

What Is Eminent Domain?

Legal View

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Recently, a reader asked me to comment on the various types of public use of land and its implications. One way the public can “access” private land is by a government’s acquisition of property through the law of eminent domain. Eminent domain, sometimes called condemnation, or *taking*, is the government’s lawful ability to take ownership of private property for public purposes.

Historically, private property could be taken by governments for the purpose of building roads and government buildings. Later, condemnation law developed to include the taking of private property for third party development, if the property was “sufficiently distressed” or “blighted.” In these situations, it was considered to justified, because it provided a program of economic development that would create jobs and increase tax revenues. However, this expanded use of eminent domain power has been vigorously debated after gaining momentum in the 2005 case of *Kelo v. The City of New London*, initially decided by the Connecticut Supreme Court and later confirmed by the U.S. Supreme Court, ruling that the City’s Plan “unquestionably served a public purpose,” opening the door to a variety of uses for condemnation. The *Kelo* decision changed the landscape of eminent domain and continues to be criticized by many, including the recently appointed Supreme Court Justice Neil Gorsuch.

How Does Eminent Domain Work?

The Fifth Amendment to the United States Constitution provides the government may only exercise the power of eminent domain if it provides just compensation to the property owner. In Colorado, like many other states, the condemning authority must follow a statutory procedure to acquire the target property. The *taking* of a person’s property, predictably, is a passionate topic in the United States. Essentially, if the parties cannot agree on a value, the condemning authority bears the burden of proving the value of the property, and according to Colorado Revised Statutes 38-1-101(2)(a): “such compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders...or by a jury when required by the owner of the property... (or by the Court) if all parties interested in the action stipulate and agree...”

I can attest the process is very interesting and important, having served on a Board of Commissioners several times. The condemning authority presents evidence of the value of the property taken, typically through experts (commercial or residential appraisers), real estate brokers and others witnesses, then the property owner presents evidence of value, including their own testimony. For instance, if only a narrow strip of land is taken to widen a road, the property owner may want to testify how widening the road has “damaged” their property, and how it has impacted their ability to sell or live at the property with increased noise. The Board may also visit the property (which we did in each case), and then deliberate privately to reach a decision on value and damages. The Board only determines compensation; the court awards the condemning authority *fee simple* title to the property and enters a final award of damages to be paid to the owner.

What Impact Can Eminent Domain Have?

Aside from the obvious issues of compensation for loss and damages to a property, tenants and landlords can also be significantly impacted by eminent domain action. If a commercial tenant is leasing a property for a restaurant, and part of the restaurant's parking lot is condemned for road expansion, what options does the lease provide to the parties? Hopefully, the lease will provide for a rent adjustment, termination and damages incurred to relocate, as well as which party may be entitled to a condemnation award. Obviously, purchasers and lenders can also be impacted by condemnation, and any related documents should anticipate the possibility that the involved property may be condemned.

Condemnation affords the government significant power that should not be abused. It is an important, long standing process that provided historical safeguards to protect property owners from their loss of property. However, the trending expansion of this power is the subject of much debate as recently seen in the disputes between the towns of Erie and Lafayette, prompting a Colorado Appeals Judge to warn of the potential for *serial condemnation* by condemning authorities. We can only wait and see where it goes in our robustly expanding State of Colorado. In the meantime, you may want to check out the recently released film "Little Pink Houses" that chronicles the plight of nurse Kelo, who was at the center of the 2005 Supreme Court case that gave rise to this more powerful authority to take private property.

Do you have a legal question? Send your inquiry to attorney Jeff Kelley (Jeff@klfpc.com). Appointments are available in both Black Hawk and Denver offices.

Note: While every effort has been made to ensure the accuracy of this information, it is published for general information and not intended to provide specific legal advice as individual situations will differ and require full analysis by an attorney of the specific facts involved.