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Eminent Domain Law

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Eminent Domain Law

Credits: 5 PDH

Course Description

This course covers the topic of land seizures using the power of the eminent domain law. This right of eminent domain is a legal power legislatively granted to city, state or federal government entities, for the purpose of seizing private property which it deems necessary to serving the best interests of the general public.

Topics

- The Definition of Eminent Domain
- Constitutional Rights of the Landowner
- Due Process Use of Jury Trials and the process of a “Jury View”
- The History of Eminent Domain Law
- Use of Eminent Domain in Redevelopment Projects
- Real Estate “Hold-outs”
- Court Case Examples of Eminent Domain
- What is Inverse Condemnation
- Seizing of Personal Property
- Steps in the Condemnation Proceedings
- Preliminary Steps in Condemning a
- Quick-Take Power and Slow-Take Power
- Establishing Fair Market Value and Just Compensation
- Making Offers which Exceed Fair Market Value
- Types of Land Valuation
- 3 Traditional Approaches to Property Valuation
- Subdivision Approach in Property Valuation
- The Highest and Best Use rule
- Compensation for Damages
- Permanent vs Temporary Usage of Private
- Strange Cases of Eminent Domain
- New Legislation to Prevent Eminent Domain Abuse



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Note:

This course provides a general overview of the legal process and various elements of eminent domain law. Its purpose is to explain some of the general concepts of land seizure through the condemnation process, and as such should not be used as a definitive guide on the subject, (as eminent domain law varies greatly from state to state).

Many of the concepts in this course do not apply in all 50 states, as well as some of the statutes and laws governing eminent domain are revised from time to time. Therefore, please verify any information you read in this course with the requirements set forth in your particular state's laws and statutes. Additionally, the topics which relate to eminent domain are extensive, thus this course is by no means exhaustive and comprehensive.

Chapter 1: What is Eminent Domain?

Eminent Domain

What is Eminent Domain?

Eminent Domain is the sovereign power of the state, to seize private property for public use, with the mandate of full restitution or “just compensation” paid to the landowner.

Eminent domain is a legal form of land seizure, outlined within the Bill of Rights’ Fifth Amendment to the US Constitution, which is used by state or other sovereign authorities, to seize private property of an individual which it deems to be necessary for the good of the public.

When the government seizes land, this is commonly referred to as a “taking”. The clause within the Bill of Rights is known as the “Takings Clause” which is the last clause in the Fifth Amendment.

The just compensation provision of the Fifth Amendment did not originally apply directly to the states. However since the case of Chicago, B. & Q.

Railroad Co. v. Chicago (1897), federal courts have held that the Fourteenth Amendment extended the effects of that provision to the states.

Who has the power of eminent domain?

In the US, the power of eminent domain is held by 51 different sovereign entities: the federal government and each of the fifty states; the power of each of the states, being effective only within its borders. The eminent domain power of the federal government is effective nationwide.

For purposes of eminent domain, the "government" also includes a variety of pseudo-public entities, such as public utility companies, which possess the power of eminent domain even though they are private companies.

Many state court systems have held that the power of eminent domain is a legislative power belonging solely to the state. As such, no person or entity, including cities, towns, and counties, can exercise the power of eminent domain unless the state legislature has granted them the authority to condemn. Additionally, private property of a landowner may be taken through eminent domain condemnation, either partially or as a whole.

Example:

One of many examples of eminent domain - when a state department of transportation seizes a series of private properties for the purpose of building a bypass or highway section.

State governments derive the power to initiate condemnation proceedings from within their state constitutions, with the exception of some states, which gain their power through the means of state statute.

There are a number of different parties which may have the power to seize lands, when it is considered to be directly or indirectly beneficial to the general public.

The following entities are common condemners of property which is seized through eminent domain:

The state and federal governments

- Municipalities (cities or towns which have corporate status)
- Utility companies – Power, water, communications, cable, and sewage treatment companies
- Transportation and Logistical – DOTs, Railway companies, airlines, port authorities
- Government agencies - EPA, USDA, Fish and Wildlife, Parks and Recreation, Dept. of Defense, etc.
- Private parties or corporations (developers, defense and other government contractors, job-creating industries and for other reasons which lead to economic development)
- Redevelopment agencies, housing authorities

Some of the most common “public use” reasons that property is seized by eminent domain:

- Governmental buildings
- Research and development facilities
- Transportation, gas, electric, water, wastewater utility ROWs (right of ways)
- Municipal facilities (power plants, water treatment plants, pump stations, etc.)
- Highway, primary and secondary road, and railroad infrastructure (image)
- Communication towers, and communication substations
- Electrical substations, or wastewater and water pump stations
- Parks and other recreational areas
- Economic development (to bring in job producing industries)
- Redevelopment of dilapidated and brownfield properties
- Reasons which will increase the property tax base
- Beautification, modernization, and revitalization of urban zones
- Military, national defense, or national security purposes
- Plants and facilities for defense contractors

- For reasons of public safety
- Annexation and re-boundary purposes
- Hospitals and other medical facilities



Exit ramp in NC

Source: condemnation-law.com

Constitutional Rights of the Landowner

Various states have specific protections for property owners, in addition to those covered in the Fifth Amendment to the US constitution.

The basic rights and protections of land owners, under the Fifth Amendment are:

- A condemnor cannot take an owner’s property unless the taking is for a public use
- When a condemnor seizes or damages an owner’s property it must pay the owner fair and just compensation
- A condemnor cannot deprive an owner of his or her property without due process of law
- In addition, private property owners have the right to initiate action against the government in a form of a legal proceeding called inverse condemnation (covered later in this chapter)

Terminology

Most states will use the term “eminent domain”, while others may use the term “appropriation” (such as in New York) or “expropriation” or “compulsory purchase expropriation” (in Louisiana), to describe the act of exercising eminent domain power.

The term “condemnation” is typically used to describe the formal act of exercising this power to

transfer full title to, or a portion of the subject property.

When properties are seized in cases of economic redevelopment or urban renewal, the term “blight” is often used to describe the rundown, deteriorated, or dilapidated condition of a property or region.

What Qualifies as “Public Use “

Public Use Lands

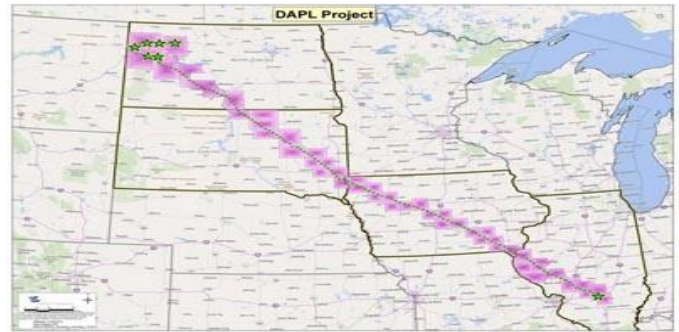
In deciding what qualifies as “public use”, the U.S. Supreme Court has typically deferred to the rights of the states to legislate their own determination, as well as what qualifies as “just compensation”, (which is the restitution paid to a landowner that loses their property).

The requirement of “public use”, states that the property taken be used for the benefit of the public rather than to benefit private individuals or corporate entities (however sometimes this is not the case).

Whether a particular use is considered for the benefit of the general public, is ordinarily a question to be determined by the court systems. However, if the state legislature has established a declaration spelling out a specific public use, the courts will defer to the legislative intent.

Initially Required to Benefit the Broad Segment of the Population

To determine if property is to be taken for public use, the courts first decide if the property will be used by a broad segment of the general public. This is a legal point which can be interpreted to fit the arguments on either side of an eminent domain case.



Proposed Bakken Pipeline Corridor (starting at the Bakken Oil fields of ND)

Source: *ThinkProgress.com*

For example, the Bakken Pipeline route (see image above), will undoubtedly require the use of eminent domain on a large scale, in order to complete its path through the four mid-west states, on its way to the distribution hub in Patoka, IL.

Counsel for the condemnor might argue in court that by building this pipeline, nearly every citizen in the US will benefit from the huge supply of domestic petroleum making its way to market. They may also argue that the construction project will bring thousands of jobs, and a temporary economic boom to the four states involved.

On the flip side, landowners, environmentalists, and other opponents of this pipeline may argue that this is yet another example of cronyism, and the government is strictly looking out for the interests of the oil companies.

They may argue that it will only benefit a select group of individuals and corporate entities, thus not meeting the criteria of “benefitting the broad segment of the people”.

Right to Due Process

The Right to Due Process in the Constitution

The Fifth Amendment to the Constitution states that no one shall be “deprived of life, liberty or property without due process of law”.

The Fourteenth Amendment, ratified in 1868, applies the same wording, called the Due Process

Clause, to describe the legal obligation of all states to adhere to the right of due process.

Right to Due Process during a Condemnation

The land owner has the right to due process of law during any condemnation proceedings.

They must be notified within a timely manner and be given a reasonable opportunity to be heard on the issues of whether the use for which the property is taken is for public use, and whether the compensation is just and adequate.

The legal considerations of due process require that the landowner receive a chance to present evidence and to confront or cross-examine witnesses, as well as having an automatic right to appeal the rulings.

Jury Trial and the right to a "jury view"

Due process does not require a jury trial in condemnation proceedings, although various state constitutions and statutes allow for the case to be assessed by a jury. Also, unless state provisions state otherwise, a court has the discretionary power to grant or refuse a motion for view of the premises by a jury, called a "jury view".

An excerpt from the Ohio code on trial procedures, states:

"If the court is of the opinion that it is proper for the jurors to have a view of property which is the subject of litigation, or of a place where a material fact occurred, it may order them to be conducted in a body under the charge of an officer to such property or place, which shall be shown to them by a person appointed by the court for that purpose".

Many times an image is worth a thousand words, and bringing a jury to the property site to judge the merit of a "taking", is more effective than half a day of testimony.

History of Eminent Domain Law

Long History of Eminent Domain

The general concept of eminent domain has long existed, since the beginning of formally recognized

land ownership. Many times throughout history, the wealthy and powerful have used the right of eminent domain to seize coveted lands.

Early European nobleman routinely seized lands they desired from their subjects, with little consideration of restitution to the owner. Prime hunting, farming and grazing lands would often end up under the control of the nobles, as well as navigational ports and freshwater-rich areas.

1215

Introduction of Due Process with the Magna Carta -

A form of the Takings Clause is found in Section 39 of the British Magna Carta, which declared that land would not be taken without some form of due process:

"No freemen shall be taken or imprisoned, or disseised, or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

In England at least, this declaration became an official protection against the confiscation of lands without some type of formal hearing and due process of law.

1789

France's right to compensation ruling

Following the time of the American Revolution, France formally recognized a property owner's right to compensation for taken properties.

This was outlined in the French Declaration of the Rights of Man and of the Citizen, which reads:

"Property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity."

In the US Constitution's 5th Amendment

Shortly after the French declaration, the newly formed US acknowledged eminent domain in the Fifth Amendment to the Constitution within the Bill of Rights, which states:

"... nor shall private property be taken for public use, without just compensation."

During the writing of the Constitution, the founding fathers had conflicting ideas on how this practice should be drafted. A compromise of ideas finally coalesced into a clause to the Fifth Amendment, specifying that compensation was to be made for those properties seized for public use.

The Fifth Amendment grants the federal government the right to exercise its power of eminent domain over private land owners, and the "due process" clause of the Fourteenth Amendment makes the federal guarantee of just compensation applicable to the states.

1954

Use of Eminent Domain to Remediate Urban Blight (case of Berman vs Parker) - In modern history, the 1954 court decision of Berman v. Parker, upheld that it is within the government's power to use eminent domain to ensure that a community is not only healthy, clean, and well patrolled, but that it is beautiful, spacious, and well balanced.

1984

Use of Eminent Domain to redistribute Land to other Private Parties (Hawaii Housing Authority vs Midkiff)

This was a case in which the US Supreme Court upheld a ruling, that a state could use the eminent domain process to take land vastly concentrated in the hands of a smaller grouping of private land owners and redistribute it to the wider population of private residents.

The taking of the land was supposed to reduce or stabilize the housing prices on Oahu; however the decision failed to meet its intended purpose of creating more affordable housing. The ruling was incapable of creating new housing because it transferred title from the land lessor only to the lessee (the homeowners who already occupied existing homes on the subject properties).

Housing prices on Oahu doubled in roughly a five year period. Many of the homes in the taking area of Kahala, were bought up by Japanese investors who razed them, and in their place built expensive, luxury housing.

The reason was, as soon as the former lessees were able to acquire fee simple titles, the homes became attractive to foreign speculators who paid excessively high prices for these properties (which were primarily in upper scale neighborhoods).

2005

Use of Eminent Domain for Economic Reasons - The Berman case was reexamined in the court case of Kelo v. City of New London in 2005. In this case, the Berman ruling was extended to allow the taking of non-blighted private property, for the sole economic benefit of the condemning city.

Present Day

Following the Kelo ruling, various states adopted legislation which limit or prohibit the use of eminent domain for any form of private gain. Though these laws are a step in the right direction, interpreting and enforcing these laws may be a challenge for the state court systems due to the many loopholes which have been incorporated.

Use of Eminent Domain in Urban Renewal

Urban Renewal Uses

Eminent domain has always been a topic with conflicting opinions, having both positive and negative facets to the practice, always resulting in winners and losers.

In the 50s, following the Berman vs Parker court case, eminent domain was used to redevelop a blighted neighborhood of San Francisco. From a cosmetic point of view, the decrepit homes were replaced with upscale hotels and other modern buildings, greatly improving the aesthetic quality of the area. However, in the process, more than 4,000 poverty-level inhabitants and over 700 small businesses were systematically removed from the neighborhood.

In the long run, the city of San Francisco benefitted greatly from cleaning up an area that would have never seen change otherwise. The property and income tax bases were improved, crime and violence were reduced, and what was once a blighted area, was now a glamorous metropolitan mecca. There is no question that the public greatly benefitted from the urban renewal.

However, the individuals which are displaced wind up paying the price in any urban renewal movement. The heritage and cultural significance of the local communities are basically eradicated and replaced with a newer cleaner replacement.

Multi-generational homes and Mom and Pop stores are replaced with franchises, strip malls, and conglomerate owned office buildings and multi-use complexes.

This same scenario has been played out in countless cities throughout the US, in order to revitalize their economies and improve the urban quality of life and experience as a whole. In fact all larger cities and smaller ones alike must resort to the use of eminent domain if they ever wish to reverse their urban decay, build infrastructure, and modernize their cities.

Imagine if there was no governmental tool of eminent domain. How would any capital improvement projects, (such as for roads, bridges, plants, parks, and utilities) ever come to fruition?



China's Nail House holding up a Road Project
Image source: chinanews.com

Just Compensation vs Wasting of Taxpayer Dollars

Just Compensation

While the use of eminent domain is essential in order to build and improve transportation and utility infrastructures, revitalize economically stagnant and impoverished urban areas, and help land planners shape the future visions of their cities, many property owners fear they will not be justly and fairly compensated for the seizure of their land.

In contrast to the needs of the land owner, these projects are usually financed through tax dollars, or long term bond referendums. Many taxpaying citizens tend to question the amounts paid for lands acquired through eminent domain, wanting the most for their tax dollar.

When a land owner is obstinate in their refusal to sell, the process can become bogged down in the courts, costing far more than initially expected, due to the legal expenses and delay of project.



"Hold-out" House in Seattle
Image source: dornob.com

Real Estate Hold-outs

Case of Edith Macefield

Edith Macefield is a famous example of a "real estate holdout". She lived in her 108 year old "farmhouse" home (see above image), for over forty years as one developer after another offered to buy her property.

She was offered substantially higher than the farmhouse's fair market value, in order to build a

commercial business development in the neighborhood of Ballard, in Seattle Washington.

She refused to sell, as this was her home, full of a lifetime of memories. As a result, one developer redesigned their project, and built around her home. The end product became an absurd looking symbol of defiance, but her stubbornness and persistence prevailed, and she became a worldwide folk hero in the process.

Though this was a situation of one private party against another, eminent domain may have been an option. If eminent domain had been used in this instance, Edith might have eventually been forced to sell to the developer.

In using eminent domain to force the sale, the fallout from bad public relations would have been a nightmare for the condemnors and local government officials to deal with, due to the worldwide publicity this case garnered, and with the unpredictability of a jury trial the ruling may have gone in favor of Ms. Macefield.

Had this been a capital improvement project such as a wastewater treatment plant, hospital, or highway bypass, the taxpayers would have been the ones on the hook for the high costs and expense of a lengthy trial.

It's a slippery slope when trying to balance the needs of the many with the needs of the few, and sometimes it's better to walk away from a fight where no one wins.

Cases of Eminent Domain

Being Fair and Impartial

Eminent domain is a necessary evil for the modernization and maintenance of a civilized society. However, with great power comes the responsibility for being fair and impartial when weighting the needs of the public with the needs of the condemnor.

When those executing eminent domain lose sight of what is considered an ethical application of the condemnation process, faith in the system can be challenged.



Eminent Domain Protests
Image source: abcnews.com

The following pages illustrate several prominent court cases of eminent domain, where there were controversial applications of the eminent domain rule.

Berman vs Parker (and the DC Redevelopment Act of 1945)

In 1945, the US Congress passed the DC Redevelopment Act in order to address the wide spread urban blight found in Washington DC. This act created a five-member commission called the "Redevelopment Land Agency" and granted it the power to redevelop these decaying areas and to eliminate "blighting factors or the causes of blight."

The act granted to this agency the power of eminent domain, if necessary, to transfer private property from the original owner to a private entity in order to serve the public purpose of redevelopment.

The purpose of the act was not only to clear out the urban blight but also to modernize the urban environment. The first project under the act was "Project Area B" in SW Washington, D.C., an area where 65% of the dwellings were said to be beyond repair.

Situated among the deteriorated buildings of Project Area B, sat a department store of reasonably good condition, which did not meet the standards of urban blight. Though, it was a building which didn't meet the standards of the new

construction, which was planned for the community.

In the case of *Berman vs Parker*, the plaintiffs (who were the owners of the department store that was scheduled to be taken) argued that this property was not deteriorating housing. Furthermore, they argued that it should not be taken, and for redevelopment, simply to make the community more attractive.

The owners argued that taking the land under eminent domain and giving it to developers amounted to "a taking from one businessman for the benefit of another businessman" and did not constitute a public use, thus violating the 5th Amendment to the Constitution.

The presiding judge ultimately interpreted the Redevelopment Act very narrowly, finding that non-blighted property could be taken so long as the taking could be tied to preventing blight.

He clearly stated, however, that eminent domain must not be used as a legal tool by the government to take private property for the purpose of improving economic or aesthetic conditions of urban landscape.

Therefore, he granted the government's motion to dismiss the case, but also raised the seriousness of using eminent domain to serve broad redevelopment projects.

Kelo v. City of New London

This is a well-known landmark court case which took place in 2005, one which is perhaps one of the most controversial modern day cases of eminent domain; the case of *Kelo vs City of New London, Connecticut*.

This was a case decided upon by the US Supreme Court involving the use of eminent domain to transfer land from one private owner to another private owner for the purpose of furthering economic development. In the opinion of many, this ruling more broadly defined the scope of

eminent domain law and opened the door for potential abuse of the practice.

In a 5–4 decision, the Supreme Court upheld the decision that the general benefits which the community derived from economic growth, qualified a private party's redevelopment plan as an allowable "public use" under the "Takings Clause" of the Fifth Amendment.

The case began when the city of New London, Connecticut, executed eminent domain condemnation of privately owned real property to be used as part of a "comprehensive redevelopment plan."

The plan was for the revitalization of the neighborhood to attract large companies to the area, bringing with them much-needed jobs.

Ultimately, the private developer was unable to obtain sufficient financing to see the redevelopment project through, and walked away leaving the land as an undeveloped empty lot. The large company which was attracted was Pfizer Pharmaceuticals. They left the area as well, five year later.

As a result of the backlash from this case, many states changed their eminent domain laws. Prior to the *Kelo* decision, only seven states specifically prohibited the use of eminent domain for economic development except to eliminate blight. Since the decision, forty-four states have amended their eminent domain laws, although some of these changes are cosmetic.

Despite the negative response to this case, the ruling has remained upheld, with many legal experts agreeing that this ruling was of sound legal principle and precedent.

Norwood, Ohio v. Horney

This was a case brought before the Ohio Supreme Court in 2006, which came about on the heels of the *Kelo v. City of New London* ruling. The *Kelo* case had involved the US Constitution, while the

issue in Norwood was the specific limitations of the Ohio State Constitution.

In the Norwood case, the city planned to seize roughly seventy residences and businesses to pave the way for private development, (including retail, offices, and condominiums). Affected homeowners filed three separate cases to stop the seizure of their homes. Following appeals, these cases were combined into the Supreme Court case of *Norwood v. Horney*.

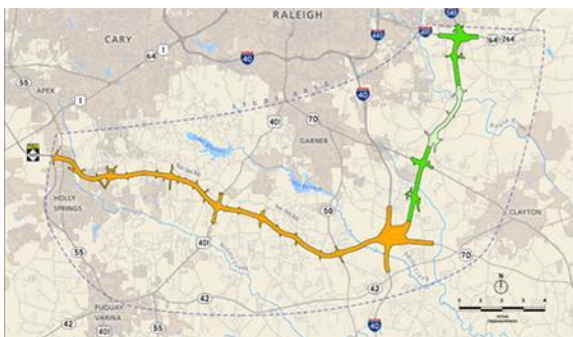
The court ruled unanimously in favor of the homeowners, stating that economic benefit alone was insufficient to satisfy the eminent domain statute of the Ohio Constitution; that an Ohio statute allowing for the use of eminent domain seizures in the case of "deteriorating areas" was void for vagueness; and that the rest of this statute should remain in force.

It also specified for the Ohio courts a standard for reviewing statutes that regulate eminent domain powers.

Kirby v. NCDOT

This case involves NC's "Map Act," which is a statute designating private property for future highway use, and which restricts a plaintiff's fundamental right to improve, develop, or subdivide their property, for an unlimited period of time.

The NC Map Act is basically a blueprint of where future road expansion is likely to occur (image).



Proposed roadway corridors

Image source: newsandobserver.com

From the condemnor's point of view:

The purpose of restricting the improvement of land in areas designated for future capital improvement projects (ie. - road infrastructure), is to prevent opportunistic parties from purchasing land in those planned corridors and artificially driving up the land value through tactics such as land subdivision.

In theory, a developer could buy large parcels of undeveloped land within the planned highway corridors, and prior to the DOT building a road; subdivide the land into minimal lot sizes.

For example, a single 20 acre parcel may be worth \$200,000 as a whole. However, once this parcel is cut up for use as a multi-use development, or divided into multiple residential lots, it could be worth ten times the value.

All this would require is legally recording the land as separate parcels, with no real construction ever occurring.

(Note: see Chapter 2 for the subdivision or development approach to appraising the value of land).

From the land owner's point of view:

In the case of *Kirby vs NCDOT*, the state DOT's legal counsel conceded in court, that one of the express purposes of the Map Act was to keep the eventual acquisition price of the designated properties low, as undeveloped land is more affordable than developed land.

But to impose an indefinite moratorium on development, especially when its primary purpose was to depress the eventual acquisition price, poses substantial legal issues in the future use of eminent domain by the state.

The court was correct in noting that property rights which are protected by the compensation requirements of the state constitution include the right to use and develop one's land, as well as the mere physical ownership of such land.

To allow this subversion of eminent domain law would have been going against the fundamental rules of eminent domain which were established in the Fifth Amendment.

The state has the power to use eminent domain to take property to build roads, but it is not allowed to circumvent the constitutional requirement of just compensation by preemptively banning development on the land, and thereby artificially lowering the price.

This decision has far reaching implications that go well beyond application to the Map Act and the taking of property for road-construction. If this ruling had been in favor of the state, it may well have set a precedent for future uncompensated takings in various other situations.

There are any number of situations where the state may have sought to lower the value of property by indefinitely banning future development, for the purpose of one day seizing the land at a deflated price, or even to transfer the property to influential 3rd parties under the facade of promoting “economic development” or alleviating urban blight.

Inverse Condemnation vs Eminent Domain

Inverse Condemnation or Eminent Domain

These two laws differ, in that eminent domain is a legal action which is initiated by the state, whereas inverse condemnation is initiated by the property owner when the government acts in a manner which may be construed as a property taking, without going through eminent domain procedures. Inverse condemnation cases are often brought about by land-use disputes in which a property owner challenges the government’s unauthorized use of their lands.

For example, the owner might allege that the government has acquired an interest in his or her property without giving due compensation, such as when the government causes flooding onto an

owner’s property (see image below) or pollutes a channel of water that crosses their land.

An inverse condemnation proceeding is often initiated when it appears as though the taker of the property has no intention of bringing eminent domain proceedings.



Residential Backyard Flooded by Municipal Stormwater Control System
Source: kirkkirklaw.com

Various forms of governmental action might bring about a case for inverse condemnation, such as those which:

- Cause damage to a private owner’s property
- Diminish a property’s use or value
- Temporarily cause damage, (such as from the flooding of lands)
- A taking can also result from over-reaching governmental regulations
- Impact the property through physical invasion
- Impact the property through direct appropriations
- Cause the deprivation of all economically viable uses of the property
- Places overly restrictive conditions on the property and the right to develop it
- Impairs access to the property
- Cause flooding on a property
- Interfere with the land’s stability

While many of the legal principles in inverse condemnation cases are similar to those in typical condemnation cases, there are some key differences between them.

While normal eminent domain cases focus strictly on the amount of just compensation to be awarded, plaintiffs in inverse condemnation cases must provide evidence that the government has caused a "taking" or "damaging" of their property before the plaintiff is entitled to an award of compensation.

These liability issues and the requirement of burden of proof placed on the plaintiff do not exist in a normal eminent domain case.

The Seizure of Personal Property through Eminent Domain

Seizing Personal Property

The executive power to exercise eminent domain over a property is not limited to strictly seizing real property assets (land and buildings).

Under ordinary and even some extraordinary situations the government might also commandeer, confiscate, or seize personal properties such as:

- Heavy equipment
- Business equipment
- Water, air, or mineral rights
- Sports teams
- Other personal assets which are either immovable or moveable

Also intangible properties may be taken which are deemed necessary to the public's benefit, such as:

- proprietary processes
- brands or trademarks
- patents and inventions
- trade secrets
- contract rights
- copyrights

Governmental Seizure of Raisins (case of *Horne vs Dept of Agriculture*)

In 2015, the Supreme Court ruling of the case of *Horne vs the Dept. of Agriculture* established that the takings clause may be applied to personal property.

The case arose from a dispute involving the National Raisin Reserve, when a farmer challenged a rule that required farmers to withhold a portion of their crops from the open market in order to maintain the stability of the raisin market.

In the ruling, the opinion of the court held that the Fifth Amendment requires the government and its agencies to pay just compensation when they take personal property from citizens.

Dating back to the Magna Carte of 1215, there is a well-established precedent attesting to the fact that personal property has been given no less protection than real property for at least 800 years, and that the physical appropriation of property gives rise to a per se taking.

Chapter 2: Steps in the Condemnation Process

Preliminary Steps of Condemnation

Preliminary Steps

The following outlines the preliminary steps that a property owner can expect in an eminent domain case. These steps can vary depending on the nature of the condemnation process and the state in which the condemnation occurs.

Step 1: Identify the public need and property to be acquired

The process of condemnation begins with identifying the intended public need, and by the condemning authority determining that it is necessary to acquire this particular private property in order to fulfill that need. This often involves public hearings where these issues are discussed.

A property owner is not always given individual notice of these hearings and the responsibility of being informed on capital improvement projects in their area, lies with the land owner.

Step 2: Provide Written Notice of Intent to Condemn

Initial Contact and Notice of Intent to Appraise and Condemn

Once the decision to acquire a piece of property has been decided upon, the condemning authority will begin to make contact with the property owner stating that it intends to acquire that party's property.

Though the condemnor may hold meetings and engage in other less formal contacts with a landowner concerning the proposed project, the first formal expression of interest in a property usually occurs when the condemnor sends a written "Notice of Intent to Condemn".

Notice is usually provided in written form directly to the property owner through courier or the postal services.

In the event the land owner does not respond, other forms of notice may be used:

- Internet
- local government meetings
- local television stories
- signs posted
- general delivery letters or flyers
- newspaper ads

Step 2: Condemnor's Appraisal

If the condemnor believes their offering value for a property exceeds a minimum statutory amount (such as \$25,000), the condemnor must seek an appraisal prior to beginning negotiations with the property owner.

In determining that the value of the property does not meet this minimal statutory value and that an appraisal is required, various sources may be used such as:

- Property tax assessments
- Comparable "arm's length" transactions
- Any other sources which may be considered as impartial and objective in analyzing the value

Once the condemnor has a valid idea of the value of the property, either through an appraisal or by the above mentioned means, they will attempt to strike a deal with the land owner, through an offer to purchase and a written statement of the intended use of the property.

Gaining Access to the Property

A condemnor is required to perform land surveys, appraisals, and the other steps required in a manner that will accomplish the greatest public good, with the least amount of injury to the land owner. When enacting a condemnation, the condemning party will need to gain access to the property being acquired.

The condemnor's survey team and the other various consultants should give reasonable advance notice of their inspections and surveys, visiting the property only at reasonable times.

When requested, the surveyor should allow the property owner the right to accompany them.

Whenever access is refused by the land owner, the condemning party may find it necessary to apply for a court order allowing full, untethered access. If the property is damaged during the performance of the survey, the condemning party is typically liable for the damages.

Good Faith Negotiations and Offer to Purchase

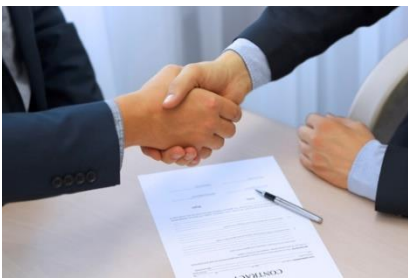
Good Faith Attempt to Negotiate

In most cases, the condemnor is required by state statute to engage in a good faith attempt to acquire the property through negotiations with the property owner.

Step 3: Submitting an Offer to Purchase

Before making the owner an offer for a property, or initiates any negotiations for the property, the condemnor must give the owner a copy of a title report to the property.

After a condemnor has given the owner the information required before its offer, it must then attempt to purchase the property from the property owner by providing a written offer to purchase the property.



Offer to purchase must be equal to or in excess of the appraisal value

An offer to purchase for the condemned property may not be less than the professionally appraised or tax-assessed value of the property; whichever is the greater of the two values. However, the offer may still exceed the appraised or tax-assessed value.

Making Offers which Exceed Fair Market Value

On many occasions, condemnors may submit upfront offers to purchase, which exceed the fair market value of the property.

This can be advantageous in the long run, as expenses accrued due to time delays and legal expenses (because of the condemnation process) can cost far more than the extra value offered for the land.

Written Statement and Summary

Included with the offer to purchase may be a written summary explaining the basis for the amount which has been offered. If an appraisal has been obtained, then the written statement of value might include the complete appraisal packet, however the government will often refuse to share its actual appraisal report.

The land owner does not have to accept the offer, and the government is required to negotiate with them (although the government will often use a take-it-or-leave-it approach to initial negotiations).

Many public agencies are also required to offer to pay up to \$5,000 in reasonable expenses for the landowner to obtain an independent appraisal of the property

The Resolution of Necessity, Public Hearing

Taking Resolutions and Filing of a Complaint

If negotiations for the acquisition of the property prove to be unsuccessful, then the condemning authority may file a complaint in the circuit court of the county in which the property to be acquired is located.

In some localities, this first requires a taking resolution (or resolution of necessity) to be submitted from the authority to allow a condemnation petition to be filed in court.

Determining the Scope of a Resolution of Necessity in Eminent Domain Actions

Before a condemning authority can exercise the power of eminent domain, it usually adopts a

Deposit of Funds and Motion to Possess

resolution of necessity to outline the need for the taking of the property. This resolution defines the scope of the authority's acquisition, and the agency is typically limited in contradicting the terms of the resolution in the eminent domain action once it has been formalized.

There is a fine line in drafting the scope of the taking in the resolution. If the scope of the taking is too narrow or vague, then the authority may be required to seek additional rights or property to fulfill the use. Alternately, if the scope is too broad, it provides an opportunity for property owners to present a claim for higher damages.

In order for the resolution to pass, it must be determined that the project for which it seeks to condemn:

- Requires the property
- Is necessary and in the public interest
- is located in a manner that will provide the greatest public good and the least private injury

Filing a Petition for Condemnation

Once the resolution of necessity has been submitted, then the condemnor must file a petition for condemnation in order to begin the condemnation proceedings. In filing the petition, the condemnor must identify the specific public use for which the property is to be taken or damaged.

The petition will need to include:

- The proposed use
- Identify the property being taken
- A description of the work or improvements to be made
- (In partial takings cases) it must also contain a plat, drawing or plan in sufficient detail to disclose fairly the nature of such work or improvements

This will enable the owner of the property to fully understand the nature and extent of the taking, as well as the extent of any improvements and construction which will occur.

Deposit of Probable Amount of Compensation

Once the government adopts a resolution and files suit it usually deposits with the court the probable amount of "just compensation" based on its initial appraisal.

The land owner is entitled to withdraw the government's deposit of probable compensation after filing an application with the court and waiting a period of time. In withdrawing the government's deposit, the land owner waives any challenges to the condemnation.

Filing a Motion for Possession

If the government wishes to take possession of the property before the lawsuit is finalized, it must serve a motion for possession to the land owner. The court will usually set a hearing on this motion 60 days after it has been served, if the property is unoccupied, or 90 days if the property is occupied.

The land owner will have 30 days to oppose the motion. If the motion is not opposed within 30 days, the court can grant the motion with only a minimal showing by the government.

If it is opposed, the government must prove that it needs possession of your property before the end of the lawsuit, making it more difficult for the government to take possession early.

At that hearing, the court must weigh the hardship the land owner will suffer if the government gets possession early against the hardship the government will suffer if it cannot get possession early.

If the court grants the government's motion for possession, it will issue an order that will require the land owner to vacate the property with minimal notice (within 10 days for unoccupied property; within 30 days for occupied property).

Deposit of Estimate of Just Compensation into the Court Registry (in Quick-Take Cases only)

Certain state agencies and jurisdictions have the authority to “quick-take” a property, but the owner still has the right to a full trial in order to determine the amount of compensation paid after the property is seized.

In order to execute a quick-take possession of the property, the condemning authority must pay into the court’s registry the amount of compensation it believes the owner is entitled to receive. This is usually based on a prior appraisal from an earlier stage of negotiations.

Date of Valuation

The date that funds are deposited into the court registry, becomes the “date of valuation” of the property. Once those funds are deposited into the court, the condemning authority has the right to enter upon the property and begin the necessary construction, and the property owner is entitled to withdraw these funds.

Note: This step does not apply in traditional eminent domain cases, as the condemning authority does not take possession, or remit payment, until after a judgment is entered. The date of valuation is the date of trial, in traditional condemnation cases.

Motion to Disburse Funds

In quick-take cases, the property owner is allowed to withdraw the funds deposited into the court registry. This requires a motion be filed with the court requesting that the funds be disbursed to the property owner.

For the owner to remove the funds, clear ownership of the land must be proven. There may be several parties with an interest in the funds on deposit; as there are typically outstanding loans (mortgage lienholders) which must be satisfied.

A hearing may be scheduled for the court to hear argument on the motion, but frequently such motions are agreed upon by all parties interested and no hearing is necessary.

Withdrawal of funds paid into court does not prejudice a property owner’s claim, or negate their right to seek a higher judgment at trial. On the other hand, a lower judgment could also be settled upon at trial, meaning that a property owner would have to return a portion of the funds.

Note: This step does not apply in traditional eminent domain cases, as the condemning authority does not take possession, or deposit the funds, until after a judgment is entered.

Court Proceedings

Evaluation Conference

The court will hold an evaluation conference and set a trial date for determining the amount of “just compensation” to be paid. The land owner may need to hire an independent appraiser if the condemnor’s appraisal is not satisfactory. About 90 days before trial, both parties will exchange their respective opinions concerning the value of the property. Later (typically 20 days before trial), both parties will exchange final offers to see if an agreement can be reached.

Settlement Conference

The court may also hold a settlement conference to assist the parties in settling the case. If no agreement can be reached as to the compensation to be paid, a trial will occur, where a jury will determine “just compensation.”

Other Pre-trial hearings

Several other hearings may take place before the trial, to resolve a variety of outstanding issues. These hearings are typically scheduled in order to resolve motions, such as those dealing with discovery disputes or addressing legal or evidentiary issues in the case.

Administrative hearings may also occur to address administrative issues such as scheduling a trial date. Most hearings can be handled out by the attorney and do not require the property owner to attend.

Continued Settlement Negotiations and Mediation

Both parties in an eminent domain suit may continue informal settlement negotiations up to the date of trial. Also, the parties are given the chance to participate in mediation proceedings or a settlement conference, depending on the jurisdiction.

Often these mediation proceedings are more successful than informal settlement negotiations because a judge or experienced attorney participates and aids the parties at achieving a resolution.

Although it is not mandatory, most courts urge this as an alternative to settle the issue prior to trials. As the saying goes, when a case goes to trial, the only winners are the lawyers.

Scheduling Order

When the formal condemnation petition is filed with the court, the court will issue a scheduling order that will govern the significant deadlines in the eminent domain case. It is very important that the deadlines be noted and complied with, as failure to comply with a deadline can result in prejudice to a property -owner's case.

Trial

Some states provide a right to a jury trial on the topic of just compensation in condemnation proceedings. However, the parties may choose to waive a jury trial, in which case the judge will be responsible for making the determination of the appropriate amount of damages.



Typical Jury in a Trial

Image source: denver-Colorado-criminal-law.com

Also, (in some states) the property owner has the right to a “jury view”, where the jury is driven to the property so that they may view the property first-hand. The parties have the opportunity to present evidence and testify in support of their claims as to the just amount of compensation.

Retention Expert Witnesses

In most condemnation cases, the main issue in dispute is a determination of the amount of money owed to the property owner for the property taken. This will usually require the use of paid professional witnesses to testify either for or against the offered amount of just compensation.

The condemning authority and the property owner might each hire an appraiser to value the property and give their professional opinion as to the value of the taken property.

In more complex cases, other additional professionals, such as surveyors, engineers, business consultants, or land planners will be called upon to provide the basis needed to accurately value the property taken and damages caused to any of the remaining property. It is vital that all experts be consulted with and retained early, for properly laying out an eminent domain case.

Discovery and Depositions

In a court case, the condemning authority and the property owner each have a right to ask the other side for information and documentation relating to their case, such as the documents supporting their claims, names and contact info of witnesses. They are also allowed to carry out depositions (formal questioning) of witnesses to get additional information.

This legal process is referred to as “discovery.” In many cases, most of the discovery will relate to the appraisals, opinions, and testimony of the expert witnesses.

Verdict (by either the Jury or Judge)

Once the judge or jury has been presented with all of the testimonies and relative evidence, a decision

will be made as to the amount of compensation which it feels the property owner is due.

Quick Take

In “quick-take” cases, if the award is higher than the initial amount paid into court, the property owner is entitled to be paid the difference, plus interest. If the award is less, the property owner will have to reimburse the over-payment.

In traditional condemnation cases, once the jury enters the verdict, the condemning authority can pay the amount of the jury’s award and obtain possession of the property.

Or, it can elect to abandon the condemnation (if, for example, the jury award is too costly), in which case it will be required to pay the property owner reasonable costs and attorney’s fees.

Post-Trial and Right to Appeal

After judgment is entered either party has the right to appeal the judgment if they believe there was an error in the trial.

Appeals can take several years to reach resolution, sometimes costing more in legal expenses than is ultimately awarded. Once the appeals process is complete, or waived, the judgment is then final.

Quick Take and Slow Take Powers

Quick-Take Power

The power of eminent domain does not authorize a condemnor to take or damage an owner’s property until after it has paid the owner just compensation.

In some instances, however, the legislature is granted an additional power of eminent domain called the “quick-take” power. The quick-take power is an extraordinary power that allows a condemnor to take an owner’s property prior to paying the owner just compensation.

The government may seek either a “quick” take or “slow” take condemnation of property:

Quick Take Condemnations

Under a “quick” take condemnation of property the government can take title and possession of a property at the front end of the eminent domain proceeding after entry of an “order of taking”.

Title and possession, however, do not become vested until the government makes a good faith deposit of its appraisal estimate. The owner may reject this initial deposit, without any prejudice to claim of a greater amount of money as just or full compensation. The government is committed to the taking once title and possession are vested, and can no longer abandon the taking.

Slow Take

This type of condemnation of property requires that a jury trial take place to decide upon the measure of just or full, compensation prior to the government being able to take title and possession of the property.

However, following a verdict the government is not required to take the property, and may decide upon abandoning the condemnation if the jury verdict exceeds what the government is willing to pay.

Review Committee Hearing (for Quick-take cases)
For cases where the quick-take authority and the property owner fail to arrive at an amicable resolution, the matter may then proceed to a review committee, which will hear the case and render an award. Any dissatisfied party may appeal to the circuit court and have the case heard “de novo”, or anew.



Hearing by a Review Committee

Image source: kfgo.com

These boards are generally meant to provide an inexpensive alternative to resolving smaller cases and are not an appropriate solution for large contested cases. The condemnor can often bypass a review hearing and file a formal condemnation petition with the circuit court from the beginning.

Note: This step does not apply in traditional condemnation cases; it applies only to quick-take cases.

Chapter 3: Valuation of the Property

Deciding Fair Market Value (The Appraisal Process)

Fair Market Value

Deciding the fair market value of a given property requires a systematic approach and methodology. This is where professional or certified real estate appraisers come into the picture.

A real estate appraiser's job is to develop a professional opinion as to the amount a given property may sell for in the present market or at a particular time. If the appraiser's opinion is based on market value, then it must also be based on the highest and best use of the real property.

Types of Land Valuation

There are several types of land valuations. Some of the more common types are:

- *Market value* – the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.
- *Value-in-use, or use value* – is the value to one particular user, and may be above or below the market value of a property.
- *Investment value* – the value of an asset to the owner or a prospective owner for individual investment or operational objectives.
- *Insurable value* – is the value of real property covered by an insurance policy. Generally it does not include the site value.
- *Liquidation value* – may be analyzed as either a forced liquidation or an orderly liquidation and is a commonly sought standard of value in bankruptcy proceedings. It assumes a seller who is compelled to sell after an exposure period

which is less than the market-normal time-frame.

Determining fair market value in an eminent domain case requires an appraisal which is specifically for an eminent domain valuation. Whether an appraiser is certified as residential or commercial, an eminent domain appraisal requires a competent real estate appraiser who is knowledgeable of, and specializes in eminent domain cases.

Real estate appraisers often have experience specific to particular types of properties or specific regions, making it important to hire an appraiser experienced in appraising of eminent domain properties in the area in which the property lies.

Approaches to Property Valuation

Three Traditional Approaches

There are three traditional methodologies or approaches, for determining a real property's value.

These approaches to value, which are generally independent of one another, are:

- *Sales comparison approach* - (comparing a property's characteristics with those of comparable properties that have recently sold in similar transactions). A sales approach relies upon comparing the subject property to similar "comps" or comparable properties. As comparing properties tends to be like comparing apples and oranges, adjustments are made for the various unlike features such as size, style, quality and type of construction, location, age, etc.
- *Cost approach* - (the buyer will not pay more for a property than it would cost to build an equivalent). This approach uses cost estimation principles to compare the subject property to the price of new construction. Adjustments are then made for age and use depreciation, comparing used to new.

- *Income approach* – This method takes into account the income earning potential for the subject property. For residential properties this usually involves the subject’s rental potential, while commercial properties take into account, other income sources such as agricultural, business, industrial, rental, etc.

Another non-traditional approach sometimes used to value land is the “development, or subdivision” approach.

Using the Subdivision Approach to Value Real Property

Deciding Value

In eminent domain cases, the primary question is about the value of the property. Nearly always, the owner believes that the land is worth more than the value offered by condemning authority. When these differences in value are significant, as it many times is, the accurate valuation of the property is of paramount importance.

The subdivision or development approach is an appraisal methodology commonly used by developers to determine the value of large tracts of land.

The subdivision analysis determines market value by subtracting the cost of developing a potential subdivision from its projected sales earnings, and discounting the remainder to present value as of the date of condemnation.



Typical residential subdivision

Image source: gkdevelopment.com

The subdivision approach is considered a “non-traditional” valuation technique, and thus is not widely accepted by many state court systems as a valid and impartial means to give a fair “just compensation” amount.

Several states have however, begun to give consideration to subdivision valuations if the proper “evidentiary foundation” is established within the landowner’s argument.

The subdivision method of land value analysis has seven general steps:

- Prepare subdivision layout to determine the number, size and shape of typical parcels (usually residential)
- Estimate the retail value of the parcels
- Estimate the direct development costs
- Estimate indirect development costs
- Compute income residual to developer’s profit and land (Step 2 minus Steps 3 and 4)
- Deduct the developer’s profits from Step 5
- Estimate the amount of time to develop and sell the entire subdivision (all parcels). Discount anticipated income stream into a current indicated raw land value.

Some states, apply a bright-line rule* and hold that the subdivision approach is, as such inadmissible. The rationale of these courts is that given the many issues that must be analyzed and assumptions that must be made, the subdivision approach is just too speculative to allow.

** Note: A bright-line rule is a clearly defined standard, made up of objective factors, which leaves little room for wide interpretation. The purpose of a bright-line rule is to produce a consistently predictable result when it is applied.*

Other states permit this type of valuation testimony if the facts establish that the analysis provides a useful and reliable measure of market value.

For example, one state has held that the development approach is admissible if:

- the party can lay a proper evidentiary foundation to show that the land is ripe for development
- the land owner can be reasonably expected to secure the necessary zoning and permitting required for development
- the development will not take place too far in the future

Other Rules which Govern Land Value

The Before and After Rule (Indemnity Rule)

Various states have legislated particular statutory rules which clarify the fair and standardized valuation of condemned lands. One such rule is the “before and after rule”.

The fundamental principle, upon which the requirement of ‘just compensation’ is established, is one of indemnity. In other words the land owner is entitled to be placed in as good a position following the condemnation as before; or to be placed in a position as if the property had never been taken.

Some states have a common-law principle which was developed to calculate just compensation fairly and predictably, known as the “before and after rule”.

This rule provides that just compensation consists of the difference between the fair market value of the land owner’s property immediately before the taking and unaffected by it, and the fair market value of the property remaining immediately after the appropriation and as affected by the taking.

Highest and Best Use

In arriving at a fair market price which would be agreed to by both a willing and informed seller and buyer, some factors are considered in making this determination. This includes the “highest and best, reasonably available use of the property and its value for such use.”

Determining the highest and best use of the land is crucial to establishing the best “just compensation” value for the land owner.

For example, a parcel whose highest and best use is for agricultural purposes, will yield a lower “just compensation” value than land which has residential development as its highest and best use.

Two factors that must be proven in order to establish the highest and best use of a property are:

- First, the landowner must exhibit that the land is physically and feasibly adaptable to be used for the proposed highest and best use
- Second, that there is the need or demand in the area for this proposed use

If a parcel lies in the middle of a rural area with few primary roads or highways in the area, that land might not be a feasible choice as a location for an industrial complex. And suppose a property is located in the middle of a predominately agricultural region.

If the proposed use was for developing a high-rise office building, then that use would undoubtedly not qualify as highest and best use. There would be very little need or demand for office space in a rural agricultural setting.



Example of Inappropriate Use of Land

In addition four other factors are determined in evaluating the highest and best use:

- *Physical Possibility* - Is the proposed use physically possible? For example, a

residential development may not be physically possible in wetlands without going through extensive remediation and mitigation.

- *Legal Permissibility* - Is the proposed use legally permissible? For instance, constructing a residential subdivision in wetlands is likely not allowed due to zoning or environmental restrictions.
- *Financial Feasibility* - Is the proposed use financially feasible? Although it may be physically possible and legally allowable to build homes in wetlands, it might not be financially feasible.
- *Maximum Profitability* - Will the proposed use achieve maximum profitability? What is the most productive and profitable means in which the property may be utilized?

Current Use of a Property is not necessarily the Highest and Best Use

In comparing possible uses of a property, the highest and best use of a piece of land is not always its current use. The market value of a property might reflect other possible uses to which the land may be used at the time of condemnation.

For example, if a parcel of land is being used for a hunting lease, but has a high percentage of leveled and cleared acreage which is rich and freshly tilled, it may be better used for agricultural purposes.

These other proposed uses must be reasonable in nature, though. The courts typically limit the highest and best use principle by permitting compensation only for reasonable certainties available to the land owner at the present time, and not for farfetched ideas, or speculative purposes which may only be possible in the future.

Chapter 4: Compensation for Damages

Properly Compensating for Damages caused by the Taking

Full Restitution

Regardless of whether the government's taking is challenged, a landowner is entitled to full and satisfactory restitution for the taking, in order to make the landowner "whole".

Many courts interpret just compensation to mean that the landowner should be compensated to the point of reasonably complete reimbursement of all out-of-pocket expenses, and a reimbursement for their inconvenience, or "making the land owner whole".

Complete compensation within reason, may include a number of damages, such as:

- The fair market value of the land taken
- Improvements on the property
- FFE or furniture, fixtures, and equipment
- Intangible business losses suffered as a result of relocating
- Moving costs of relocating either a business or residence
- Reestablishment of the business to meet the conditions present, prior to the taking
- Damages resulting from excessive delays or other unreasonable conduct by the government
- Interest (the time value of the financial compensation due to delays)
- Attorney fees, and other legal or documentation fees
- Appraisal fees (to pay for an independent appraisal, in addition to the condemner's appraisal)
- Other necessary legal expenses such as surveyors, consulting engineers, and business appraisers

Compensation for Business Losses

Business Losses

Many times there are extenuating circumstances involved in eminent domain cases, especially concerning business losses.

Property owners often have questions concerning eminent domain compensation for business losses in cases where:

- There is a loss of business interests
- Improvements were made to the property
- Compensation in cases where the property has a tenant
- Only a portion of a property is seized, affecting the valuation of the remaining land
- Legal expenses were incurred

Loss of business interests

In most states, property owners are not entitled to compensation for business losses as a result of the property being seized in eminent domain actions. However, some states, allow for compensation for loss of business "goodwill".

Properly Valuating the Loss of Business "Goodwill and Going Concern Value"

What does "Business Goodwill" refer to?

Business goodwill is a key intangible asset that represents the portion of the business value that cannot be attributed to its tangible, physical business assets. The whole business is worth far more than the sum of its individual parts.

In other words, business goodwill reflects the "business harmony" among the various assets used by a business to produce income.

In the beginning, as a business opens its doors, its value is mostly a sum of its tangible parts, which include FFE (furniture, fixtures, and equipment) with maybe the intangible value of possibly being in a good location.

As time goes by, the business builds a dedicated following of customers who are used to associating the business with that particular location.

When that business relocates to a new location, many times the owner will have to rebuild a customer base for a variety of reasons, such as:

- The customers are unaware of the move and can't find the new business location
- The customers assume the business is closed, and quickly migrate to the competitor
- The new location is inconvenient to the customer base (too far to travel, or just not close enough)
- Some customers may have only visited the business because it was near to other businesses which they patronized
- Some customers may not have automobiles and are unable to travel to the new location
- The new location does not have the look and feel of the old business (for example, trendy restaurants)

Restoring the ambience of the original business as well, can be a challenge. This has been the end of many businesses, especially the retail type.

What creates business goodwill?

Here are some of the key factors that contribute to the creation of business goodwill:

- Going concern value
- Excess business income
- Expectation of future economic benefits
- Intangible value of a business's location, reputation, and other issues that ensure a continued patronage

When a business' site is taken or damaged, it is not uncommon to see business-loss claims that are well above the value of the real estate.

With claims such as these, business owners must convince courts that a taking or damaging of real property will cause an actual loss to the intangible aspects of the business, which mainly includes the goodwill and going-concern value of that business.

A business goodwill claim is recoverable if the business' profitability decreases as a result of being forced to move.

Goodwill is typically determined by expert business analysts or appraisers who will take into consideration, various factors such as:

- the nature of the business
- the affect that the business' reputation has on their profit margin
- the length of time in the business - total
- the length of time in the business - at that location
- the type of customer base
- the amount of foot traffic patronage

Not all businesses possess goodwill. Some businesses are capable of produce equal earnings in any space they are located. If the owner cannot prove their case sufficiently enough to show tangible losses from the move, the courts may decline their claim.

What is the "going concern value of a business?"

Concerning business valuation, "Going Concern Value" is the value of a business that is expected to continue operating into the future, as opposed to being liquidated for its assets. When appraising real estate, Going Concern Value usually refers to the total value of the real estate plus the business operation.

General Rule is No Recovery for Business Loss

The general rule of thumb when deciding just compensation for cases where a business exists has usually been to deny the land owner value for the intangible portion of the business losses.

However, over the past few decades there has been an increased trend among states in recognizing business loss as an element of just compensation, both legislatively and judicially.

Courts are slowly beginning to recognize that intangible value is a part of just and fair compensation; nevertheless they are still hesitant

to compensate property owners for business losses that cannot be precisely quantified.

The traditional reasoning for denying financial recovery to the landowner is that the damage to a business is *damnum absque Injuria*, or “a harm without an injury”, and thus it is not clearly compensable or quantifiable.

Common reasons that courts may deny any business-loss recoveries in an eminent domain case are:

- Business loss is too speculative and ambiguous to calculate to an acceptable degree of certainty
- The condemnor has not taken the business from the owner, only the real property

Compensating for Other Losses

Compensation for Improvements

An owner is entitled to be compensated for "all improvements pertaining to realty". This could be construed as any items installed for use on the property that cannot be removed without substantial damage to the property. Such improvements may include buildings, fencing, paved parking lots, or equipment such as wells, and solar panels.

In many jurisdictions, valuation of improvements considers the particular improvement as it relates to the property's ongoing value, rather than salvage value or replacement cost.

Compensation for Tenants

Anyone with an interest in a taken property, such as a tenant, is usually entitled to receive just compensation for his or her interest in that property.

The valuation of just compensation for a rented property in these cases may differ depending on whether the lease or rental agreement contained a condemnation clause.

In some eminent domain cases, such a tenant may be entitled to receive a considerable portion of

eminent domain compensation made for the property. The condemnation clause, if it exists, determines how the compensation between the owner and the tenant will be allocated. A tenant's just compensation may include business goodwill, fixtures and equipment, relocation costs, and possibly any increases in rent paid as a result of relocation.

Compensation for Partial Seizure (Severance Damages)

In many eminent domain condemnation cases, only a portion of the property is taken, for example the taking of a strip of land required to widen a street, add utilities, or create a drainage ditch.

Usually in these situations the strip of land is along one side of the property. But there are occasions where the strip is cut through the center area of a parcel, such as for a road, or transmission line, and winds up splitting a parcel or land, thus isolating each side from the other.

In these cases, one side may not be used in the taking, but is rendered useless for reasons such as being landlocked or too narrow to build on.

In cases where the property (which the land owner retains), suffers damage to its marketable value because of the partial taking, the land owner is entitled to the value of the property taken plus the damages to their remaining property. These damages are called "severance damages".

Severance damages are usually measured by the decrease in the marketable value of the leftover portion of the property.

Severance damages may also be necessary to cover damages to a property caused by the actual construction project for which the property was seized.

Compensation for Relocation of a residence

The costs incurred when moving a residence is pretty straight forward compared to moving a business. The courts will attempt to insure that the

new home is equal in value and quality to the taken home.

They will try to be fair in making the home owner whole again, by compensating for:

- Furniture movers
- Closing costs
- Legal and agents fees incurred in the closing of the new home
- Increased mortgage rate for the new home compared to the old

Compensation for Relocation of a business

In some cases, the property owner is awarded additional compensation for having to relocate a business. Relocation reimbursement may cover a portion or all of the moving expenses, though these relocation costs are normally subject to certain maximum payment limitations.

Some examples of possibly reimbursable relocation expenses may be:

- utility reconnection and retro fitting
- business advertising to bring customers to the new location
- finding a replacement site
- costs of having to pay more for a new site
- costs of a change in financing incurred due to the relocation
- the difference in cost of a similar site and the old site
- printing new stationery
- reinstall and reconnect machinery and equipment

Recovery for these items typically occurs through an administrative proceeding or hearing, and not in the eminent domain action itself. This negotiation can become quite complex, as there are many variables to consider beside the cost of the moving van.

Compensation for Unnecessary Time Delays

When the government excessively delays in commencing the condemnation action after announcing its intent to take your property, or the agency engages in other unreasonable conduct, the

land owner may be entitled to pre-condemnation damages.

For example, pre-condemnation damages may occur if the owner is unable to rent their property at market prices because tenants are unwilling to move in as a result of the condemnation announcement. The owner may also be entitled to recover damages if the property decreases in value during the excessive delay.

Compensation for Legal Expenses and Court Costs

In many states, the attorney fees and other legal expenses incurred to defend against the government are taken into account when deciding full compensation to the landowner.

Such fees and costs are paid in addition to the amount determined for the property or business owner to receive for the property taken and any severance or business damages.

This provides the property or business owner a level playing field in which to defend their property rights. The owner can be made whole, receiving the full measure of compensation for the loss of land, without the settlement being diminished by the cost of defending a lawsuit that the owner did not ask for nor wanted in the first place.

Compensation for Interest

The government is usually required to pay interest on any award of "just compensation" beginning on the date it takes possession. The land owner is also entitled to recover normal "court costs," such as filing fees, deposition fees, and expert witness fees.

Attorneys' fees and appraisal fees are also recoverable, but there are situations where they are not included in the land owner's compensation package, such as when they exceed reasonable limitations

Chapter 5: Other Topics relating to Eminent Domain

Permanent or Temporary Taking of a Property without a Condemnation

Permanent Usage of Property without condemnation

The permanent, physical occupying by the government of a given portion of a property is considered to be a taking, even though the government does not remove the property owner from the location, take actual title of the property, or file for condemnation in the courts. In most situations such as this, it is still obvious that a taking has occurred.

Example of a Permanent Taking without condemnation

A property owner has a residential property of which a portion is needed by the local power utility for expanding their electrical transmission lines.

This requires condemning a 3 foot wide parcel of the land owner's property adjacent to the sidewalk, and running the lines along that section of land. This is clearly a taking of land for a permanent usage, and therefore the utility will need to make just compensation for the taking.

Temporary Usage of Lands by the Condemnor without Condemnation

On the other hand, a temporary usage of the property by the condemnor, might infringe on the ownership rights of property owner, but it is not considered to be a taking.

Temporary takings consist of two types:

- *Physical takings* - where the government "occupies" the property
- *Non-physical takings* - such as moratoriums, where the government deprives the user or property owner of other rights, but not the right of occupancy

Just compensation is still required to be paid to the land owner for a temporary taking the same as it is

in a permanent taking; however the basis for the compensation differs for the two situations. This is because the basic measure of damages for a temporary taking is payment of what would be fair market rent for use of the property during the taking period, instead of the fair market value of an arm's length sales transaction.

Temporary Taking when a Tenant is on the Property

In the case of a temporary taking where a tenant occupies the property, the government might take the tenant's interest in an existing lease of a property temporarily, as if it were a sublease.

Compensation would be paid to make the tenant whole again, but may leave the property owner without a tenant once the temporary taking has ended, and with little or no compensation at all for the taking.

Example of Temporary Usage

The Department of Transportation is building a roadway bridge over one of their state's rivers. In building the bridge, the state requires a clear area off the road, and near to the construction site, in order to store heavy equipment, store materials and fill dirt, and for employee parking.

The only site which meets this criterion is a local diner, with ample parking and level storage capabilities.

Even though no condemnation has occurred, the DOT temporarily takes possession of the parking area, until the construction is completed, two years later. The diner owner is paid just compensation in the form of fair market rent for the period of 24 months only.

When Governmental Regulations affecting a Property is considered to be a "Taking"

The governmental regulating of a property, through zoning laws or other administrative rulings, is not usually ruled in court to be a taking of property.

However, if a governmental regulation deprives the owner of any economically viable use of his or her land, then the courts may indeed rule it as a taking.

Example where the regulation resulted in a taking:

A property owner has coastal property on which he plans to construct beachfront condos for future rent or sell. However, the local government passes a law that forbids the construction of habitable structures on coastal property for environmental reasons.

In this case, the Supreme Court states that the law did indeed amount to a taking, because the environmental ruling caused the property to be valueless to the owner, as he only bought the property for one economic purpose and now, that economic purpose has been eliminated.

Therefore, it is a taking and the government must pay for the taking of the property.



Beach condos

Image source: Miamicondolifestyle.com

Example where the regulation is not considered as a taking:

An owner owns a farm that runs along a rural highway. The farming land owner erects a sizeable billboard on his land that is visible from the highway.

He rents out the billboard to commercial advertisers and profits in doing so. However, the state legislation then decides to pass a law outlawing billboards that are visible from interstate highways.

Even though this law deprived the owner of the economic benefits from billboard rentals on his property, the law will likely not be considered as a taking.

The property was still usable for agricultural purposes, just as before. Therefore the law does not deprive the owner of all economic use of the property, and is thus not a taking.



Rural Billboards

Image source: downwithtyranny.com

Strange Cases of Eminent Domain

Eminent Domain to create an “Odor Easement”

In the 90’s, residents near a sewage treatment plant successfully petitioned the city to rectify the foul odor issues of the wastewater facility. The solution to the problem was to create an “odor easement” surrounding the plant by condemning those houses adjacent to the plant.

The city began condemnation proceedings on dozens of properties nearby, but as soon as their eminent domain invocation was completed, the city sold the land to a local business owner for nearly \$2 million, without remediating the odor.

Redefining the standard definition of “Urban Blight”

When residents of a Great Lakes community discovered their waterfront properties were wanted by condo developers, hundreds of residents began to sell and move out of the area.

But with some occupants holding out, the city had to get creative in order to legally force out the remaining residents. City officials came up with the

idea of re-classifying their area as blighted, and run down.

Because many of the dwellings were well-maintained, the scheme was to change the standard of urban blight to read, anything less than a two-car garage, three bedrooms, with central air conditioning. The entire plan left such a bad taste in the mouths of so many residents that citizens eventually voted the acting mayor out of office.

Golfing as a Public Use

West Palm Beach is a city with an abundance of golf course communities. Even so, the county targeted one particular neighborhood for condemnation so that a golf course community could be built in its place.

In the 80's, over 300 residential properties were purchased by a developer to make way for a new golfing community. However, as most families sold their homes and moved on, roughly ten families remained defiant.

Over the coming years, the neighborhood became a ghost town with the only occupants being those holdout families. The remaining empty houses had since become dilapidated and vandalized, thus the neighborhood now met the criteria of urban blight. The property values of the remaining ten families saw their values plummet.

Through the years and countless legal battles, the last remaining holdout family was forced out of their home in 2002. In the end the golf course community was never built, and the vacant property which was once home to 300 families was eventually turned into a completely different use.

Conflicting Interests can be Costly

Nevada is full of cases involving eminent domain cases which involve the construction and expansion of casino interests. When the owner of a small strip mall died and left rental property to his widow, she expected to continue operating the small strip mall and living on those profits.

However in 1994, Las Vegas seized the property so that a parking garage could be built as part of a casino redevelopment. When the widow fought the case in court, the presiding Judge ruled in favor of the city and casino.

The judge failed to mention his financial ties to the redevelopment plan by owning shares in that particular casino. When this was brought to light, the city was sued, ending up in Supreme Court, with an eventual settlement of \$4.5 million.

Legislation to prevent Private Gain through Eminent Domain

States which have Legislated Protection against Eminent Domain

The Supreme Court decision in the Kelo vs New London court case generated an enormous degree of outrage from many who felt that the state was beginning to over step its authority in the use of eminent domain.

When the Kelo case upheld the right to condemn private property for transfer to other private owners in order to promote economic development, this touched a nerve with many who saw it as a blatant abuse of power.

Reform Laws to counter abuses

Polls showed that over 80% of the public opposed eminent domain takings for the sole purpose of economic development. As a result, many states have enacted eminent domain reform laws restricting the condemnation of property strictly for the benefit of private interests.

Unfortunately, many of these new reform laws still do not fully prevent the abuse of power in some eminent domain takings. Some legislators produced bills that had major loopholes to allow for business as usual.

The most common tactic is the allowance of economic development condemnations under the alleviation of blight. As mentioned on the previous page, many states define "blight" so broadly that

almost any neighborhood or property would qualify and is therefore subject to condemnation.

Areas such as downtown Vegas and New York's Times Square have been declared "blighted areas" for the purpose of justifying condemnations for private parties.

To counter this loophole, some state legislators are beginning to draw up bills such as Mississippi's "Measure 31", prohibiting the transfer of so-called blighted property to private parties unless the properties are severely dilapidated or pose a direct threat to health and safety.

Limiting the Power of Eminent Domain

Limiting the Powers of Eminent Domain

These states have passed legislation which prohibits or limits the use of eminent domain for private gain:

- Arkansas
- Kentucky
- Maine
- New Hampshire
- Ohio
- South Carolina
- Washington

These states have amended their legislation to prohibit or limit the use of eminent domain for private gain:

- Florida
- Georgia
- Louisiana
- Michigan
- Mississippi
- Nevada
- Oregon
- South Carolina
- Texas

These states have passed state laws to prohibit or limit the use of eminent domain for private gain:

- Alaska
- Delaware
- Indiana
- Iowa
- Kansas
- Minnesota
- New Mexico
- North Dakota
- Pennsylvania
- South Dakota
- Utah
- Virginia
- Wisconsin
- Wyoming