

Trade Fixtures and Condemnation

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What is a Trade Fixture?

Obtaining a concise definition is not an easy task. Generally speaking, a trade fixture is something that is more than a mere chattel but something less than real property. One classic definition is that it is something that is affixed to the realty which cannot be removed without its destruction or material injury to the freehold. But that archaic definition proves to be insufficient, especially in the context of eminent domain proceedings. Determining whether an item is a trade fixture is important because asserting a claim for trade fixtures can increase the value of a condemnation award. Compensation for trade fixtures can be collected either as an increment to the fee simple condemnation award, or, depending on the jurisdiction, it can be obtained as a separate condemnation award entirely.

One of the most important tests for determining if an item is a fixture was developed by the Ohio Supreme Court in an 1853 case, *Teaff v Hewitt*, 1 Ohio St. 511. In that case, the court, in an effort to furnish a test of general and uniform application, announced a three-prong test which has been applied in almost every jurisdiction ever since the decision was rendered. In *Teaff*, the court explained the test as follows:

[T]he united application of the following requisites will be found the safest criterion of a fixture 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold -- this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the

structure and mode of annexation, and the purpose or use for which the annexation has been made.

Id. at 529-30.

Many jurisdictions continue to adhere to a strict application of the annexation, adaptability, and intention of permanency three-prong test which requires a trade fixture to be physically annexed to the real property. *See*, 8a *Nichols on Eminent Domain* (3rd Ed), § G28.02[1][a], fn 17. Other jurisdictions have applied a more liberal approach, recognizing that an item can be deemed to be a trade fixture even if it is “constructively annexed” to the freehold. In the liberal jurisdictions, the movable fixture is typically integral to the fixture owner’s business or it is permanent in nature.

For example, in a recent New York case, *Matter of the City of New York, Melrose Commons Urban Renewal Area Phase II (Kaiser Woodcraft Corp.)*, 39 AD3d 131 (1st Dept 2007),¹ an appellate court affirmed a trial court’s decision to award compensation for machines which were found to be an integral part of a woodworking business even though the machines were movable. This result was reached after the court considered New York’s variation of the three prong test which was explained as follows:

New York takes a broad view in evaluating what improvements are to be regarded as [separately compensable] fixtures. Machinery is deemed a fixture where it is installed in such a manner that its removal will result in material injury to the realty, or where the building in which it is placed was specifically designed to house it, or where there is other evidence that its installation was of a permanent nature. Additionally, the term fixtures includes those improvements which are used for business purposes and would lose substantial value if removed.

Id. at 133 (citations omitted)

¹ An appeal of this decision is currently pending in the New York State Court of Appeals.

The result from the *Kaiser Woodcraft Corp.* case is similar to a 1933 decision from the State of California, *Los Angeles v Klinker*, 219 Cal 198. In that case, processing equipment which was used in connection with the publication of a newspaper was deemed to be a trade fixture even though the equipment could have been salvaged and removed. In the *Klinker* case, the court applied the classic three-prong test, but it placed more emphasis on the third prong when it explained that “the intention of the parties...is of controlling importance....” *Id.* at 209. And, after considering that, the court was satisfied that the acts and conduct of the owner established that the equipment was a fixture. In reaching its result, the court relied, in part, on an earlier decision from the Court of Appeals of Indiana, *White v Cincinnati*, 34 Ind App 287 (1904), where movable machines were recognized as fixtures based on the concept of constructive annexation.

In the *White* case, an appellate court decided that jury instructions were incorrect when the instructions provided that machinery would become part of the property acquired only if the machinery was attached in such a manner that it could not be detached and removed without injury to the real estate. In that case, the condemned party could only obtain compensation for the machinery if the machinery increased the value of the freehold. On appeal, the court decided that the jury instructions were incorrect because they did not consider the three-prong test. But when the appellate court applied the three-prong test, it disregarded the requirement of physical annexation. Instead, the appellate court adopted the concept of constructive annexation. The court’s analysis is explained as follows:

One Machine...essential in the manufacture of paper might be so annexed to or constitute such part of the building that it could not be removed, and another machine equally essential might be easily removed, and yet, when the two machines are separated, each is without value for the uses

intended. In such case both of the machines should be considered as attached to the freehold—one by real, and the other by constructive annexation. As the machinery is permanent in its character, and being essential to the purpose for which the buildings are used, is a fixture....

Id. at 294.

Physical annexation is no longer a requirement in many other jurisdictions. In an Oregon case, *State Highway Com. v Empire Bldg. Material Co.*, 17 Ore App 616 (1974), an appellate court wrote:

It is undisputed that the machinery and equipment in the case at bar were attached and adapted for use in the production of [claimant's business]. It is also readily apparent from the exhibits and testimony that these items were intended to be installed permanently. Therefore, the possibility of removal is not controlling as to whether a particular item in question is a fixture.

Id. at 634.

And in Pennsylvania, there is a concept called the Assembled Economic Unit Doctrine which deems movable items to be trade fixtures if those items are necessary for the operation of a plant whether or not they are attached to the realty. *Redevelopment Authority of Erie v Pulakos*, 17 Pa Commw 251 (1974).

Deviating from the strict application of the three-prong test is one way for jurisdictions to ensure that just compensation is paid to all people who may be affected by a condemnation proceeding. Another way would be for jurisdictions to adopt different or alternative tests entirely.

In New York, for example, an item will not only be considered a trade fixture if it meets New York's version of the three-prong test, but it will also be deemed a trade fixture if it is used for business purposes and it would lose substantial value if removed. *Matter of the City of New York, Melrose Commons Urban Renewal Area Phase II (Kaiser*

Woodcraft Corp.), *supra*. This broader approach is based on equitable principals since many business owners would not be able to collect damages if the classic three-prong test was the only criteria to determine if an item is trade fixture. In *Rose v State of New York*, 24 NY2d 80 (1969), the Court of Appeals explained New York's position on trade fixtures as follows:

New York takes a broad view in evaluating what improvements are to be regarded as fixtures. Not only is machinery deemed a fixture 'where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature'... but also those improvements which are used for business purposes and which would lose substantial value if removed

This formulation of the rules permits equitable treatment of the owner of fixtures. It signifies a recognition of the obvious realities confronting the business community. Modern business, in order to produce goods and services, invests heavily in cumbersome and complicated machinery which, because of the manner of its installation, can only be removed with difficulty. This approach to the problem of fixtures, however, recognizes that on occasion these structures can be profitably removed to another location and used by the owner. This will occur when the machine is specially adapted to the owner's particular needs or when the owner cannot be assured of a favorable delivery because of his manufacturer's lag time and, therefore, must remove the fixture to his new location in order to start production promptly. On these occasions, however, these items can only be moved normally at inordinate expense and, therefore, it would be inequitable to treat these items as personalty simply because of the possibility of removal at less than total destruction of the machine or the structure which houses it.

Id. at 86 (citations omitted and emphasis supplied).

Florida also recognizes that condemnees must be compensated for machinery involved in takings where the machinery is worth much while in place but little when disassembled. *Malone v Division of Admin., State Dep't of Transp.*, 438 So 2d 857.

Compensation

The first step for any practitioner is to figure out if an item can be considered a trade fixture. The next step is to figure out how a condemned party can obtain compensation for that item.

Some jurisdictions continue to apply a “unit rule” in valuing fixtures. This rule values fixtures and machinery only to the extent that they enhance the value of the freehold. 8a *Nichols on Eminent Domain* (3rd Ed), § G28.03[1], fn 15. If the unit rule is applied, then the fixture owner must demonstrate that he or she is entitled to the portion of the award representing the amount that the fixtures enhance the value of the property. *Id.*, fn 19.

Other jurisdictions have moved away from a strict application of the unit rule. *Redevelopment Authority of Erie v. Pulakos, supra* at 264-65 (noting that the unit rule is still in effect in Pennsylvania even though the rule has been relaxed under the opinions of the court); *Marraro v State of New York*, 12 NY2d 285 (1963) (noting that the universal application of the unit rule has been expressly doubted) (*citing United States v City of New York*, 165 F 2d 526 (1948)); *City of Gunnison v MCCabe Hereford Ranch, Inc.*, 702 P2d 768 (Colo Ct App 1885) (noting that evidence of the separate value for land and improvements is admissible even though the jury may not return separate awards for land and improvements).

In New York, the proper method of valuing trade fixtures in place is by determining their sound value, and the sound value of a trade fixture in place is measured by the reproduction cost of the fixture less depreciation. *Marraro v State of New York*,

supra at 296 (1963); *Universal Empire Industries, Inc., v State of New York*, 149 Misc 2d 773 (1990). However, if the trade fixture owner chooses to remove the fixtures for use in a new location, and he or she notifies the condemnor of his or her intention to remove the fixtures, then the owner is only entitled to an award in the amount of either the difference between salvage value and the present value in place or the cost of removal, whichever is the lesser. *Matter of City of New York (Glantz)*, 55 NY2d 345 (1982).

This is similar to how damages are calculated for trade fixtures that have been relocated because of a condemnation in Florida. In that State, damages are determined by calculating the difference between the value of the fixtures in place and their salvage value. The cost of disassembling, trucking and reassembling the machinery may also be considered as an alternate method, but if the alternative method is relied on, then damages can not be more than the amount that would have resulted from the first method of valuation. *Malone v Division of Admin., State Dep't of Transp., supra*. Likewise, in North Dakota, the measure of damages for trade fixtures which can be removed without substantial injury to the freehold, and to which the tenant has a right of removal, is the difference in value between the trade fixtures in place and their salvage value as severed. *Schnaible v Bismarck*, 275 NW2d 859 (1979).

Conclusion

The intent of this essay is to provide a broad overview on the topic of trade fixtures and condemnation. The practitioner must review the applicable law in his or her jurisdiction to determine if an item is a compensable trade fixture.