



## **EMINENT DOMAIN: A LEGAL INTRODUCTION**

### **Definition**

Although eminent domain is one of the oldest and most settled legal doctrines in the English common law, most American lay persons would be hard pressed to articulate an accurate description of its characteristics. Much of this inability might stem from the fact that the term, eminent domain, is composed of two highly technical words of Latin derivation which are seldom used in their legal sense in everyday English, but which each have separate, unrelated usages in colloquial speech. Part of the inability might arise from public confusion of the term, eminent domain, with more common, but less accurate, terms such as condemnation, taking, or forced transfer. Part, and probably not the least part, might have to do with the public's general dislike of the underlying concept.

Concisely stated, eminent domain is the sovereign authority of a national or state government to take, or to authorize someone else to take, private property (usually, but not exclusively, real property) for a recognized public purpose without the owner's consent, but in return for an appropriate compensation at the expense of the condemnor. That said, scores of legal treatises, hundreds of statutes, and thousands of appellate cases have been

written, enacted, and contested to refine that basic concept. Most of these refinements are highly technical and of little importance from a legislative policy perspective, and, though frequently litigated, are well-settled within the legal community. The following represents a brief, general summary of the essential principles of the doctrine of eminent domain, with special emphasis on its public policy components.

### **Characteristics**

First of all, it is important to understand that eminent domain is a sovereign power, deriving ultimately from the sovereignty of the state, and is, as such, inherent and inalienable. The state may choose to place restrictions upon its own use of eminent domain, but this authority cannot be eliminated or destroyed. Within that continuum, any variable is conceivable from an ideologically pure communism, where the state owns all property in the name of the general good, to an ideologically pure capitalism, where the state defers, as much as possible, to private ownership on the theory that private ownership will utilize property more efficiently than the public sector.

A second fundamental principle of eminent domain is that eminent domain is, within the American system of separation of powers, an inherently legislative power. The preeminent legal encyclopedia, *American Jurisprudence*, makes this point clearly and well:

The decision to exercise the power of eminent domain is a legislative function, for the Legislature alone to determine. Under the separation of governmental powers into the executive, legislative, and judicial branches, the right to authorize the exercise of the power is legislative, and there can be no taking of private property for public use against the will of the owner without direct authority from the Legislature. Subject to constitutional limitations, it is the province of the Legislature to prescribe how and by whom the power of eminent domain is to be exercised, and the discretion to exercise the sovereign power of eminent domain is in the Legislature and those to whom it delegates such function by statute. The executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. Where, therefore, the constitution is wholly silent on the subject, the power of eminent domain rests entirely with the Legislature and lies dormant until the Legislature sets it in motion. (Second Edition, Volume 26, page 447)

This situation is somewhat analogous to the delegation of legislative authority in

the rules promulgation process. Rules promulgation is an inherently legislative function that the Legislature may delegate under such terms and conditions as it may choose, to an executive agency. The agency may use its technical expertise to make policy within parameters set by the Legislature. Indeed, it would be unconstitutional for the Legislature to delegate unrestricted rulemaking authority to a state agency, just as it would be unconstitutional for the Legislature to delegate its power of eminent domain to a municipality, special district, or public utility without restricting the scope of that authority with reference to the public purpose to be accomplished.

### **Public Purposes**

To be subject to eminent domain, private property must be reasonably necessary to the accomplishment of some significant public purpose; however, such purposes may be highly variable. The most readily agreed upon public purposes will generally be those that are a direct function of a nation, state, or local government. Buildings, such as post offices or courthouses, military fortifications, flood control projects, such as dams or levees, roads and bridges, parks and playgrounds, and even the preservation of historical sites are fairly clear examples of public purposes which justify the use of eminent domain.

Public purpose is a justiciable question, however, and some public purposes may or may not justify the use of eminent domain. The construction of a municipal library may serve as an illustration. First, libraries are commonly maintained by municipalities, but there are private libraries as well as state and regional libraries, so there is some

question about whether this would constitute an essential government service. Second, library buildings take up little space; should not it be possible to purchase enough real estate without resorting to eminent domain? On the other hand, what if a particular downtown location is uniquely suited to use as a library, or what if the existing library needs to build an addition or expand? What if the owner of a particularly suitable tract is demanding \$200,000 for the site that is objectively worth only \$100,000, confident that it would cost the city more than the price differential to build in a less appropriate location? Those are the types of questions that are frequently addressed in statute or common law and are continually litigated.

Another problematic formulation of public purpose revolves around public utilities. States have traditionally permitted the use of eminent domain for railways, electrical utilities, telecommunications, gas, pipelines, canals, storage facilities, and irrigation projects. With such large-scale projects, even though privately funded and operated, there is often little possibility of developing the project without the use or the threat of eminent domain. Is it appropriate to allow one landowner to effectively block the building of a pipeline that will reduce the price of natural gas to everyone by fifty percent? Is it wise to force an electric company to pay a greedy property owner twenty times what his property is worth and pass the cost on to all consumers? Should a municipal power plant and an independently owned power plant both have equal access to the power of eminent domain? And, if the public and the private power plant do not have equal access, how can the one with less access effectively compete?

## Compensation

The Fifth Amendment to the federal constitution and similar language in most state constitutions enshrine the principle of just compensation. Both the common law and state statute have established an elaborate and detailed set of variables determining what compensation may be considered just. A complete enumeration of these factors is impossible here, but the following few may be illustrative:

- (1) In a fee simple transfer, the landowner is ordinarily entitled to the fair market value (as opposed to either the book value or the value of the property to the condemnor);
- (2) The owner is also entitled to any damages which result from the eminent domain proceeding but has a duty to mitigate those damages;
- (3) The owner may be entitled to compensation for a compensable taking even though the property itself is not condemned (if the original use is impaired because of adjoining noise, smoke, odor, etc.);
- (4) Holders of leases, easements, and other property rights must be compensated for their losses;
- (5) Holders of future interests (remainders) share a right to compensation;
- (6) If a partial tract is taken, the landowner's compensation will normally be the difference between the fair market value of

the original tract and the fair market value of the remaining tract (not the fair market value of the condemned tract);

- (7) The landowner may be compensated for a "regulatory" taking (for example, rezoning or the abatement of a preexisting use);
- (8) The condemnor is generally not entitled to a setoff for any increase of value due to the altered conditions which result in an increase of the fair market value of any tract retained by the landowner;
- (9) The condemnor may be limited to taking an easement if a property transfer is not necessary to accomplish the public purpose;
- (10) The landowner may be awarded the right of reversion if the public benefit should ever cease.

### **Condemnation Proceedings**

If the Legislature provides the legal framework for eminent domain and the executive branch ordinarily takes the role of condemnor, the judicial branch performs the vital oversight function. Although legislative policy in this field changes very slowly and while most legal precedents are well established, the application of these principles is continuous, and the courtroom is the focal point of the legal procedures surrounding eminent domain.

Condemnation proceedings operate as a normal civil proceeding, often utilizing juries if damages or valuations are an issue. The court typically plays an important part as an impartial referee

and generally serves as a judicial arbiter of subjective questions, such as the nature of the public purpose in question, the good faith of the participants, and the expediency or deliberateness of noncondemnatory alternatives. Frequently, it sits at equity; that is, it applies common sense to a factual situation where no point of law is determinative. The court may award legal fees and other expenses because of bad faith or unreasonable delay; and, in this type of proceeding, such awards can be powerful incentives toward settlement.

In almost all instances, condemnation proceedings are brought by the condemnor, who has no power to take property without a judicial decree. If, however, a landowner feels that the value of his property has been diminished, he may bring an action for inverse condemnation. The court then may award damages to the landowner if he can prove some sort of regulatory or constructive taking.

### **Extralegal Relief**

Some states and other jurisdictions have sought to relieve the impact of eminent domain processes by administrative programs. Although these programs are not common, they can relieve hardships and may help to alleviate very stressful situations. Relocation assistance is probably the most common of these programs. Prepayment of moving expenses is also known. Arbitration boards or commissions may provide a less formal forum for dispute resolution.

## **Conclusion**

Although the legislative policies and common law dealing with eminent domain have changed very little in recent decades, every eminent domain proceeding is fraught with strong emotions, important economic consequences, and potential litigation. Not infrequently, constituents threatened with loss of property through eminent domain will turn to their legislators for assistance. These constituents are often emotionally overwrought. Most are honest citizens in unusual and

confusing circumstances hoping for aid or sympathy from any corner. A few may be seeking undue political pressure to assist them in reaching a more favorable resolution whether in the political, judicial, or private arenas. While the Legislature should constantly monitor the eminent domain process to identify the onset of needed reforms, the courts have proven, over several centuries, their value as the best arbiter of individual condemnation questions. At this date, neither the legislative nor the judicial role in the eminent domain process seems ripe for fundamental changes.

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**This issue memorandum was written by Reuben D. Bezpaletz, Chief of Research Analysis and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

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