

# Eminent Domain

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July, 2004

## What is Eminent Domain

Eminent domain refers to the power possessed by the state over all property within the state, specifically its power to appropriate property for a public use. In some jurisdictions, the state delegates eminent domain power to certain public and private companies, typically utilities, such that they can bring eminent domain actions to run telephone, power, water, or gas lines. In most countries, including the United States under the Fifth Amendment to the Constitution, the owner of any appropriated land is entitled to reasonable compensation, usually defined as the fair market value of the property. Proceedings to take land under eminent domain are typically referred to as "condemnation" proceedings.

## The Process of Eminent Domain

Eminent domain law and legal procedures vary, sometimes significantly, between jurisdictions. Usually, when a unit of government wishes to acquire privately held land, the following steps (or a similar procedure) are followed:

- The government attempts to negotiate the purchase of the property for fair value.
- If the owner does not wish to sell, the government files a court action to exercise eminent domain, and serves or publishes notice of the hearing as required by law.
- A hearing is scheduled, at which the government must demonstrate that it engaged in good faith negotiations to purchase the property, but that no agreement was reached. The government must also demonstrate that the taking of the property is for a public use, as defined by law. The property owner is given the opportunity to respond to the government's claims.
- If the government is successful in its petition, proceedings are held to establish the fair market value of the property. Any payment to the owner is first used to satisfy any mortgages, liens and encumbrances on the property, with any remaining balance paid to the owner. The government obtains title.
- If the government is not successful, or if the property owner is not satisfied with the outcome, either side may appeal the decision.

## Takings

There are several types of takings which can occur through eminent domain:

**Complete Taking** - In a complete taking, all of the property at issue is appropriated.

**Partial Taking** - If the taking is of part of a piece of property, such as the condemnation of a strip of land to expand a road, the owner should be compensated both for the value of the strip of land and for any effect the condemnation of that strip has on the value of the owner's remaining property.

**Temporary Taking** - Part or all of the property is appropriated for a limited period of time. The property owner retains title, is compensated for any losses associated with the taking, and regains complete possession of the property at the conclusion of the taking. For example, it may be necessary to temporarily use a portion of an adjacent parcel of property to complete a construction or highway project.

**Easements and Rights of Way** - It is also possible to bring an eminent domain action to obtain an easement or right of way. For example, a utility company may obtain an easement over private land to install and maintain power lines. The property owner remains free to use the property for any purpose which does not interfere with the right of way or easement.

## **Fair Value**

Fair value is usually considered to be the fair market value - that is, the highest price somebody would pay for the property, were it in the hands of a willing seller. The date upon which the value is assessed will vary, depending upon the governing law. If the parties do not agree on the value, they will typically utilize appraisers to assist in the negotiation process. If the case is litigated, both sides will ordinarily present expert testimony from appraisers as to the fair market value of the property.

## **Just Compensation**

At times, fair value includes more than the price of an item of property or parcel of real estate. If a business is operating from the condemned real estate, the owner is ordinarily entitled to compensation for the loss or disruption of the business resulting from the condemnation. In a minority of jurisdictions, the owner may also be entitled to compensation for loss of "goodwill," the value of the business in excess of fair market value due to such factors as its location, reputation, or good customer relations. If the business does not own the land, but leases the premises from which it operates, it would ordinarily be entitled to compensation for the value of its lease, for any fixtures it has installed in the premises, and for any loss or diminishment of value in the business.

## **Public Use**

Ordinarily, a government can exercise eminent domain only if its taking will be for a "public use" - which may be expansively defined along the lines of public "safety, health, interest, or convenience." Perhaps the most common example of a "public use" is the taking of land to build or expand a public road or highway. Public use could also include the taking of land to build a school or municipal building, for a public park, or to redevelop a "blighted" property or neighborhood.

## **Abuses of Eminent Domain**

In recent decades there has been growing concern about the manner in which some states and units of government exercise their power of eminent domain. Some governments appear inclined to exercise eminent domain for the benefit of developers or commercial interests, on the basis that anything that increases the value of a given tract of land is a sufficient public use. Critics respond that this is absurd, and that there are few properties, no matter how upscale, which could not be made more valuable if developed in a different manner. They also note that if a developer is unable to purchase the property on the open market, it is unlikely that the landowners will truly be offered the value of the property through condemnation proceedings. The governmental response to that point is that the law of eminent domain arose from the experience that some property owners are unwilling to negotiate a reasonable sale price, and such unreasonableness should not provide a basis to extort an above-market price or to prevent the completion of a public project.

For example, in one case a town wished to exercise eminent domain over a residential neighborhood, so that an upscale condominium development could be built on that land. To advance that goal, they defined any home within the neighborhood as "blighted" if it did not have three bedrooms, two bathrooms, an attached two car garage, and central air conditioning. The homeowners challenged the definition in court, and were ultimately successful in fighting the municipality's efforts to take their homes.

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