

Eminent Domain Basics for Condemnors: Overview

by Practical Law Government Practice

Status: **Maintained** | Jurisdiction: **United States**

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A Practice Note explaining the basics of eminent domain from the perspective of condemning plaintiffs. This Note discusses the nature of condemnors and the property they seek for projects, due process protections for property owners, and condemnation procedure.

Eminent domain is the power of an entity authorized to take private property for public use without the owner's consent. This power is derived from the common law concept of the king's (government's) sovereignty, now sometimes delegated to other entities serving the public. An entity may take property only if:

- The appropriation (also known as condemnation) of the property is reasonably necessary.
- The property will be used for a public purpose.
- Just compensation is paid to the property owner for the condemned property.

For a detailed analysis of the public use requirement, see [Practice Note, Eminent Domain: Compliance with Public Use Requirement](#).

For more information on the concept of just compensation, see [Practice Note, Eminent Domain Just Compensation: Overview](#).

This Note explains the scope of the condemnor's eminent domain power, including the due process limitations on that power, and describes the condemnation process.

This Note does not discuss inverse condemnation, where a government entity is sued by a plaintiff alleging implied takings by action and regulation. For more detail, see [Practice Note, Inverse Condemnation: Overview](#).

Eminent Domain Actors

An entity taking property through eminent domain is called the "condemning authority" or "condemnor," and the private property owner is called the "condemnee."

The power of eminent domain can be exercised by:

- The federal government.
- State governments.
- Other public bodies, such as:
 - cities and towns;
 - counties; and
 - school boards.
- Quasi-public corporations, such as railroads, airports, and public utility corporations.
- Private corporations or individuals, such as power and telephone companies, if the eminent domain power is delegated expressly by a constitutional or statutory provision (*Kelo v. City of New London*, 545 U.S. 469 (2005)).

Federal and state governments can generally condemn property owned by subordinate levels of government. For example, Congress can authorize the condemnation of state-owned land for the expansion of an interstate highway.

Character of the Condemned Property

Eminent domain is most often used to appropriate real property interests, including a property's air or water rights. The condemning authority usually takes the property in fee simple title. However, it can also take the property in the form of an easement or through the right to occupy the land for a term of years.

In many states, if an easement satisfies the necessary public use, then only an easement may be granted. The



landowner receives the full market value of the easement condemned, but retains fee ownership of that land.

The concept of property subject to condemnation is broad and includes:

- Personal property.
- Intangible property.
- Contract rights and leasehold interests.

Constitutional Limitations on Eminent Domain

The public use and just compensation requirements of the Takings Clause of the Fifth Amendment to the US Constitution have been incorporated through the Fourteenth Amendment. They apply to state and local land use decisions. Most, if not all, states have enacted their own eminent domain provisions.

To condemn land under eminent domain, the condemning authority must demonstrate that the appropriation of property meets constitutional and statutory requirements by showing that the condemnation:

- Is reasonably necessary (see Reasonable Necessity).
- Is for a public purpose (see Public Purpose).
- Includes payment of just compensation to the property's owner (see Just Compensation).

The Fifth and Fourteenth Amendments also limit the government's ability to condemn property by requiring that the property owner be afforded due process. Due process means that owner must be given:

- Notice of the condemnation proceedings.
- An opportunity to be heard.
- Impartial judicial review.

Reasonable Necessity

The condemning authority has a great deal of discretion in deciding whether the condemnation of a particular property is necessary. A court will not overturn this determination unless it finds that the decision was made in bad faith or was a gross abuse of discretion.

Public Purpose

A condemning authority may only take property for a public purpose. Whether the use intended by the condemnor is public within the meaning of the Takings

Clause is left to the courts (*Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

Traditionally, a public purpose required public ownership or public access. The predominant position today is that eminent domain can be justified if it creates a general public benefit, including, for example, an aesthetic improvement (*Berman v. Parker*, 348 U.S. 26 (1954)).

In 2005, the US Supreme Court held that a city could condemn private property for private commercial development (*Kelo*, 545 U.S. at 469). The Court reasoned that the general benefit a community received from economic growth was enough to deem private redevelopment plans to be for a public use. Most states have adopted legislation limiting *Kelo*, making it more difficult for state legislatures, agencies, and local governments to use eminent domain for economic development projects.

Valid public purposes, in the absence of state legislation, include:

- Parking facilities.
- Roads and associated drainage systems.
- Sewer and potable water lines.
- Parks.
- Environmental protection or conservation lands.
- Trails.
- Power and gas lines.
- Economic development projects, such as:
 - sports stadiums; and
 - projects aimed at reducing blight and slums.

Just Compensation

The Takings Clause requires that the owner of condemned property receive just compensation. The goal of the just compensation requirement is to put the property owner in as good a financial position as if the property had not been condemned. Therefore, the amount of damages is measured against the owner's loss, not the condemnor's gain.

Just compensation is generally related to the fair market value of the property that is condemned. This value is determined through an appraisal process to determine the sales price that would reasonably have been reached in a consensual sale between the property owner and a buyer (*Olson v. United States*, 292 U.S. 246 (1934)).

The actual and potential uses of a property, such as commercial development, farming, mining, and rental income, also influence its value.

If only part of the property is condemned, the condemnor may also have to compensate for:

- The loss of value to the remainder of property.
- The business damages, in certain jurisdictions.

To fulfill the just compensation requirement, the condemnor must often pay the property owner's attorneys' fees, and almost always their court costs such as filing fees and expert witness fees, associated with the condemnation proceeding.

Eminent Domain Procedure

Planning for Condemnation

At the first stages of a development project in which property is acquired through eminent domain, the condemnor should consider:

- What affirmative authority it has to take the needed properties.
- What constitutional and state legislative limitations may affect condemnation.
- What purpose is the driving force behind the project, and if alternatives to eminent domain may be possible to achieve that purpose, such as economic development incentives.
- Whether the condemnor has any existing rights to the property (such as an easement or a code enforcement lien).
- What entity will be the end user of the facility.
- Whether alternative properties were considered, especially if the chosen route has environmental concerns.
- Whether the property owners oppose the project.
- Whether the project timeline meets political goals of the governing body.

For more information on the planning process, see [Practice Note, Eminent Domain: Preliminary Considerations for Local Governments](#) and [Eminent Domain: Initial Planning Checklist](#).

In the follow-up, pre-petition part of the planning phase, the condemnor's due diligence should include:

- An analysis of the appropriate property rights, such as:
 - fee simple title; or
 - an easement.

- An appraisal to determine the property's:
 - fair market value;
 - highest and best use (such as the most profitable use for which the property is reasonably adaptable); and
 - current zoning status (as well as the probability of approval for rezoning and permitting).
- A title search.
- A survey of the real property.
- An environmental assessment.

For more details on due diligence, see:

- [Eminent Domain: Due Diligence Checklist](#).
- [Eminent Domain: Appraisal and Negotiation Checklist](#).
- [Practice Note, Eminent Domain: Condemnor's Initial Due Diligence Before Condemnation](#).
- [Standard Document, Eminent Domain Property Access Request Letter for Public Works Project](#).
- [Standard Document, Eminent Domain Property Right of Entry Form for Government Project](#).

Good Faith Negotiations and Offers

It is generally faster and less costly for the condemnor to negotiate with the property owner for a direct sale of the property, rather than acquiring the property through an eminent domain suit. Many states require that a condemnor enter into good faith negotiations with the property owner before filing an eminent domain action.

Before sending offer letters, the condemnor should:

- Choose a lead negotiator.
- Set up files with all pertinent information.
- Establish an office for the project and an acquisition team that meets regularly for updates.

The condemnor should send the property's appraisal along with the written offer to the property owner. The property owner then has a statutory period of time to respond to the offer. Many jurisdictions customarily offer an amount significantly greater than the property's fair market value to induce the property owner to sell.

For a sample offer letter, see [Standard Document, Eminent Domain Offer of Purchase Letter for Public Works Project](#). For a sample letter suggesting donation, see [Standard Document, Eminent Domain Request for Property Donation Letter](#).

Negotiations may include:

- Solving title issues to facilitate acquisition.
- Obtaining a right of entry to allow the project to proceed in the short term.

If the property owner refuses to sell, the condemnor would then need to start an eminent domain action.

Condemnation Proceedings

Final Offer

Before filing a condemnation petition, the condemnor should:

- Send a final offer letter by certified mail with an acceptance deadline for each unsettled parcel, along with any documents required by state law.
- Update the appraisals to the current date of value.

Condemnation Petition

The condemnation petition itself is filed with the appropriate court or local office required by state law. Some states may have special jurisdictional requirements or court systems for eminent domain actions, but the action should be brought in the county where the relevant parcel is located.

The petition's form varies according to state requirements, but in general it should include:

- The name of all relevant property owners, lienholders, lessees, and anyone with a potential interest. The condemnor wants to ensure its funds for the parcel purchase satisfies all potential claimants without the possibility of future liability.
- The legal description of the property interest sought for condemnation.
- The relevant authority of the condemnor to condemn the property interest. The petition often includes the resolution of the governing body or corporate board approving staff and counsel's petition filings for the project parcels.
- Recitations that all legal prerequisites for providing documents to the property owners are met, such as:
 - good faith offer;
 - appraisals; and
 - property owner bill of rights.

Along with the petition, the condemnor should file a lis pendens that puts potential purchasers of the parcel on legal notice that the condemnation has started and

impairs their title if they complete the purchase. For an example of a lis pendens notice usable for condemnation, see [Standard Document, Eminent Domain Notice of Lis Pendens](#).

Trial

In a condemnation proceeding, the court is asked to determine:

- Whether the condemnor has a legal right to take the property (whether the condemnation is reasonably necessary and accomplishes a public purpose).
- What is just compensation for the property.

In some states, public utility and other projects that have obtained necessary permits and approvals from the state utility commission are presumed to be in the public interest and necessary. Therefore, in these states, the only litigated question is to determine just compensation.

Eminent domain proceedings vary by jurisdiction. While due process does not require a jury trial, many states have passed legislation guaranteeing a jury trial in condemnation actions.

Some states have administrative proceedings before non-judicial decisionmakers where no judge is present and rules of evidence may be relaxed. Appeals to a judicial track are common if one of the parties is unhappy with the result of the financial award to the property owners, or if the landowner is contesting the power to condemn. Both sides should preserve the evidence they present at an administrative stage if the appeal to a judicial track is *de novo* and starts the trial all over.

The condemnor usually presents as witnesses:

- Management or elected officials to show the proper authority to condemn.
- Project engineers showing the route through the parcel is necessary and desirable.
- Licensed appraisers to show the proper value of the sought property interest.

For suggested practices preparing witnesses for pretrial and trial proceedings, see [Eminent Domain: Handling Direct Witnesses Checklist Before and at Trial](#).

Before filing the eminent domain petition, the condemnor must choose between one of two types of procedures for acquiring title to the property, referred to by practitioners as:

- Quick take (see Quick Take).
- Slow take (see Slow Take).

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Quick Take

Quick take is the most commonly used eminent domain proceeding. This method allows the condemnor to take title and possession of the property before a compensation trial is held. Title vests, and the property is considered condemned, once the condemnor deposits in the court registry what it estimates as just compensation for the property, based on the property's appraisal.

This method is useful for keeping large projects running on schedule, especially those involving multiple property acquisitions, such as road extensions. However, unlike in a slow take proceeding, the condemnor does not have the option of cancelling the condemnation should the jury award turn out to be higher than the amount initially deposited with the court.

Slow Take

Using a slow take proceeding, title does not vest with the condemnor until the compensation trial ends and the

condemnor deposits the verdict amount into the court registry.

One notable benefit of using this method is that the condemnor can choose not to proceed with the condemnation if the compensation verdict is higher than expected. Some drawbacks of this method are that:

- Should the condemnor choose not to condemn the property, it is still liable for attorneys' fees and trial costs.
- It is difficult to use on projects involving the condemnation of multiple properties.

Regardless of which procedure is chosen, the condemnation judgment must be recorded, and the property owner has an automatic right to appeal the judgment.

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