



Eminent Domain - Part 1 of 4

Limits on the Power of Eminent Domain

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“Hello landowner, I work for a company hired to purchase property for a public improvement that is scheduled for your area. It looks like your land is in the path of that improvement. We had your land appraised and need to discuss purchasing some land from you at the appraised price. *** I’m sorry you don’t agree with the appraisal; it was prepared by an expert. *** I can’t imagine how this improvement could possibly damage the rest of your property. *** Please understand if we can’t reach an agreement on price, I will have to turn your file in for CONDEMNATION proceedings. I’m sure you don’t want to experience the hassle and costs of litigation.”

We hope you have not experienced a similar conversation, but if you own property there is a good chance you will be put in a situation where you are forced to negotiate the sale of all or part of your property – under threat of condemnation. If so, you need to understand your rights in order to respond. This article is the first in a series of four articles. This article will identify some of the limits on the power of eminent domain. Following articles will address the procedure that a condemning authority must follow in order to lawfully take private property, the important steps that a landowner should take when given notice that his property is being condemned, and the course of action a landowner should take to ensure that he receives just compensation for the taking.

Every government entity in the United States, from local governments to the federal government, has the power of eminent domain. The United States Supreme Court recognizes eminent domain as “the right of the government to appropriate private property for a public use, ...[and] an essential attribute of the sovereignty of the United States and the individual states.” However, both the United States Constitution and the Oklahoma Constitution place significant limitations on this power. A government or other public entity can only use its power of eminent domain to condemn private land rights if it shows that there is a legitimate public use for the condemned land and that the landowner will receive just compensation for the taking.

Kelo v. City of New London

The Fifth Amendment to the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation.” Traditionally, governments have used eminent domain to condemn land necessary to construct public highways and other thoroughfares, railroad tracks and water and electric right of ways. The 2005 U.S. Supreme Court case *Kelo v. City of New London*, however, defined “public use” much more broadly than it had previously been interpreted. In *Kelo*, the City of New London authorized a private entity to condemn the property necessary to allow Pfizer, a pharmaceutical corporation, to turn a ninety-acre neighborhood into a privately-owned research facility. The Connecticut courts allowed the takings to go forward, and some of the affected landowners appealed to the U.S. Supreme Court. The Supreme Court held that the economic development that would certainly follow the construction of a modern privately-owned research facility could be considered a “public use.” Therefore, the condemnation of the privately-held neighborhood lots was a legitimate exercise of the city’s power of eminent domain under the U.S. and Connecticut Constitutions.

The *Kelo* decision sent shock waves through the country, as private landowners worried that condemning authorities

across the country would begin using the “economic development” rationale to take any property that did not fit into their ideal vision of development and growth. Depending on the poll cited, anywhere from 65% to 90% of American citizens disagreed with the Supreme Court’s decision. Churches and non-profit organizations which owned property also worried that their tax-exempt status and lack of monetary revenue would be used as an excuse by condemning authorities to condemn their properties in desirable locations in order to relocate retail or industrial entities to those tracts. This uncertainly led the legislatures in all fifty states to propose legislation placing various degrees of limitation on state and local use of eminent domain to condemn private property.

Eminent Domain in Oklahoma

Although *Kelo* certainly raised public awareness of the issues surrounding state and local government’s use of eminent domain, it did not significantly impact the protections private landowners in Oklahoma were already afforded by the Oklahoma Constitution. After stating that the Fifth Amendment to the U.S. Constitution would allow prospective economic development to be considered a legitimate public use, the Supreme Court noted that state legislatures could craft stricter definitions of “public use” to further limit the power of eminent domain. Article 2, Section 23 of the Oklahoma Constitution expressly limits the government’s power by stating that private property cannot be taken for private use.

Less than one year after the *Kelo* decision, the Oklahoma Supreme Court had the opportunity to affirm the stricter limits on the government’s use of eminent domain in Oklahoma. In *Board of County Commissioners of Muskogee County v. Lowery*, Muskogee County attempted to use its power of eminent domain to acquire two water line easements for a private company to construct an electric plant. The County, echoing the City of New London’s rationale, stated that the purpose of the taking was to spur economic development and greater job opportunities for the County’s population. The landowners, represented by the OFB Legal Foundation, appealed their case to the Oklahoma Supreme Court, and in 2006 the Court expressly held the Oklahoma Constitution provided more protection for private landowners than the U.S. Constitution, and that economic development, without any other rationale, does not create a legitimate public purpose or public use. The Court noted that “[t]o permit the inclusion of economic development alone in the category of ‘public use’ or ‘public purpose’ would blur the line between ‘public’ and ‘private’ so as to render our constitutional limitations on the power of eminent domain a nullity. If property ownership in Oklahoma is to remain what the framers of our Constitution intended it to be this we must not do.” Therefore, Oklahoma landowners can successfully challenge a proposed condemnation by showing that the proposed use is not allowable under Oklahoma law.

In addition to challenging whether a proposed eminent domain taking is for a valid “public use,” landowners can also challenge whether the proposed taking of their property is necessary. In Oklahoma, private property “may not be taken or damaged by condemning agency unless taking or damage is necessary for accomplishment of a lawful public purpose.” However, a landowner challenging the necessity of a proposed taking has an uphill battle. Under the current law, the standard to prove necessity is very low. In rare instances, will a challenge of necessity be successful.

Although Oklahoma landowners have more initial protections against takings than landowners in many other states, and in some cases the landowner may be able to challenge the applicability of the right of condemnation or the necessity for the taking, most condemnation cases still revolve around the amount of just compensation due the landowner. “Just compensation” generally means the value of the taken property on the date of the taking plus the damage, if any, to any remaining property. Landowners must be diligent in the protection of their rights as most condemning authorities are simply interested in obtaining the property at the lowest cost. The next article in this series will discuss the procedure that a condemning authority must follow in order to lawfully take private property.

Links

[Eminent Domain - Part 2 of 4: Step-By-Step Guide to the Condemnation Process](#)

[Eminent Domain - Part 3 of 4: Practical Strategies a Landowner Should Follow to Maximize](#)

[Compensation](#)

[Eminent Domain - Part 4 of 4: Settlement or Trial?](#)

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