have held that the specialized knowledge of a real estate appraiser is 'essential' in condemnation cases where the only issue is the amount of compensation to which the landowner is entitled as a result of the taking."[52]

II. WASHINGTON'S MODEL TOXICS CONTROL ACT

Washington's statutory environmental remedial scheme affects a property's fair market value. Washington's Model Toxics Control Act (MTCA) provides a statutory baseline for environmental contamination remedial liability outside of eminent domain, [53] and it does not serve as a bar to including environmental contamination in condemnation valuations.[54] Broadly, the MTCA provides a regulatory remedial scheme by which owners and operators of a contaminated property are strictly liable, jointly and severally, for all remedial action costs.[55] The statutory intent is the funding and directing of "investigation, cleanup, and prevention of sites that are contaminated by hazardous substances."[56] "It

48. *See* State v. Wineberg, 444 P.2d 787, 794 (Wash. 1968).

49. *See id.* at 792–93.

50. *See* discussion *supra* Section I(c).

51. State v. Larson, 338 P.2d 135, 136 (Wash. 1959).

52. 13 ROBERT M. ABRAHAMS & JULIAN M. WISE, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 148:29 (5th ed. 2021).

53. Model Toxics Control Act, WASH. REV. CODE § 70A.305 (2020).

54. *Contra* Moomaw, *supra* note 38, at 1229–33.

55. *See* WASH. REV. CODE § 70A.305.010 (2020).

56. *See id.*; *Model Toxics Control Act,* DEP'T OF ECOLOGY, https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Rules-directing-our-cleanup-work/Model-Toxics-Control-Act [https://perma.cc/T7B2-M8YT].

works to protect people's health and the environment, and to preserve natural resources for the future."[57] But importantly, MTCA is not the exclusive remedy for environmental remediation.[58]

MTCA has a broad reach in its inclusion for liability of any "owner or operator."[59] In fact, "[w]ith narrow exceptions, [MTCA] imposes strict liability on an owner of property based merely on ownership without regard to what actions the owner took on the property to cause [contamination]."[60] MTCA's creation of a remedial scheme, forcing joint and several liability on an owner based on strict liability, regardless of whether the owner actually contributed to the contamination, evidences Washington's strong policy favoring environmental reporting and remediation.[61] MTCA attempts to ensure cost will not be a bar to the remediation by apportioning the remedial costs among as many potentially responsible individuals as possible.[62]

When Washington's legislature enacted MTCA, it declined to include certain defenses available under MTCA's federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[63] Most notably, CERCLA allows for an "innocent landowner" defense.[64] The innocent landowner defense applies, in relevant part, when the potentially liable party "is a government entity that acquired the property . . . by eminent domain" and did not cause or contribute to the release of the environmental contaminants.[65] This defense is notably missing from Washington's MTCA liability scheme, making the condemnor as likely as a private purchaser to be liable under MTCA.[66] While MTCA's liability scheme is not the exclusive remedy for environmental contamination on real property, it's inclusion for liability of condemning authorities puts such authorities in the same risk position as a willing buyer in the private market.

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57. *Model Toxics Control Act*, *supra* note 56.

58. *See* § 70A.305.

59. *Id.* § 70A.305.040(1)(a).

60. Matter of Chi., Milwaukee, St. Paul & Pac. R.R. Co., 78 F.3d 285, 290 (7th Cir. 1996).

61. *See* WASH. REV. CODE § 70A.305.010(2) (2020) (stating the purpose of MTCA is to "raise sufficient funds to clean up all hazardous waste sites").

62. *See id.* § 70A.305.010(5) (justifying joint and several liability with the near impossibility of adequately "allocate[ing] responsibility among persons liable for hazardous waste sites").

63. 42 U.S.C. § 9601–75.

64. *See* 42 U.S.C. §§ 9607(b)(3), 9601(35)(A). *See generally* 42 U.S.C. § 9601(20)(D).

65. 42 U.S.C. §§ 9607(b)(3), 9601(35)(A); *see also* 42 U.S.C. § 9601(20)(D).

66. *Compare* 42 U.S.C. §§ 9607(b)(3), 9601(35)(A) & (20)(D), *with* WASH. REV. CODE § 70A.305.040(3)(b) (2020).

III. JURISDICTIONAL APPROACHES TO THE ADMISSIBILITY OF ENVIRONMENTAL CONTAMINATION EVIDENCE IN EMINENT DOMAIN PROCEEDINGS

In the absence of comprehensive legislative or judicial guidance, state and federal courts have been left to decide, for themselves, the role of environmental contamination in eminent domain proceedings. This discretion has resulted in a divide between what is colloquially deemed the "inclusionary approach," which generally allows evidence of environmental contamination, and the "exclusionary approach," which generally disallows such evidence. Today, there is a growing trend toward the exclusionary approach's inadmissibility of environmental evidence, while still allowing the evidence in minor situations, such as the stigmatic effects of contamination on the property value.[67]

A. The Exclusionary Approach

The exclusionary approach holds inadmissible most, or all, evidence of environmental contamination in eminent domain proceedings. Even though excluding environmental evidence may result in higher compensation than an otherwise fair market value analysis, several state courts follow this approach.[68]

While the inquiry remains fact specific, courts applying this approach generally follow the same line of arguments. First, allowing environmental evidence can lead to the property owner's double liability if those amounts are deducted from their compensation because many state statutory environmental remedial schemes also allow recovery of such remediation costs from past owners.[69] Therefore, the avenue of recovering environmental remediation costs is through "other available avenues" outside eminent domain proceedings.[70]

Second, some courts found that allowing environmental evidence violates private owner's due process rights.[71] These courts argue a state's environmental remedial scheme provides the exclusive procedure for recovering remedial costs—not the eminent domain process—and allowing evidence of contamination in condemnation proceedings would

67. *See, e.g.*, Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 885 (Minn. 2010).

68. *See, e.g.*, Aladdin Inc. v. Black Hawk Cnty., 562 N.W.2d 608 (Iowa 1997); Dep't of Transp. v. Parr, 633 N.E.2d 10 (Ill. Ct. App. 1984); Wray v. Duffy & DeBlass, No. 91-B-37, 1993 WL 12253 (Ohio Ct. App. 1993); *Moorhead Econ. Dev. Auth.*, 789 N.W.2d at 885; Housing Auth. of New Brunswick v. Suydam Invs., L.L.C., 826 A.2d 673, 686 (N.J. 2003) (holding courts should "[o]mit[] the complications of contamination from the valuation process").

69. *See, e.g.*, *In re* Syracuse Indus. Dev. Agency, 20 A.D.3d 168, 171 (N.Y. 2005).

70. *Id.*

71. *See, e.g.*, *Aladdin Inc.*, 562 N.W.2d at 615.

circumvent that sole process of recovery.[72] Lastly, at least one court justified the exclusion of such evidence on bare policy grounds.[73] That court held that the private owner should not be forced to combat the condemning authority's experts (which are taxpayer funded) with their own environmental experts (out of pocket funded).[74]

Oddly, even when evidence of environmental contamination and remediation costs are not admissible in a condemnation proceeding, some courts have held the property is to be valued as if it were already remediated, not as if it were never contaminated.[75] This consideration allows for devaluation of the property based on the stigma of past environmental contamination, such as the fear of further undiscovered contamination, but not the effect of the contamination on the overall valuation of the property at the time of the taking.[76]

In 2010, the Minnesota Supreme Court illustrated this point. The court held that deductions to the fair market value, based on environmental contamination and remedial costs, were not allowed; however, the court held that the effect of the stigma of contamination to reduce the value of the property was admissible evidence.[77] The court reasoned "the fact finder should take into account conditions that exist at the time of the taking but are discovered subsequent to the taking."[78] The court further explained, "evidence of factors that affect what a willing buyer would pay a willing seller may be considered," which "does not preclude . . . the consideration of the contamination to the extent necessary to determine if there is any loss of value to the property due to the stigma of contamination."[79] However, evidence of environmental remediation costs are not admissible outside the stigma exception.[80] It is a confusing balance to strike—allowing specific environmental evidence only to show its effects on the market's subsequent perception of the property, while not allowing environmental evidence otherwise throughout the proceeding.

Minnesota, and other states following the exclusionary approach, have created a legal fiction that requires courts, evaluating the value of a contaminated property, to consider the stigma attached to remediated

72. *See, e.g.*, *id.*

73. *Id.* at 616.

74. *Id.*

75. *See, e.g.*, Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 885 (Minn. 2010).

76. *See, e.g.*, *id.* (holding stigma "akin to an immutable condition," which cannot be cured and reduces the fair market value of a previously contaminated property because prospective buyers will be "fear[ful] of discovering further contamination and the accompanying liability").

77. *Id.* at 884–85.

78. *Id.* at 884.

79. *Id.* at 885.

80. *Id.* at 878.

property but not the cost of actually remediating the property.[81] What stigma remains, aside from consideration of remediation costs, is imprecise and elusive.

This stigmatic practice is also standard in property valuation during tax proceedings. For example, the Pennsylvania Supreme Court condoned a blanket 5% reduction in the value of property that results from the stigma associated with environmentally contaminated property.[82]

Overall, policy and fairness considerations seem to play a bigger role in these courts' determinations than the long-developed doctrine of just compensation; however, the growing trend in state courts is to adopt the exclusionary approach. The Minnesota Supreme Court admits its focus on policy over doctrine, by holding the exclusionary approach is superior, because the alternative inclusionary approach "ignores the unfairness inherent" in such an approach.[83]

B. The Inclusionary Approach

The inclusionary approach allows evidence of environmental contamination and remediation costs thereof during eminent domain proceedings. Contrary to the exclusionary approach, courts following this approach have adopted the simpler view that "the only relevant question in an eminent domain proceeding is the fair market value of the property taken."[84] Through this narrow lens, the inclusionary approach reasons the fair market value of a property, as of the date of the taking, must include environmental evidence and remedial costs "to show the effect, if any, that those factors had on the fair market value of the property."[85]

Broadly, all courts following the inclusionary approach agree that the concept of just compensation, as determined by the fair market value, necessarily factors in property-specific details that affect the value of an individual piece of property. Because environmental contamination often affects the value of real property, evidence of the same is relevant and admissible when determining the value of the property. Stated differently, the judiciary does not get to pick and choose which issues affecting real property value are admissible in their courtroom and which issues relevant to the property's value are not. Fundamentally, "[t]he condemnor is acquiring property in a given condition, and with a value based on that condition."[86]

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81. *See, e.g.*, *id.* at 885.
82. Harley-Davidson Motor Co. v. Springettsbury Twp., 124 A.3d 270, 286 (Penn. 2015).
83. *Moorhead Econ. Dev. Auth.*, 789 N.W.2d at 879.
84. *Id.* (citing Northeast Ct. Econ. All., Inc. v. ATC P'ship, 776 A.2d 1068, 1083 (Conn. 2001)).
85. *ATC P'ship*, 776 A.2d at 1081.
86. *Id.* at 1083.

Advocates of the inclusionary approach argue the alternative exclusionary approach asks the wrong question because the exclusionary approach discusses issues determining responsibility for the environmental condition and the separate judicial procedures designed for such a process.[87] The inclusionary approach rejects this analysis of responsibility by looking only at the value of the underlying property, not who caused its condition, because "who is responsible has nothing to do with that determination."[88]

Some courts using the inclusionary approach recognize the legal fiction imposed by the exclusionary approach is a bridge too far and cannot stand.[89] In a particularly illustrative analysis, the Connecticut Supreme Court derided the "fictional property value" created by the exclusionary approach, arguing "[i]t blinks at reality to say that a willing buyer would simply ignore the fact of contamination, and its attendant economic consequences, including specifically the cost of remediation, in deciding how much to pay for property."[90] And while adherents of the exclusionary approach claim the inclusionary approach is inherently unfair, some courts reason the inclusionary approach is actually the picture of fairness. Specifically, the *ATC Partnership* court held it would be unfair to the condemnor not to allow it to introduce environmental evidence, which may be the single most determinative factor in the value of the property.[91]

The *ATC Partnership* court also recognized the definition of fair market value includes what a well-informed buyer would be willing to pay and a well-informed seller would be willing to accept. In doing so, the court established factors "in addition to the actual costs of remediation," which tend to decrease the value of property in the minds of potential purchasers, including: "(1) [P]otential liability under various environmental statutory schemes; (2) potential litigation brought by members of the public for damages relating to the contaminants; (3) stigma to the property even after full remediation; (4) higher financing costs charged by lending institutions by virtue of the contamination; and (5) increased regulation."[92]

Similarly, most state courts that allow environmental evidence follow the logic that environmental contamination has an identifiable, adverse effect on property value outside eminent domain, so the same must

87. *See id.*
88. *Id.*
89. *See, e.g.*, *id.* at 1081–82.
90. *Id.*
91. *Id.*
92. *Id.*

be true within eminent domain.[93] Some courts have been clear and simple in their rulings. For example, the Florida Supreme Court held "evidence of contamination is relevant and admissible on the issue of market value in a valuation trial."[94] The Kansas Supreme Court agreed, holding "[environmental] contamination necessarily affects the market value of real property. Evidence of such contamination is therefore admissible in an eminent domain action."[95] The New Jersey Supreme Court also agreed concisely when it held "evidence of environmental contamination and remediation costs is relevant to the valuation of real property taken by eminent domain and admissible in a condemnation proceeding."[96]

Other states have been less definitive in their rulings, while still rejecting the alternative exclusionary approach. For example, a Tennessee appellate court held environmental evidence admissible, reasoning "the mere fact that the property is, or has been contaminated, may have a direct bearing upon the value of the property in the marketplace."[97] However, Tennessee's Supreme Court declined to review the issue.[98] Likewise, an Oregon appellate court held "evidence related to the contamination that existed on the property on the date that the condemnation action was filed, and evidence regarding whether the contamination could have been discovered by a prospective buyer or seller at that time, is relevant to determining the market value of the property" at the condemnation action was filed.[99]

The Connecticut Supreme Court succinctly articulated the primary arguments rejecting the exclusionary approach as follows:

> The condemnor is acquiring property in a given condition, and with a value based on that condition. How the property got to be that way and who is responsible has nothing to do with that determination. To deny the condemnor the right to put on evidence as to one of the significant determinants of that condition—and hence value—because it may not reflect the owner's degree of responsibility for the condition misses the point of an eminent domain valuation process. If a condemnor sought to acquire a property which had been damaged by the negligence of a third party (e.g., lateral support, landslides),

93. *See, e.g.*, City of Olathe v. Scott, 861 P.2d 1287, 1290 (Kan. 1993) (holding "[environmental] contamination necessarily affects the market value of real property. Evidence of such contamination is therefore admissible in an eminent domain action.").

94. Finklestein v. Dep't of Transp., 656 S.2d 921 (Fla. 1995).

95. *Scott*, 861 P.2d. at 1290.

96. *ATC P'ship*, 776 A.2d at 1080.

97. State v. Brandon, 898 S.W.2d 224 (Tenn. Ct. App. 1994) (holding such environmental evidence *may* have an effect on the market value without allowing).

98. *Id.*

99. State *ex rel* Dep't of Transp. v. Hughes, 986 P.2d 700, 703 (Or. Ct. App. 1999).

> the condemnor would not pay the undamaged value of the property because the condition was not the owner's fault.[100]

While courts around the country have wrestled with the benefits and detriments of each approach, Washington has not yet addressed the issue.

IV. A SOLUTION FOR WASHINGTON

Washington should adopt the inclusionary approach allowing evidence of environmental contamination during eminent domain proceedings. Under the principles of just compensation,[101] STA should not be forced to pay more than the fair market value of the property in the private market by ignoring evidence of environmental contamination. The inclusionary approach is supported by doctrine and logic and rejects the piecemeal inclusion of certain aspects of environmental contamination while excluding its primary substantive effects on real property valuation.[102]

Environmental contamination has an identifiable, adverse effect on how a well-informed buyer and seller value real property. A well-informed buyer, willing and able to buy a contaminated property, will only buy at a price that reflects the adverse effects of contamination, including the expected costs of remediation. Likewise, a well-informed seller, willing and able to sell their property, will do so at a price that reflects MTCA's liability scheme, including contributions from them for any future remediation. A well-informed buyer and seller will know any price paid and received considers MTCA's liability scheme, and that each will have to pay their fair share, including the condemning authority. Thus, by adopting the inclusionary approach, Washington law appropriately will acknowledge the effects of environmental contamination of the value of real property.

The inclusionary approach also avoids the confusing distinction between evidence of environmental contamination and the associated stigma resulting from environmental contamination. The result is simple: evidence of environmental contamination, including any stigmatic effect therefrom, is admissible for the jury to use when determining the fair market value of a condemned piece of land.

Additionally, adhering to the inclusionary approach and allowing the jury to determine the fair market value in light of all relevant evidence ensures neither party to the condemnation gets a windfall or double recovery. In the private marketplace, environmental contamination on a

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100. *ATC P'ship*, 776 A.2d at 1083.

101. *See* discussion *supra* Section I(a)(ii).

102. *See* discussion *supra* Section III(b).

property would be factored into the property's value in the eyes of a well-informed buyer. Allowing the jury to hear the same evidence private parties would consider, comports with the policies underlying just compensation and eminent domain writ large. Alternatively, excluding what might be the single most determinative factor in real property valuation proceedings serves an opposite end.[103] Similar to the treatment of minerals in eminent domain proceedings, Washington should allow the jury to consider—as a factor, not wholly determinative—the potential adverse effects of environmental contamination on condemned property.

In addition to adopting the inclusionary approach, Washington should explicitly reject the exclusionary approach and its evolving structure of including only the stigmatic effects of environmental contamination. Importantly, Washington courts do not fold to national trends.[104] For example, Washington's more subjective fair market value approach follows a different path than the alternative highest and best use standard.[105] Washington also does not strictly follow the national standard under the public use doctrine.[106] Washington should reject the trending exclusionary approach and adopt the inclusionary approach—under which environmental contamination is relevant and admissible to determine the fair market value of property in an eminent domain proceeding.

The difference between Washington's requirement of a jury in the eminent domain process, and the national lack thereof, is revealing. Juries are constantly tasked with difficult decisions, and policy generally dictates juries are to receive as much information as possible without crossing the line of becoming prejudicial. Washington's jury requirement fosters the same policy, and Washington should not bar the jury from hearing environmental evidence, keeping in mind "[t]he issue before [the jury] is the *admissibility* of such evidence," not a determinative effect on the results.[107]

A. Model Toxics Control Act

Some critics suggest the adoption of the inclusionary approach would create the risk of double liability from both devaluation in eminent domain proceedings and a MTCA liability case. But the risk of MTCA liability should not preclude environmental evidence entirely in Washington State.

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103. *ATC P'ship*, 776 A.2d at 1081–82.

104. *See supra* Section I(a)(i) and n.22.

105. *Compare* State v. Rowley, 444 P.2d 695, 699 (Wash. 1968), *with* Metropolitan Transp. Auth. v. Longridge Assocs., L.P., 122 A.D.3d 856, 857 (N.Y. 2014).

106. *Compare* Kelo v. City of New London, 545 U.S. 469, 480 (2005) (substituting the term "public use" with "public purpose"), *with* STOEBUCK & WEAVER, *supra* note 23, § 9.20 (detailing Washington's progression of the public use doctrine).

107. *ATC P'ship*, 776 A.2d at 1082 (emphasis in original).

Under MTCA, current and former owners are liable under its scheme, strictly, jointly and severally.[108] "It blinks at reality to say that a willing buyer would simply ignore the fact of contamination"[109] and the effects of MTCA's broad remedial scheme on their perceived fair market value of the property. For example, MTCA's liability scheme may steer potential buyers away from the property, shrinking the potential purchaser pool and decreasing value. Washington finders of fact in eminent domain proceedings should not have to close their eyes to this relevant evidence; instead, they should be allowed to consider all factors, including any risk of MTCA liability, when determining fair market value.

Although MTCA does not provide an exclusive remedy, it does have an identifiable effect on the value of contaminated property, and that risk of liability should not preclude Washington from adopting the inclusionary approach and allowing juries to consider the relevant effects of MTCA on property valuation.

B. Speculative Evidence

Some commentators have argued evidence of environmental contamination is inadmissible because it violates the rules against speculative evidence.[110] However, these arguments ignore important aspects of environmental contamination and due diligence in the private market.

At its base, speculative evidence is only inadmissible if is "pure[ly] conjecture" or is not "reasonabl[y] probab[le]."[111] Using environmental evidence in eminent domain proceedings falls short of that mark; if evidence of existing environmental contamination is available and used at trial, it may be reasonably probable because its existence can be proven. No conjecture is needed to determine the contamination exists in the present day. What is being measured is not "fear" of future real or imaginary phycological effects[112] (arguably like the stigmatic effects exception of the modern exclusionary approach), it is the very real consequences of environmental contamination that exist on the parcel of land being valued.

Notably, the line of cases used to support the speculation argument all admit "the only elements that a jury should consider 'are those which will actually affect the fair market value of the property and which are

108. WASH. REV. CODE § 70A.305.040(2) (2020).

109. *ATC P'ship*, 776 A.2d at 1080.

110. *See* Moomaw, *supra* note 38, at 1226.

111. State v. Motor Freight Terminals, Inc., 357 P.2d 861, 862 (Wash. 1960).

112. *See, e.g.*, Pac. Nw. Pipeline Corp. v. Myers, 311 P.2d 655, 656 (Wash. 1957); State v. Evans, 634 P.2d 845, 850 (Wash. 1981).

established by the evidence.'"[113] Because environmental contamination "actually affect[s] the fair market value of the property,"[114] and because just compensation is determined as of the date of the taking,[115] the speculation argument fails.

CONCLUSION

Washington State has a strong policy favoring identification and remediation of environmental contamination, and Washington courts should not frustrate that purpose by adopting a system by which evidence of environmental contamination is barred from eminent domain proceedings. Instead, Washington should adhere to its principles by adopting the inclusionary approach, which allows evidence of environmental contamination and remediation in eminent domain proceedings.

The just compensation principle demands only that a sovereign may not take private property without payment of just compensation,[116] which is generally understood to encompass the concept of fair market value.[117] Because fair market value incorporates how actual, willing, and reasonable buyers and sellers conduct transactions in the private market,[118] eminent domain proceedings should not drastically differ from a well-informed private market transaction. Juries are constantly asked to make difficult decisions by weighing several, often complicated factors; environmental contamination should not be the line Washington draws, as a matter of law, in deciding that juries are not capable of making such decisions.

Because environmental contamination can play a key role in private market transactions and has the potential to substantially affect any transaction of real property, Washington should adopt the inclusionary approach and reject the arbitrary and unfair results of the exclusionary approach. The inclusionary approach's absence of artificial distinctions comports with Washington's broader policies of objective fairness and focuses on the important issues before the court: the relevancy of environmental contamination in determining constitutional just compensation. STA should not be forced to spend taxpayer dollars to overcompensate private property owners by paying more than a well-informed buyer in the private marketplace.

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113. *See* Moomaw, *supra* note 38, at 1229 (citing *Evans*, 634 P.2d at 849).
114. *Evans*, 634 P.2d at 849.
115. *See* Northeast Ct. Econ. All., Inc. v. ATC P'ship, 776 A.2d 1068, 1081 (Conn. 2001).
116. *See* U.S. CONST., amend. V; Landgraf v. Usi Film Products, 511 U.S. 244, 266 (1994).
117. *See* WASH. CONST. art. I, § 16; WASH. PATTERN JURY INSTRUCTION 150.08.
118. *See* WASH. PATTERN JURY INSTRUCTION 150.08.