

BEWARE THE PITFALLS OF CONDEMNATION PROCEEDINGS

To obtain fair compensation, owners must have keen insights into the complexities they face in property condemnations.

By Ryan J. Kammerer, Esq.

Access to a major highway is a desired commodity for commercial real estate, but that proximity brings the constant risk of a condemnation action to make way for roadway improvements. Here is a brief look at what property owners should expect to encounter after receiving notice that they are about to lose all or part of their property, based on my legal experience representing the Pennsylvania Department of Transportation for nearly a decade.

Pre-Condemnation Acquisitions

Many, if not most, eminent domain matters begin and end without an official condemnation commencing. Generally speaking, condemning authorities such as the Department of Transportation will try to reach a settlement with the owner of a property identified for acquisition prior to the filing of the first court paper, which is called a declaration of taking.

The state hires right-of-way consultants to "clear the right of way" so that the project can proceed without delay. These independent contractors will make an acquisition offer based on a drive-by or strip appraisal, typically performed by an in-house appraiser who considers only the right-of-way plans and the outside appearance of the property.

With the expenditure of public funds at stake, the consultant's focus is

on the project proceeding without delay, and moving on to many layers of settlement approval should the acquisition require litigation. This puts the property owner in a precarious position, confronted with a settlement offer typically based on incomplete information and analysis.

If the owner rejects the consultant's offer and an actual declaration of taking is necessary, the condemning authority hires a private appraiser for a full before-and-after appraisal report, which will form the cornerstone of the government's negotiations. That obviously involves additional expense and introduces the legal department into the scenario, along with new layers of approval required for any potential settlement.

Set the Right Expectations

In a condemnation case, liability is not at issue, nor is it a matter of blame and punishment. The sole determination for the trier of fact is an award of just compensation.

The Commonwealth of Pennsylvania defines just compensation as the difference between the fair mar-



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ket value of the entire property interest before the condemnation, as if unaffected by the taking, versus the remaining property interest's fair market value as affected by the right-of-way acquisition.

A couple of points are crucial here. First, the focus is not on the value of what was taken; rather, the determination is how the taking decreased the market value of the remainder. The issue is straight-forward in a total taking. In a partial taking, however, the impact on the remainder may be unclear, and therefore open to the judgment of appraisers, engineers and, ultimately, the trier of fact.

The other important element is to understand fair market value. Although the property's highest and best use is a cornerstone to the appraisal problem, value to the particular user or owner of the property is not compensable. Often, a property owner's first response to a condemnation is an expression of how long they've owned the property and what it means to them. Again, this is not determinative.

The fundamental principle of eminent domain law is the necessity of a taking by the government of an individual's property for the common good. Accordingly, while the owner is to be compensated, it is not a matter of wrongful conduct or punishment.

When the condemnation forces the closure of a business at a particular location, additional relocation benefits are available. It is important to document every expense related to the move, because property owners forced to relocate typically receive compensation for their reasonable and documented expenses.

Stop the Condemnation

A property owner can challenge not only the amount of compensation but also the condemnation itself. The basis for doing so is extremely limited, however. The only recourse Pennsylvania allows is to file preliminary objections within 30 days of notice of the declaration and there are only four bases of challenge: lack of power to condemn; lack of sufficient security; flaws in the declaration of taking; or flaws in any other procedure by the condemning agency.

Many owners and their counsel file preliminary objections claiming lack of sufficient security, pointing to meager estimated just compensation offered. However, this is not a proper objection to the taking itself. In

fact, any preliminary objection which speaks to valuation will be dismissed by the court without a hearing.

The key for property owners is to realize the necessity of consulting with an attorney and gathering information as soon as it is known that the property may be condemned. Once formal condemnation proceedings have begun, the owners must be prepared to file their challenge immediately. The decision to do so, and the process of gathering supporting data for success, will almost certainly take longer than the time allotted by statute. As previously stated, Pennsylvania allows a mere 30 days.

Experience Matters

Commercial property owners are no strangers to appraisals, whether in valuing a property for acquisition or accounting purposes. However, the appraisal problem in an eminent domain case is unique. It requires a before-and-after appraisal, which takes into consideration the impact of a taking upon the fair market value of the remainder.

Not all appraisers have experience with this type of analysis. Equally important to realize is that not every appraiser is accustomed to testifying in support of their report and opinion of value. Pennsylvania ultimately tries condemnation cases before a jury, which requires not only skilled and experienced counsel in jury selection and trial, but also skill and experience in the expert appraiser, whose credibility will be decided by 12 people presumably hearing the concepts for the first time.

Commercial property owners must recognize the possibility of their property being condemned by the government, whether for a highway project, utilities relocation or other purpose. If it occurs, act immediately. The risks created by waiting for formal condemnation proceedings to begin include being at a severe disadvantage to claim the maximum benefits, falling behind in establishing damages, and jeopardizing any potential challenge to the condemnation itself.

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