Eminent Domain in the Wild

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Pre-Litigation Planning

Authority to Condemn

- Who is condemning?
  - Do they have the authority to condemn?
    - State has the power to condemn
      - Can delegate that power to municipalities, public corporations and other government entities
        - Entity must be statutorily authorized to exercise that power
    - Working with non-governmental partners to complete Project
      - E.g., non-profit partners etc.
        - Available to assist, but City ultimately condemned and will have rights to the property.

Authority to Condemn

- Funding sources
  - From the public entity or another source?
  - How is the just compensation going to flow to condemnee?
- Consultants
  - Engineers/planners working on the project
- Contract and agreements laying out arrangements
  - Should articulate who is the condemning authority with clarity

Authority to Condemn

- Purpose of the Project
  - Is this for a Public Purpose?
  - Kelo-broadly defined public purpose
    - Condemnation to create residential, commercial and park space in New London, CT. Owners challenged taking alleging not for a public purpose and alleged taking violated the public use restriction in the Fifth Amendment
      - Supreme Court concluded that economic development can constitute a public purpose
    - Moreover, must consider the plan as a whole not on a piecemeal basis

Authority to Condemn

- Purpose of the Project
  - State law guidance-Kelo only considered under the 5th Amendment. Concluded that many states impose stricter public use requirements.
  - Trail v. Linear Park
    - In Pennsylvania you can specifically condemn for a Park but no explicit allowance for a Trail.
      - Condemnation of land for trail and park becomes “linear park”.
      - Includes a trail and other park features
        - Benches, green space, garbage disposal etc.

Scope of Condemnation

- Fee or Easement
  - Fee takings can eliminate uncertainty in ownership but has downsides:
    - Higher cost to acquire property
    - More objection to the taking
    - Taxable property returned to the municipality
  - Can an easement satisfy your requirements?
  - Don’t forget to consider temporary construction easements for construction access!

Scope of Condemnation

- Location and Scope
  - Generally reviewed to determine if municipality acted fraudulently, illegally, in bad faith or abused its discretion.
    - Courts won't usually disturb scope and location decisions which were well reasoned and thought out
      - Document the steps taken
      - Alternative locations studied
      - Reason for the final alignment


THE DELAWARE RIVER

Title Work

- Correct owner
  - Anyone have interest in the property?
    - Old easements/rights
- Correct address
  - Sometimes difficult to determine for split parcels or industrial space
- Other interests in the property
  - Mortgages and liens
  - Lis pendens
  - HOA restrictions with reversionary clauses
  - Unexpected claimants can increase project costs

Land Survey

- Roles of survey
  - Exhibit to condemnation proceeding in Court
  - Exhibit to Ordinance
  - Included with offer letters to property owners
- Right of Entry
  - Physical non-invasive entry
    - Permitted by statute/common law
  - Preference for consensual entry during reasonable hours
- Have it reviewed by your municipal surveyor to confirm details and approve survey!
  - Have it stamped and sealed by municipal surveyor, if possible

Funding

- Do funding requirements have any restrictions?
  - Disclosure requirements
    - Appraisal with approved appraiser
    - Review and acceptance of plans
  - Determine if/how this will affect timeline for condemnation

Alternatives to Litigation

- Negotiation with landowner
  - Most jurisdictions this is a prerequisite to litigation
  - Avoid time and costs
- Alternative location for project
  - Where land is easier to acquire or already owned by the municipality

Valuation

- Just Compensation
  - Complex analysis that is property specific
    - Fair Market Value
      - Established on the date of the taking
      - Based on reasonable buyer and seller
      - Includes reasonable time on the market
      - Factors:
        - Market Data-Comparable Sales
  - Don’t forget compensation for temporary takings (construction easements, etc.)

Litigation

Defending Condemnation

Declaration of Taking

- What to file
  - Declaration of Taking
    - Need to be recorded?
    - Service requirements
  - Petition usually includes:
    - All interested parties (owners, lienholders, lessees etc.)
    - Legal description with survey
    - Authority to condemn (ordinance)
    - Confirmation that any statutory requirements are met
  - File Lis Pendens to put any potential buyers on notice

Challenge to Taking

- What does trial look like
  - Many states bifurcate proceedings
    - PA-Preliminary Objections-akin to a trial on the merits
    - Then Just Compensation hearing
- Discovery
  - Written discovery and deposition
  - Important step to move process along smoothly
    - Avoid remand

Challenge to Taking

- Trial/Hearing
  - Witnesses
    - Municipal Authority
      - To articulate the public purpose and authority
    - Engineers
      - Show how parcel is needed for success the project
      - Explain any technical analysis done to determine scope and location
    - Appraiser
      - If valuation is also at issue in trial (not bi-furcated)

Challenge to Taking

- Condemnee Defenses
  - Procedural
    - Did the municipality take all steps is should have before condemning?
      - Notice
      - Just Compensation
  - Substantive
    - Purpose, use and/or necessity of taking
      - All considered before filing condemnation

Just Compensation Proceeding

- Hearing to determine valuation
  - Include “battle of the experts”
    - Appraisers to lay out how they reached their individual valuations
      - Many times, decision made by a jury
        - Must consider jury’s feeling regarding municipality/condemnations

Conclusion

- Much of the preparation for condemnation proceedings happen before any litigation
- Careful, thorough planning is the most beneficial way to defeat a challenge to a taking