

The Right to Take in the Eminent Domain Process: Public Use, Just Compensation and Necessity

The process in which a governmental or quasi-governmental entity can take private property for public use is called eminent domain. Commonly known as condemnation, the eminent domain process is complex and can often be interpreted differently from state to state. The important thing to know is that the eminent domain is not totally unlimited – there are areas in which the right to take can be challenged. The challenge arises when the basic eminent domain requirements for the taking are not satisfied. In order to take property from an individual property owner, a governmental entity must satisfy two requirements. One, the property must be used for public use, as defined in the federal constitution; and two, the property owner must be paid just compensation. There is also the issue of necessity, which is a sub class of public use. Necessity is the test that determines the amount of property needed to adequately undertake the public purpose. Notably: failure for the taking to fulfill the definition of public use could be a basis for stopping the taking of the property.

Public use, blighted property and the necessity requirement

In recent years, governmental entities have attempted to acquire property for the use of development or redevelopments by deeming entire areas and neighborhoods as “blighted” in order to satisfy the definition of public use. The term blight was first addressed in eminent domain law back in the 1950’s. This term referred to a deteriorating neighborhood or property – essentially meaning that the area did not serve its intended purpose within the community. Today, much of the controversy concerning the public use definition stems from the concept of “blighted” property. This poses the ultimate question, “Is the property actually blighted”. The term blighted has created a perpetual battle ground in eminent domain law, where the

heart of the battle is fought between property owners, who feel their property is not blighted, and condemning authorities. Governmental entities will overuse their power to exercise eminent domain and attempt to deem a lower grade neighborhood as blighted in order to acquire the property and have the area redeveloped in order to increase their tax base. Even though the area may not be technically blighted, governments will objectively call it that to settle the public use definition. In some states, but not all, the definition of blight is ill defined making it easier for governments to misuse this designation in order to exercise their eminent domain authority. As a result, this area of eminent domain law is still very unsettled and interpreted differently by different states, as set by precedence by the United States Supreme Court case of *Kelo v. City of New London, Connecticut*.

The case of *Kelo v. City of New London, Connecticut* most notably questioned the definition of “public use”, and whether or not property could be acquired through eminent domain for the sole purpose of economic development, even if the property was not blighted. The case was heard at the US Supreme Court who ruled in a contentious 5-4 decision in favor of the city and ultimately granted each state the power for crafting language in their statutes and constitutions specific to public use, the blight definition and whether or not eminent domain could be used for the sole purpose of economic gain.

As far as the right to take is concerned, there is a necessity requirement. In many cases, the issue of necessity does not arise. Under certain circumstances, however, a governmental body may reach too far in terms of the property it is condemning. For example, does the amount of property being acquired coincide with amount the condemning authority needs in order to complete the project? If not, the right to take would be challenged through the necessity requirement. Although this claim would likely not prevent the project from occurring, it would force the condemning authority to reevaluate the amount of property necessary to fulfill the

public purpose and therefore limit the amount of land they can acquire.

Challenging the right to take: You the property owner

As a property owner, you have the right to challenge the taking and this is the only way to stop the taking from occurring. Although just compensation will not stop the taking, the failure of the government to provide a proper public use will be a basis for stopping the taking. The right to take is usually challenged if the condition of the property does not meet the blight criteria outlined in the state statutes or constitution. If you truly believe that your property is not blighted, you can challenge the validity of the taking in court.

About the author

Dan Biersdorf, principal attorney at the law firm of Biersdorf & Associates, has been a trial lawyer since 1977 and has degrees in mechanical engineering and law. Dan frequently lectures on property valuation matters, lobbies for property owner rights, and has achieved the enactment of important new eminent domain legislation in various states.

His firm devotes approximately 95% of its efforts to real property valuation litigation. These efforts are focused in two primary areas: property tax appeals and eminent domain claims. His firm only represents property owners, never the government or condemning authority.

Biersdorf & Associates has presented eminent domain cases in the appellate courts across the country, and has attorneys licensed in fifteen states. The firm is also in the process of expanding into 2 additional states. The attorneys at Biersdorf & Associates can handle cases in all other states upon request.

Biersdorf and Associates has represented owners with an array of property types, including manufacturing facilities, food distribution centers, office warehouses, multi-building corporate headquarters, freestanding retail facilities, strip centers, multi-family housing, hotels and many more. The firm has taken cases to trial with disputed property values as high as \$49 million.

Biersdorf & Associates has obtained a beneficial ruling for property owners regarding the determination of contamination value before the Minnesota Supreme Court. The firm has also obtained an expansive valuation ruling that was favorable for property owners with multiple parcels affected by an eminent domain taking before the Wisconsin Supreme Court, which was the first decision on this issue in any appellate court in the United States.

Visit our website at <http://www.condemnation-law.com> or call our firm toll free at 866.339.7242 to speak with us.