

What Is Eminent Domain And What Am I Entitled To If The Government Seeks To Condemn My Property?

A SURVIVAL GUIDE TO EMINENT DOMAIN FOR PROPERTY & BUSINESS OWNERS

*Compliments of Nossaman's
Eminent Domain and Valuation Practice Group*



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The Basics

Eminent domain is the power of the government to take or condemn property for “public use,” without the land owner’s consent, upon paying just compensation. The “government” includes most federal, state, and local government agencies (e.g., a County, a City’s Redevelopment Agency, etc.). For purposes of eminent domain, the “government” also includes certain quasi-public entities, such as public utility companies, that possess the power of eminent domain even though they are technically private companies (e.g., Southern California Edison, Pacific Gas & Electric).

You have the right to oppose to the government’s right to take your property. However, without special circumstances, challenging the government’s right to take a particular property is generally unsuccessful.

Whether or not you challenge the government’s right to take your property, you are entitled to compensation for the taking, which may include a number of damages, such as:

- The fair market value of the land taken;
- Improvements on the property, such as fixtures and equipment;
- Business losses suffered as a result of relocation;
- Costs to relocate;
- Damages resulting from excessive delay or unreasonable conduct by the government; and
- Interest, costs, attorneys’ fees, and appraisal fees.

What Can I Expect & What Are My Rights?

When the government is interested in taking your property through eminent domain, the following events typically occur:

The Initial Contact

Though the government may hold meetings and engage in other less formal contacts with you about the proposed project, the first formal expression of interest in your property occurs when the government sends you a written “Notice of Intent to Appraise.”

The government agency will then conduct an appraisal of your property to determine its value. You have the right to accompany the appraiser during his or her inspection of the property.

Following the appraisal, the government agency will make a written offer to purchase your property for what it deems to be “just compensation” based on its appraisal. You do not have to accept the government’s offer, and you have a right to receive a summary of how the government arrived at its offer.

Public agencies are also required to offer to pay up to \$5,000 in reasonable expenses for you to obtain an independent appraisal of the property (this requirement may not apply to quasi-public agencies, such as public utility companies).

The Resolution of Necessity

If you do not reach an agreement with the government following its written offer, the next step is the government’s adoption of a “Resolution of Necessity” at a public hearing, which is the government’s formal decision to acquire property by eminent domain. In order for the resolution to pass, the agency must determine that the project:

- Requires your property;
- Is necessary and in the public interest; and
- Is located in a manner that will provide the greatest public good and the least private injury.

The agency’s findings on these issues are usually conclusive.

You have the right to receive notice of the public hearing, and you have 15 days after the notice was mailed to file a written request to appear and be heard at the hearing.

At the hearing, you or your counsel may appear and raise objections about the steps the government has taken to acquire your property, and you may request that the government take additional steps before proceeding with the condemnation action. The government often ignores such requests, and proceeds to adopt the Resolution of Necessity, authorizing the condemnation action.

The Initial Stages of the Lawsuit

Once the government adopts a Resolution of Necessity, it files a lawsuit and, usually, deposits with the court the probable amount of “just compensation” based on its initial appraisal.

You are entitled to withdraw the agency’s deposit of probable compensation after filing an application with the court and waiting at least 20 days.

If the government agency wishes to take possession of your property before the lawsuit ends, it must serve you with a motion for possession. The court will usually set a hearing on this motion 60 days after you have been served if the property is unoccupied or 90 days after you have been served if the property is occupied. You have 30 days to oppose the motion. If you do not oppose the motion within 30 days, the court can grant the motion with only a minimal showing by the government. If you oppose the motion, the government must prove that it needs possession of your property before the end of the lawsuit, making it more difficult for the government to take possession early. At that hearing, the court must weigh the hardship you will suffer if the government gets possession early against the hardship the government will suffer if it cannot get possession early.

If the court grants the government’s motion for possession, it will issue an order that will require you to leave the property with minimal notice (within 10 days for unoccupied property; within 30 days for occupied property). A relocation agent should contact you to assist in relocating your residence or business.

If forced to relocate, you are entitled to have certain relocation expenses reimbursed by the government. This happens through an administrative proceeding; it is not a part of the eminent domain lawsuit.

The Trial Proceedings

The court will hold an evaluation conference and set a trial date for determination of the amount of “just compensation” you should be paid.

You will need to hire an appraiser of your own to prepare an appraisal of your property. About 90 days before trial, you and the government will exchange your respective opinions concerning the value of the property.

Later (typically 20 days before trial), you and the government will exchange final offers to see if you can reach an agreement. The Court may also hold a settlement conference to assist the parties in settling the case.

If no agreement can be reached as to the compensation to be paid, a trial will occur, where a jury will determine “just compensation.”

What Is “Just Compensation”?

You are entitled to “just compensation.” This means you should receive the fair market value of your property. Fair market value is the highest price that would be agreed to by a willing buyer and seller.

Fair market value is an objective test to be determined by the jury. Any unique value or special affection you have for the property is not taken into consideration. The value is usually determined by real estate appraisers, although appraisers may disagree in their opinions of value. You may also be permitted to testify to your opinion of the property’s value under certain circumstances.

What Other Compensation Am I Entitled To As The Owner Of The Property?

As part of and in addition to “just compensation,” you may also be entitled to business losses, compensation for fixtures and equipment, precondemnation damages, relocation benefits, and interest, costs, attorneys’ fees and appraisal fees.

Business Losses

If you operate a business on the property, you may be able to recover for lost “business goodwill” and other business losses. Compensation for business losses is described more fully in this Guide under the heading “What If I Own A Business On The Property, But Not The Underlying Property?”

Fixtures & Equipment

You are entitled to compensation for “all improvements pertaining to realty.” This includes items installed for use on the property that cannot be removed without substantial damage to the property, such as machinery, fencing, or other equipment.

Precondemnation Damages

Where a government agency excessively delays in commencing the condemnation action after announcing its intent to take your property, or the agency engages in other unreasonable conduct, you may be entitled to “precondemnation damages.” For example, you may be entitled to precondemnation damages if you are unable to rent your property at market rents because tenants are unwilling to move in as a result of the condemnation announcement. You may also be entitled to recover damages if your property decreases in value during the excessive delay.

Relocation Benefits

You are entitled to reasonable costs to relocate. This includes moving costs, expenses in finding a replacement site, printing new stationary, and costs to reinstall and reconnect machinery and equipment. Recovery for these items typically occurs through an administrative proceeding, not in the eminent domain action itself.

Interests, Costs, Attorneys' Fees, and Appraisal Fees

The government agency is usually required to pay interest on any award of "just compensation." You are also entitled to recover normal "court costs," such as filing fees, deposition fees, and some witness fees. Attorneys' fees and appraisal fees may also be recoverable in certain situations.

What If The Property Is Rented?

Anyone with an interest in your property, such as a tenant, is entitled to receive just compensation for his or her interest. However, many leases contain a "condemnation clause" which determines how the compensation between the owner and the tenant will be allocated. A tenant's just compensation may include business goodwill, fixtures and equipment, relocation costs, and possibly any increases in rent paid as a result of relocation.

What If Only Part Of The Property Is Taken?

Frequently, the government agency is only taking a portion of your property. For example, an agency may take a strip of land needed for a drainage channel, a utility line, or a street widening. In these types of cases, the property you retain may suffer damages because the partial taking diminishes the value of the portion not taken.

You are entitled to the value of the property taken plus any damages to your remaining property. The damages to your remaining property are called “severance damages.” Severance damages are usually measured by the decrease in the market value of the remaining portion of your property.

What If I Own A Business Operating On The Property, But I Do Not Own The Underlying Property?

If you own a business but do not own the property, you may not receive the government’s “Notice of Intent to Appraise,” notice of the hearing on the “Resolution of Necessity,” or any written offer of compensation. This does not mean you are not entitled to compensation. If you own a business that is displaced or otherwise suffers from lost “business goodwill” as a result of the taking, you are entitled to be compensated for your losses.

A business may accrue “goodwill” as a result of its location, reputation, and ability to acquire and keep patrons. Compensation for business goodwill may be awarded if a business loses these benefits as a result of the taking. For example, business goodwill is recoverable if your business’ profitability decreases as a result of being forced to move. Goodwill is usually determined by expert business appraisers who consider factors such as the nature of the business, reputation, length of time in the business, length of time at the location, and customer base. In order to recover goodwill, you are required to show a loss from the taking which cannot be prevented by relocation or other steps. Not all businesses possess goodwill.

You may also be entitled to recover relocation costs, the value of lost “Fixtures and Equipment” and, depending on the lease terms, you may also be entitled to part of the compensation for the real property.

What If The Government Takes Or Damages My Property Without Filing A Lawsuit?

Where the government agency takes or damages your property without filing a lawsuit, you may bring a lawsuit against the government. This is known as “inverse condemnation.”

Inverse condemnation can occur in many different situations in which government action damages your property rights. Typical inverse condemnation claims involve situations where the government:

- Places overly restrictive conditions on your property and your right to develop it;
- Impairs access to your property;
- Floods your property; or
- Interferes with your land stability.

While many of the legal principles in inverse condemnation cases are the same as those in “direct” condemnation cases, there are some key differences. In particular, while normal eminent domain cases typically focus only on the amount of just compensation to be awarded, plaintiffs in inverse condemnation cases must prove that the government has caused a “taking” or “damaging” of property before the plaintiff is entitled to any award of compensation. These liability issues do not exist in a normal eminent domain case.

What Should I Do?

Eminent domain is a rapidly developing area of the law. You will likely obtain a better result if you are represented by counsel. Nossaman LLP has successfully represented hundreds of property owners and business owners in all aspects of eminent domain proceedings, including:

- Precondemnation planning that may start years before the government even sends out its initial Notice of Decision to Appraise;

- Representation during the government's public hearing on the Resolution of Necessity and, if necessary, challenging the government's right to take the property;
- Representation during the initial phases of the litigation, including assisting with relocation issues and in the selection and preparation of appropriate appraisers and experts; and
- Representation during the trial on "just compensation," asserting claims for the value of the property, precondemnation damages, fixtures and equipment, and business losses.

Our eminent domain team and its courtroom success consistently earn substantial statewide attention.

For More Information

- Visit our website at www.nossaman.com/eminentdomain
- View our blog at www.CaliforniaEminentDomainReport.com
- Contact **Rick Rayl**, Chair of Nossaman's Eminent Domain and Valuation Practice Group and Southern California Landowner Liaison at rrayl@nossaman.com or 949.833.7800
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More About Nossaman's Eminent Domain and Valuation Practice

Nossaman's Eminent Domain and Valuation Practice Group has an unrivaled track record of success in representing California landowners and business owners. Nossaman has a prominent, state-wide reputation for creative, competent and efficient representation of the targets of eminent domain. Nossaman attorneys -- who comprise one of the largest single eminent domain groups in the State -- regularly achieve top-notch results in litigation concerning:

- Inverse condemnation
- Precondemnation delay damages and blight
- Loss of business goodwill
- Complex severance damages claims
- Unreasonable government pre-litigation and litigation tactics

The successes of Nossaman's Eminent Domain and Valuation Practice Group consistently garner substantial attention throughout the State. Our condemnation experience includes presenting creative valuation theories for a broad range of property types, including large undeveloped tracts, commercial and multi-family residential buildings, and industrial space.

Summaries of some of our cases:

Caltrans v. Bayport Imperial Promenade Nossaman represented four business owners in a condemnation action against Caltrans involving view and construction impacts resulting from Caltrans taking a portion of a shopping center for construction of a new bridge on Imperial Highway. Caltrans made no offers of compensation to the businesses. Pretrial settlements were reached with two of the four businesses; the other two went through a month-long jury trial. Total compensation awarded was more than \$600,000.

Southern California Edison's Tehachapi Transmission Project Nossaman represented four property owners in four separate condemnation actions brought by Edison to acquire easements for a major electric transmission corridor as part of Edison's Tehachapi Transmission Project. Each matter settled well before trial at a substantial premium over Edison's offer of compensation.

Lake Elsinore Unified School District v. Centex Homes Nossaman represented a homebuilding company in connection with a condemnation action on 14 acres to be used for a new school. The District filed the condemnation action after allowing a contract to lapse by which the District could have purchased the property for just a few million dollars. The District claimed in the condemnation that soils problems made the property worth only about \$3 million. After debunking the soils claim, Nossaman negotiated a settlement of the case for \$8 million.

People of the State of California v. Imperial Terrace Nossaman represented the owner of a 40-unit apartment building condemned by Caltrans for the realignment of a highway. The representation, which included a nearly two-week jury trial, resulted in a verdict of more than \$9.5 million, about 75 percent higher than Caltrans' initial offer.

Kelly-Wright Hardwoods v. Placentia-Yorba Linda Unified School District Nossaman represented a lumber company in an inverse condemnation case in which the District initially made no offer of compensation despite having forced the business to relocate under the threat of eminent domain. The business owner demanded \$400,000 before litigation, and with Nossaman's help, the parties ultimately settled for nearly three times that amount.

Winchester 700 v. Western Riverside County Regional Conservation Authority Nossaman represented the owner of a 454-acre property in Riverside County that the Regional Conservation Authority (commonly known as the "RCA") had deemed necessary for conservation as part of its Multiple Species Habitat Conservation Plan. The RCA and the County refused to process Winchester's development entitlements, yet they never made an offer to purchase, instead "de facto" conserving the property. The RCA valued the property at less than \$30 million. After completion of a lengthy arbitration, the parties reached a settlement by which the RCA paid more than \$70 million.

Long Beach Redevelopment Agency v. Walker Trust Nossaman represented the owner of a commercial property being condemned for a redevelopment project. Nossaman negotiated a settlement of \$3.5 million, more than double the Agency's original offer.

Napa County Flood Control and Water Conservation District v. Smith Nossaman successfully represented the owners of a mobile home park faced with losing a portion of their business and land to the Napa County Flood Control and Water Conservation District for a Napa River flood control project. The District originally offered \$2.14 million for the property. Nossaman negotiated a \$4.3 million dollar settlement for the landowners.

Costco v. BART A Nossaman attorney represented the property owner in an inverse condemnation action against BART for environmental contamination caused by the construction of the BART extension to the San Francisco Airport. A two-week jury trial resulted in a finding of liability of BART by the Court and an awarding of damages, including attorneys' fees, to the property owner.

People of the State of California, by and through the Department of Transportation v. B.H. & B.M. Woodson Family Trust, et al. Following a jury trial, Nossaman won a testimonial jury verdict for our clients, the owners of a mobile home park condemned to make room for a freeway widening. Despite the jury's siding completely with our clients, the trial judge refused to award attorneys' fees and other litigation expenses. Nossaman appealed. In a published opinion, the Court of Appeal concluded that our clients should have been awarded attorneys' fees, and remanded the case for a determination of the amount of attorneys' fees to be awarded.

Marin Advisors Investors II v. California Department of Transportation Nossaman represented the property owner in an inverse condemnation action against Caltrans arising from Caltrans' use of our client's property during seismic retrofit construction on Highway 101 and the partial taking of our client's parking lot. Nossaman assisted in obtaining a settlement on the eve of trial.

Las Galinas Valley Sanitation District v. Silveira, et al. Nossaman trial attorneys won one of the largest jury verdicts (\$14.6 million) ever obtained in Marin County Superior Court. Our client, the Silveira family, had owned a 364 acre ranch on the border of the City of San Rafael since 1900. A nearby sanitary district sought to condemn a significant portion of the ranch, much of which would otherwise have been suitable for residential and mixed use development. The District tried to preempt any future development plans and would have robbed much of the ranch of value. Nossaman lawyers won a three week jury trial so convincingly that the District abandoned the condemnation and paid the Silveira family's litigation expenses.

County of Contra Costa v. Pinole Point Properties A Nossaman attorney represented the property owner at trial and on appeal in a condemnation action in which the property owner was awarded in excess of \$6 million for the taking of unimproved land. The appellate decision clarified California law on the use of a prior inconsistent appraisal for impeachment of an appraiser at trial. This rule was later codified by the legislature in a 2002 amendment to C.C.P. §1255.060.

United State of America v. Alameda Gateway, Ltd. A Nossaman attorney represented the owner of a shipyard in the Oakland inner-harbor in an action brought by the United States Government under the Rivers and Harbors Act of 1899, and represented the owner in a related action in the United States Court of Federal Claims.

Garden Grove Agency for Community Development v. Dionisie and Daniela Goia, Garden Grove Auto Care and Care Rent-A-Car Nossaman represented the land and business owners in a four-week condemnation jury trial. The Agency's pre-litigation offer was \$636,000. The verdict and attorneys' fees award totaled \$1.6 million.

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