



Eminent Domain

PRIMER

INTRODUCTION TO EMINENT DOMAIN

Eminent domain is defined as a mandatory transfer of a real or leasehold interest in a piece of property to a governmental entity for a public purpose. The action of the transfer through eminent domain is known as condemnation or a taking. This transfer, dictated by state law and/or constitutions, is to be undertaken only when a public purpose outweighs the interests of an individual property owner. The property owner is then entitled to a market value that is fair and reasonable, or “just compensation” as guaranteed in the U.S. Constitution.

The rationale for the use of eminent domain is often financial. Eminent domain has been used to keep the cost of a project manageable when one property owner blocks a project by either refusing to sell or holding out for a very high purchase price.

Eminent domain is among the three powers fundamental to local and state governments; the other two include taxing and police powers. Eminent domain can be used to take real property or to prematurely end leasehold interests, such as for tenants or renters of property. Federal or state law often triggers relocation benefits in addition to the cost of the purchase of the property. Eminent domain can also be used for acquiring a portion of a property, known as a partial taking.

Eminent domain is most often utilized for governmental projects such as road/transit/transportation projects or government buildings. Some governmental entities also use eminent domain to acquire property and then transfer the property to a private entity for economic development or redevelopment purposes. A U.S. Supreme Court case in 2005, *Kelo vs. City of New London*, upheld the right of a local government to condemn property for private development. However, the high profile of the case resulted in many states significantly restricting the use of this tool for economic development or redevelopment purposes.

There is also a situation known as “friendly condemnation” where a private owner may ask for eminent domain to be used to give additional time for the property owner to purchase another property without tax implications.

TYPICAL STEPS IN THE USE OF EMINENT DOMAIN

State law usually outlines a specific process necessary for the use of eminent domain. These steps often include:

1. Governmental board/council action to initiate formal notice of the use of eminent domain and submittal of such to a court or quasi-judicial entity.
2. Appraisals prepared by each party and potentially a review appraisal by a third party.
3. Mediation if a purchase price cannot be agreed to in the appraisal process.
4. Statement of public purpose prepared by the governmental entity and submitted to the court.
5. Potential challenge by property owner to the public purpose and a review by the court of its validity.
6. If the public purpose is upheld, the governmental entity will need to make a deposit equal to a percentage (potentially 100% or more than 100%) of the appraised value of the property.
7. Some states allow the governmental entity to take title to the property before a final value is established. This step introduces significant price risk for the governmental entity.



8. A court or a quasi-judicial entity, such as a panel of experienced real estate professionals, determines if the governmental entity's offer price is sufficient. If not, a higher amount will be awarded to the property owner.
9. If the initial award amount is too high, the governmental entity may choose to not purchase the property or it may appeal the award to a higher court. If the property owner believes the award is too low, it may also appeal the amount to a higher court.

QUESTIONS THE FINANCE OFFICER SHOULD ASK ABOUT EMINENT DOMAIN

The finance officer should be prepared to answer the following questions about a proposed acquisition using eminent domain:

- » Has the local government retained specialized legal counsel with experience in eminent domain?
- » Does the local government have a formal or informal position on acquisition price compared to an appraisal? Is there a policy on when eminent domain is used?
- » Is there an internal and external communication strategy in place to explain the rationale for the use of this tool?
- » What is finance's role in financial administration before, during, and/or after taking?
 - How early in the eminent domain process is the deposit to the court for acquisition required to be deposited?
 - How is the final purchase price determined and can the local government decline to purchase after a price is finalized by judicial action?
 - Who has undertaken relocation cost estimates for owners and tenants in any buildings acquired?
 - Is the local government at risk for the property owner's legal fees and is there any cap on that amount?
- » What alternative sites or routes exist if a public purpose challenge is lost or if the final acquisition price is too high?

OUTSIDE RESOURCES FOR EMINENT DOMAIN

- » National Conference of State Legislatures:
<http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-overview.aspx>
- » Saginor, Jesse and John F. McDonald. "Eminent Domain: A Review of the Issues." *Journal of Real Estate Literature*, 2009, v.17 no. 1, p. 3-43
- » Thomas, Robert H. "Recent Developments in Eminent Domain." *Urban Lawyer*, Fall 2016, p. 939-1005
- » Kerekes, Carrie B. and Dean Stansel. *Takings and Tax Revenue: Fiscal Impacts of Eminent Domain*. Arlington, VA: Mercatus Center, October 2014.
- » The Institute for Justice: http://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf

About GFOA

The Government Finance Officers Association (GFOA) represents approximately 20,000 public finance officers throughout the United States and Canada. GFOA's mission is to promote excellence in state and local government financial management. GFOA views its role as a resource, educator, facilitator, and advocate for both its members and the governments they serve and provides best practice guidance, leadership, professional development, resources and tools, networking opportunities, award programs, and advisory services.