

Compensation as Defence: Efficient, Naïve, or Simply too Expensive?

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Do Compensation Rights Protect Against Eminent Domain Abuse?

Suggestions from the Literature

A few Details to Consider

Examples from Norway

Compensation as Defence

Properly designed, the compensation mandate can go a long way toward protecting the public from abuse of the takings power and ensuring that it is only used to promote the interest of the public at large.¹

[...] it is only in the most extreme cases that the Court is likely to decide that Article 1 of Protocol No. 1 has been violated. But this is difficult to criticise, provided, as the Court expects, that those whose property is affected are compensated.²

[..] the public use clause is meant to screen out takings for which monetary compensation is not 'just'.³

¹ Abraham Bell and Gideon Parchomovsky, 'The Hidden Function of Takings Compensation', *Virginia Law Review* Vol.96, p. 1675.

² Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, Human rights files No 17, Council of Europe Publishing, p. 13.

³ Lee Anne Fennel, 'Taking Eminent Domain Apart', 2004 *Michigan State University Law Review* 957, p. 1002.

Suggestions from the Literature

- ▶ Berger, (Epstein and Merrill): A 150% premium in 'suspect' cases.
- ▶ Fennel: An 'opting-in' mechanism with tax breaks and up to a 200% premium.
- ▶ Bell and Parchomovsky: Self-reported value, with tax liabilities and restricted possibility of selling at a lower value.
- ▶ Lehavi and Licht: Give owners a choice between 'standard' compensation and shares in a special company that negotiates a price (but is under an obligation to sell).

A few Details to Consider

- ▶ Planning permissions.
- ▶ Hope value.
- ▶ Counterfactual thinking: What would have happened in the no-scheme world?
- ▶ Calculations: Present-day values from future (expert-)estimated cash flows.
- ▶ How do such details relate to the reform proposals considered above?

Basic Overview of Compensation in Norway

- ▶ No hope values - all or nothing!
- ▶ Market value or value of use, whichever is highest.
- ▶ Seemingly strong constitutional protection: *full compensation* must be paid.
- ▶ A thorny question of detail: Are zoning plans (which authorise/presuppose expropriation) binding on the compensation assessment?
- ▶ Answer: Usually yes, but dozens of exceptions (developed by the Supreme Court).

Example 1, Rt-2006-473 (*Steinerskolen*)

- ▶ Expropriation of land for a private school.
- ▶ Owner turned down an offer of NOK 250 per m².
- ▶ The appraisal court calculated the market value based on *agricultural use* and awarded NOK 320 000 in compensation.
- ▶ The appraisal court of appeal calculated market value based on the price that had actually been offered, leading to a compensation award of NOK 3 550 000.
- ▶ The Supreme Court overturned the decision – the price that had been offered was not held to reflect a market value in the no-scheme world.

Example 2, Rt-2005-1255 (dissent 3-2) (*Voss*)

- ▶ Expropriation of land for a ski resort.
- ▶ One group of owners made a deal with the developer, the other group refused.
- ▶ Expropriation compensation based on damages (assumed higher than market value in the no-scheme world).
 - ▶ Compensation for the owners that resisted the development (37% of the land): NOK 162 000.
 - ▶ Compensation (potential) for the owners that agreed to the development (63% of the land): NOK 26 000 000.
- ▶ Not resisting the developer resulted in a 9600% premium per square metre.

Example 3, LH-2014-92631 (dissent 4-1) (*Smibelg*)

- ▶ Expropriation for large-scale hydropower.
- ▶ In many of the affected rivers, the owners had plans for small-scale hydropower.
 1. Should compensation be based on the loss of owner-led development opportunities?
 2. If so, what was the value of the lost opportunities?
- ▶ Expert witness: Present value of lost development opportunities is NOK 1 238 187 943.
- ▶ Appraisal court: Present value of lost development opportunities is NOK - 37 450 000.
- ▶ Appraisal court of appeal: Value of lost opportunity is irrelevant since the licensing authorities clearly preferred the expropriation project.
- ▶ Total compensation (based on “benefit sharing”, including a 25% premium): NOK 38 528 920.

How do lawyers argue in these kinds of cases in Norway?

- ▶ Precedent.
- ▶ Experts.
- ▶ Little or no guidance from statutory rules.
- ▶ In the end, pragmatism:
 - ▶ Final argument made by the expropriating party in *Smibelg* (paraphrased): Paying for the alternative development value is simply *too* expensive. Society clearly wants us to develop these rivers, but it will not happen unless we get a compensation discount.
- ▶ The Supreme Court would not hear the appeal.