

Eminent Domain 101

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The power of eminent domain, also referred to as condemnation, is the power to involuntarily take a person's private property for a public purpose. The power of eminent domain may be exercised by federal, state, and local governments, and by certain private parties authorized by statute to exercise such powers such as electric power, telephone, and railroad companies. Typically, the most common purposes for which property is "taken" through eminent domain proceedings are the construction of roads and public facilities such as public buildings, parks, and utility and drainage lines.

Often, when the power of eminent domain is exercised, it is an emotional issue and incites strong opposition from the affected land owner. So, what should you do if and when a government agency or other party authorized to exercise the power of eminent domain notifies you that it is going to take your property? Can you stop the process? What compensation will you receive for your property? Should you proceed with a condemnation lawsuit?

This article will help you answer these questions by providing you with some basic information regarding eminent domain law in North Carolina.

Can The Eminent Domain Process Be Stopped?

When property is selected for acquisition through the condemnation process, all affected property owners must be formally notified. If you receive such a notice, the first question you may ask yourself is, "can I stop this process?" In most cases, the answer will be "no." In 2005, the United States Supreme Court ruled that the power of eminent domain provided for by the "takings" clause of the Fifth Amendment of the United States Constitution was expansive in scope because the term "public use" should be interpreted to mean "public purpose." The Supreme Court held that government agencies and private parties who have been authorized to take property may do so not only for use by the public, but also for a private use that results in a public benefit such as economic development. In essence, the Supreme Court held that your private property can be taken from you and conveyed to some other private owner as long as the holder of the power of eminent domain determines that the new owner's use of your former property will be more beneficial to the public than your use of it.

For example, in North Carolina, municipalities are permitted to acquire property through the use of eminent domain as long as the acquisition is for "the public use or benefit." The determination of whether the intended use of the land is for "the public use or benefit" is a question of law for the courts. If a municipality's taking of property appears to serve a purpose set forth in the North Carolina General Statutes, then the burden shifts to the property owner to show that the intended use does not serve an authorized purpose.

The North Carolina Supreme Court uses two tests to determine whether a taking of private property is for "the public use or benefit":

- The "public use test," which asks whether the public has a right to a definite use of the condemned property; and,
- The "public benefit test," which asks whether some benefit accrues to the public as a result of the desired condemnation.

North Carolina courts have held that a taking of land must satisfy both tests.

In one recent case, the North Carolina Court of Appeals found that the landowners met their burden of showing that no public use or benefit was achieved from the taking of their property. The evidence in that case showed that the municipality was motivated by considerations which were irrelevant to public benefits. The facts in that case were unusual and the result was not typical and, given such a broad interpretation of the term "public use," you probably won't be able to prevent the government agency or private party from taking your property. However, before you take any action on your own, you probably should consult with an eminent domain attorney. If, however, you and/or your attorney have determined that the proposed taking of your property has a high likelihood of meeting "the public use and benefit" tests, the next question you might ask yourself is, "now what happens?"

The Eminent Domain Process

Even if a government agency or private party has the right to take your property, you are entitled to receive "just compensation" for the property taken. "Just compensation" is defined as the "fair market value" ("FMV") of the property taken considering its "highest and best use." If only a portion of your property will be taken, your just compensation may be determined by the difference in the FMV of your entire property immediately before the taking and the FMV of your remaining property after the taking.

In order to determine the amount of "just compensation" you will receive, the entity that is taking your property will hire an appraiser who will inspect and appraise your property. The appraiser will gather information regarding:

- The "highest and best use" of your property. For example, your property might actually be used for farming, but located in a choice spot for a high-end retail shopping center. The use that would bring the highest price should be the one considered;
- The history of your property, such as some prior use that might affect its value;
- The area in which your property is located;
- Recent sales of nearby comparable property;
- The cost of replacing any improvements located on your property;
- Any income generated by your property; and,
- Any other information that may be relevant to the FMV of your property.

Based on such information, the appraiser will prepare a written appraisal regarding the FMV of your property using its highest and best use. The entity taking your property will then make an offer to purchase it based on the value established by the appraisal. Don't be surprised if this offer is lower than what you think the property is worth. It usually is, and the owner is usually correct, though the gap between the perceived values differs from case to case. The entity taking your property will likely attempt to negotiate the price just like any other potential buyer. "Just compensation" issues often are worked out through negotiation prior to a lawsuit being filed, so hiring a qualified eminent domain attorney and other experts during the negotiations may result in a higher amount of compensation being paid for your property.

However, unlike a potential private buyer, if you do not agree on the condemning entity's "best and final offer," it can proceed to take your property by filing a condemnation lawsuit. When the lawsuit is filed, the complaint will contain a complete description of your property, a description of your property that is actually being taken if it is only a portion of your overall property, a statement of any liens and encumbrances affecting your property, and a statement of the condemning entity's opinion of the "just compensation" due to you as a result of the taking. The entity filing the condemnation lawsuit will also deposit its valuation of the "just compensation" with the court.

If you decide to challenge the condemning entity's right to take your property, you should immediately contact a qualified eminent domain attorney, if you have not already done so.

If, in addition, or alternatively, you expect to challenge the entity's determination of the FMV of your property, you probably will need to hire other experts such as your own appraiser, engineers, soils experts, real estate developers, and real estate brokers, to name a few, because their expertise can help convince a judge or jury that the FMV of your property is greater than the condemning entity is conceding.

Recovery of Attorneys' Fees

One question often asked by owners facing loss of their property through condemnation is, "can I recover my attorneys' fees if I go to trial?" The answer is that, in most cases, the property owners will be responsible for paying their own attorneys' fees. However, property owners often will use the amount the condemning entity deposited with the court as "just compensation" to help fund the litigation against the condemning entity. The "just compensation" deposit can be collected by the property owner without conceding it is the correct value.

The question then becomes, "can any of these fees be recovered at the conclusion of my case?" In North Carolina, attorneys' fees can only be recovered under the following limited circumstances:

- If it is determined that the entity attempting to take the property did not have the right to take it;
- The condemning entity abandons the lawsuit after it has been filed; or,
- Where the property owner is forced to file an "inverse condemnation proceeding" because, in actuality, the condemning entity has by its actions taken the use of the property away from the owner without exercising its power of eminent domain to do so, thus forcing the property owner to sue for the loss, and the owner prevails.

So, when evaluating any offers made by the entity exercising eminent domain powers, you probably should assume that any attorney's fees you incur are not going to be recoverable.

Relocation Expenses

If you are a business owner, you may ask yourself, "are the costs of moving my business recoverable?" The answer is "yes", but the amount will be established by the condemning entity because relocation benefits are considered independent of the claim for "just compensation." Relocation expenses are typically negotiated prior to any lawsuit being filed.

Some typical relocation benefits include:

- Professional services for planning the move and analyzing alternate sites;
- Costs to pack, move, and unpack;
- Reconnection fees to utility providers;
- Annual licenses, fees, and permits;
- Re-establishment expenses (such as, repairs or improvements to the replacement property required by federal, state or local law, code or ordinance);
- Modifications to the replacement property to accommodate the business operation or make replacement structures suitable for conducting the business;
- Construction and installation costs for exterior signing to advertise the business;
- Loss of tangible personal property; and,
- Other related costs such as one-time impact fees and provision of utilities.

Conclusion

When a government agency or private party involuntarily takes private property from you, it must pay you "just compensation." It will make you an offer and tell you it represents the FMV of the property it is taking from you based on an

appraisal it has obtained.

Keep in mind that you do not have to accept the condemning entity's valuation of your property and rejecting its offer will not jeopardize your right to receive a higher amount for your property. So, don't be worried when the entity taking your property threatens to file a lawsuit against you. Instead, you should consult with an attorney who is experienced in the area of eminent domain or land condemnation law concerning your legal rights. A good eminent domain attorney will be able to effectively identify your potential damages and help you select necessary experts to prove your damages. The attorney also will help you negotiate with the entity that is taking your property and will take your case to trial if a settlement is not reached.

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