PRACTICE NOTE

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Eminent Domain: Preliminary Considerations for Local Governments

by Practical Law Government Practice

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A Practice Note for local government attorneys on issues to consider before filing eminent domain proceedings. This Note also discusses authority for condemnation, state-imposed limitations and requirements for the use of eminent domain, planning of public projects to acquire needed right of way, alternatives to taking private property, and considerations of project cost and political realities.

Eminent domain or condemnation proceedings to take property from landowners are often necessary for the completion of important public projects. Sometimes the government entity that takes property through eminent domain (referred to as the condemnor) should consider other alternatives.

Government attorneys representing condemnors should also use and facilitate careful long-range planning before filing the initial eminent domain petition. Counsel should help oversee specific, legally required procedures that involve the real property sought for the project before filing the petition. This Note sets out the key preliminary issues that a local government's attorney should consider before their entity initiates an eminent domain proceeding:

- The condemnor's power to file eminent domain actions.
- The steps necessary to plan for the forthcoming use of eminent domain.

For more information about preliminary considerations regarding eminent domain, see Eminent Domain: Initial Planning Checklist.

For information on due diligence before filing an eminent domain action, see Practice Note, Eminent Domain: Municipal Condemnor's Initial Due Diligence before Condemnation and Eminent Domain: Due Diligence Checklist.

For a complete list of eminent domain resources, see Asserting Eminent Domain Toolkit.

Power to Assert Eminent Domain

Filing an eminent domain action without first ensuring the entity's authority to condemn real property may result in:

- Significant delays to public projects with right of way needs.
- Increased costs and fees.
- Embarrassment and political fallout for elected officials and staff members.

Before initially planning for the use of eminent domain, local government counsel should:

- Ensure the local government has the affirmative authority to take the properties needed for the project (see Affirmative Authority to Take).
- Consider any restrictions on the local government's power to take or regulations of that power (see Constitutional and State Limitations on Local Governments Asserting Eminent Domain).

Affirmative Authority to Take

States typically grant the power of eminent domain to home rule cities and counties in constitutional and statutory provisions. Some local charters similarly authorize the use of eminent domain. Cities operating under Dillon's Rule must check state law for authorization.

Local agencies (such as airports, ports, or development districts) may have a different source of eminent domain

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authority from the local government entity itself (for example, a separate enabling act). Similarly, some local or regional entities may have the power of eminent domain from a combination of statutory and contractual authorization (for example, a joint airport authority).

Constitutional and State Limitations on Asserting Eminent Domain

The Fifth Amendment and Supreme Court caselaw impose the ultimate requirement that condemnation of property be for the public's use. For more detail on the constitutional public use doctrine, see Practice Note, Eminent Domain: Compliance with Public Use Requirement.

Most states have enacted additional restrictions on a local government's use of eminent domain. For example:

- Many states ban local governments from taking private property for economic development purposes in response to the Supreme Court's *Kelo v. New London* decision (545 U.S. 469 (2005)).
- Local governments cannot typically use eminent domain to take state or federally owned property. This restriction is problematic for transportation projects in particular, as the entity must separately negotiate easements for the new right of way.

Local charters may also further restrict the use of eminent domain for some purposes.

State-Imposed Requirements Before Asserting Eminent Domain

State eminent domain statutes commonly include additional requirements, such as requiring all condemnors to be listed with the state attorney general or comptroller. This registration typically is a one-time requirement due to a new state statute. The act of registration may or may not affect the power of local entities to proceed with eminent domain filings.

State law may also require good faith negotiation with each landowner and disclosure of rights given by caselaw and statute, appraisal reports, and other prerequisites before filing a petition for eminent domain (see Negotiation for Each Parcel).

A home rule charter or state law may have detailed procedures for instituting eminent domain that vary based on the nature of the specific parcel or project. Examples of specific procedures include:

- A requirement of an open and public vote authorizing the project.
- A detailed description of the public purpose for the project.
- Use of specific language in the resolution that authorizes purchase or condemnation.
- A requirement for a supermajority vote by the governing board of the entity.

Initial Planning for Possible Eminent Domain Project

Counsel should ensure that the local government's staff and governing body are educated about eminent domain before starting a project that may involve its use. This may involve asking and answering questions about:

- Alternatives to using eminent domain for one or more of the parcels needed in the project (see Alternatives to Using Eminent Domain).
- The anticipated cost estimate of property acquisition and possible mitigation of those costs (see Cost Considerations When Planning the Project).
- The expected or possible political ramifications of the project and whether certain steps can avoid or reduce them (see Political Considerations When Planning the Project).

Alternatives to Using Eminent Domain

Economic Development Incentives

Many states restrict the use of eminent domain for the promotion of economic development, often in reaction to *Kelo* (see Constitutional and State Limitations on Asserting Eminent Domain). Counsel for local governments in these states should consider the possibility of attracting businesses through financial incentives, as an alternative to asserting eminent domain. Financial incentives have the potential to spur economic growth and redevelopment, while allowing for private negotiations for the purchase of needed land for the business.

Incentives that counsel might want to consider include:

- A hotel tax payment as allowed by state law.
- An economic development sales tax subsidy.
- Tax abatements.
- Tax reinvestment zones.
- General fund spending as allowed by state law.

Negotiation for Each Parcel

Negotiation is often the preferred alternative to eminent domain by citizens and members of the entity's governing body because:

- **The price of acquisition is set by the parties rather than by a jury or by special commissioners.** The price through negotiation may often be lower as it is based on market value, which is what a reasonable buyer would pay a reasonable seller. This is fairer to the entity than paying for speculative suggestions of profit by the landowner that may be granted by jurors or commissioners hostile to the government side.
- **The government saves the costs associated with eminent domain litigation**, including:
  - the hiring of outside counsel and experts;
  - attorneys' fees and costs that could be awarded against the condemnor under certain circumstances (such as the award being above the initial offer);
  - additional punitive damages for having to dismiss proceedings if the project design changes and the parcel is no longer needed; and
  - the hidden costs of having government employees tied up in condemnation litigation.

Many states also require the local government to attempt to negotiate a sale of the property before asserting eminent domain.

For more details on negotiating the purchase of required property before using eminent domain, see Eminent Domain: Appraisal and Negotiation Checklist: Negotiate for the Properties.

Cost Considerations When Planning the Project

Avoiding Speculative Property Creep Through Public Discussion

Public discussion about specific parcels needed for a project may increase the market values of the parcels. A party seeking a speculative windfall profit may buy a parcel on the potential wish list for purchase by the local government. Until a level of certainty about the inclusion of the parcel in the project occurs, this increased value is awardable in the condemnation proceedings (see *Fuller v. State*, 461 S.W.2d 595 (Tex. 1970)).

Government counsel may suggest that the relevant parties keep the public discussion broad to counter this value creep. The parties should avoid discussing the precise location of the project, perhaps suggesting several alternative routes. This strategy will also show that staff and the governing body are considering the best use of taxpayer money and the most effective design for the project.

Planning Property Acquisitions in a Cost-Effective Manner

The condemnor should consider the need for, and costs of, certain significant parcels when designing the project. For example:

- The government may have an existing property interest along an alternate location or route for the project. For example, the government may already be able to use portions of the property because of a prior plat dedication or prescriptive easement. This could reduce the cost of property acquisition and speed up the project. However, the entity needs to balance the costs and environmental ramifications of the alternate route.
- The local government may be able to settle outstanding property tax or code enforcement liens and bring the price of a property down or induce its sale. The government counsel should use caution, though, about several concerns:
  - other taxing entities' rights regarding these liens;
  - environmental concerns with the liened property; and
  - charges about misuse of local government powers to affect the parcel's value that might violate equal protection (a possible "class of one" claim). For more information on equal protection claims, see Practice Note, Section 1983: Equal Protection Claims.
- Projects that traverse environmentally sensitive areas (for example, bridges over water bodies), or include potentially polluted parcels (for example, older dry cleaners) may add significant delays and costs to the project.
- Changes to construction timing on some parcels, allowing for the property owner's convenience, may lessen the compensation needed to acquire the parcel. For example, delaying a road project on agricultural property could prevent interference with the planting or harvesting of crops.
- Parcels intersecting railway lines may be very expensive, may require federal approval to abandon a line, and may not be easily condemnable under the doctrine of competing public uses. If they can be avoided, they should, otherwise additional time is desirable in the project timeline.

Quick Take Preference

Depending on the options under state law, the condemnor can save money by using the quick take option. However, counsel must balance taking the property without having a better idea how much compensation the special commissioners or jury may award the landowner. The potential advantages of using quick take procedures include:

- Meeting an immediate need for the construction project. For example, immediate construction needs often include quickly approaching deadlines that the local government is bound to:
  - by a provision in a contract with a construction company; or
  - as a condition of accepting grant money.
- Setting an earlier valuation date for awarding compensation, in markets with rapidly rising property values.
- Ensuring that the project will not be abandoned or significantly delayed, which leads to additional expense.

For more information on quick takes, see Practice Note, Eminent Domain Basics for Condemnors: Overview: Quick Take.

Political Considerations When Planning the Project

Seeking Consensus in the Community

Reaching agreement with the property owners helps the government's future relationship with the community regarding the project. If the project is contingent on successful negotiations at a price that stays close to the budget, property owners (especially those whose land benefits from the project's new road or utility lines) and the public may respect this government policy and cooperate to make the project a reality.

Create Reasonable Timelines

The timeline anticipated for completing the project should be adequate. The timeline should carefully consider the possibility property owners will demand payments totaling above the initial anticipated project budget and therefore force condemnation and possible project delay. If a promised road or utility project is not completed on time, public outcry may result in:

- The denial of future bond projects requiring public votes.
- Negative publicity leading to members of the governing body not being re-elected.

Some state statutes allow the landowner to repurchase property acquired through eminent domain if substantial progress on the project has not occurred, so counsel should confirm if any such statute is applicable and plan accordingly.

Avoiding Conflict

If possible, consider alternatives to using eminent domain in areas with recent controversies including:

- Forced annexations.
- Forced utility connections such as conversion of septic to sewer. For more information on septic issues, see Regulating Septic Systems: Local Government Checklist.
- Tax or similar fee increases.
- Reduction in services.
- Unpopular re-zonings or comprehensive plan amendments. For more information on adopting and amending the comprehensive plan, see Practice Note, Comprehensive Plans: Overview and Adopting or Amending a Comprehensive Plan Checklist. For detail on the zoning process, see Practice Note, Local Government Zoning and Land Use Regulation: Overview.

Delaying Condemnation Until After an Election

Consider the proximity of the project to a local government's election date. If the project is likely to be controversial, a delay in property acquisition until after the election provides political cover to elected officials. On the other hand, by delaying the project until after a local election, there is a risk that newly elected officials will oppose the project and deny the use of eminent domain to acquire the necessary property.