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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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LAND USE

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A Brief Look at Land Condemnation

Public infrastructure projects often require municipalities to acquire real property interests from private property owners. If a municipality cannot acquire the necessary real property interests through a negotiated agreement with the property owners, then the municipality may exercise the power of eminent domain through a condemnation action, subject to certain procedures and legal limitations, including those set forth in the Fifth Amendment's Takings Clause. This article summarizes key concepts, definitions, and approaches to land condemnation litigation in the context of municipal infrastructure projects that require the physical appropriation of property.[1]

A. **Constitutional Limitations.** Eminent domain is the government's inherent right to take private property for public use or benefit without the owner's consent.[2] Condemnation is the government's formal exercise of eminent domain.[3] [4] The government's power of eminent domain is limited by the Fifth Amendment to the United States Constitution, which states, "nor shall private property be taken for public use, without just compensation."[5] The fundamental right to just compensation is incorporated by states through the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of . . . property, without due process of law."[6]

1. There must be a "public use." Whether a proposed infrastructure project meets the legal definition of "public use" is a question that is often left for the courts to determine. In the landmark case of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), the United States Supreme Court, by a 5-4 majority, held that the condemnation of unblighted property to support an economic development plan constituted a valid public use under the Takings Clause. Many state legislatures responded to *Kelo* by passing laws to clarify the scope of "public use" in the government's exercise of eminent domain.[7] Therefore, it is important that you understand how your state defines the phrase "public use" in considering the types of infrastructure projects that will require using eminent domain.

For example, North Carolina courts have held that a condemnation action must satisfy both the "public use" and the "public benefit" test.[8] Under the "public use" test, the courts ask whether the public has a right to a definite use of the condemned property.[9] It is the public's right to use, not the public's actual use, that is the key factor in making the public use determination.[10] Under the "public benefit" test, the courts ask whether some benefit accrues to the public as a result of the desired condemnation.[11] Not just any benefit to the general public will suffice, however. The taking must furnish the public with some "necessity or convenience which cannot readily be furnished without the aid of some governmental power."[12]

2. The owner of private property is entitled to "just compensation." It is well settled law that an owner of private property taken by power of eminent domain is entitled to just compensation.[13] To competently represent your municipal client in a condemnation action[14], you must understand how the law defines and determines the amount of just compensation owed to property owners whose land has been taken by eminent domain. The most common measure of just compensation is the fair market value of the land taken.[15] Though state law definitions will vary, for purposes of this discussion, *Nichols on Eminent Domain* provides the following definition of fair market value:

"Fair market value," for the purpose of evaluating land and improvements taken under the power of eminent domain, is the amount of money which, as of the date of valuation, an informed and knowledgeable purchaser willing, but not obligated, to buy property would pay to an informed and knowledgeable owner willing, but not obligated, to sell it. Consideration must be given to the following:

- all uses for which the land is suited and might be applied, including, but not limited to, present use or highest and best available use;
- the existing zoning or other restric-

tions on use, and the reasonable probability of a change in those restrictions;
- the period of time within which the sale could reasonably be effectuated.[16]

If there is a dispute over the issue of just compensation owed to the property owner, then you are likely going to be dealing with valuation witnesses, including certified appraisers. Whether you are negotiating the settlement of a condemnation lawsuit or preparing for a condemnation trial, you will need to be very familiar with appraisal methodologies[17] and valuation standards utilized by valuation witnesses, such as the *Uniform Standards of Professional Appraisal Practice*.[18] In addition to on-the-job training, there are online and in-person courses that can help you develop subject matter expertise in property valuation methodologies.[19] Educating yourself about valuation methodologies and concepts such as "highest and best use" is a critical aspect of providing competent legal representation on behalf of municipalities in land condemnation litigation.

B. Procedural Considerations.
There are many procedures to follow in a typical condemnation lawsuit. Ihave selected three procedural areas, discussed below, that warrant special consideration.

1. Initiating a Condemnation Action.
Municipal attorneys handling condemnation litigation should be familiar with applicable statutory procedures, including those required to initiate a condemnation action. State laws typically govern which procedures you will need to follow, though the federal process for initiating a condemnation action is instructive. For example, most federal condemnation cases are initiated by filing a Declaration of Taking pursuant to the Declaration of Taking Act, 40 U.S.C. § 3114, in the U.S. District Court for the district in which the property is located.[20] The Declaration of Taking must contain:
(1) a statement of the authority under which, and the public use for which, the land is taken;
(2) a description of the land taken that is sufficient to identify the land;
(3) a statement of the estate or interest in the land taken for public use;
(4) a plan showing the land taken; and
(5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.[21]

The statutory process in North Carolina is very similar to the federal process described above.[22] For your typical public infrastructure project, meeting requirements like those described above is a pretty straightforward process, though condemnation attorneys should verify the accuracy of information presented in the declaration of taking.[23] Furthermore, it is important to research the property that is the subject of the taking, commonly referred to as the "subject property," to ensure that there aren't any title issues or other issues that may inform your litigation strategy. For example, if the subject property is encumbered by a lien or encumbrance, then other third parties who have an interest in the subject property may need to be named as parties to the condemnation lawsuit.[24] Similarly, it is important to understand the infrastructure project giving rise to the condemnation action. In some cases, there may be opportunities to mitigate damages based on decisions that are tied to the project's design, including the project's physical alignment.

2. Measure of Damages.
The general rule in most states is that the value of the property taken by eminent domain is fixed at the time that the property is actually appropriated by the government, often referred to as the "date of taking."[25] The amount of just compensation owed, sometimes referred to as the "measure of damages," depends on the nature of the property interest being acquired. If the taking requires acquisition of the entire property in fee simple, then the typical measure of damages is the market value of the entire property as of the date of taking.[26] In my experience, most municipal infrastructure projects require taking something "less than" a fee simple title of the entire subject property; rather, these projects require easements over a portion of the subject property. This requires an understanding of easement law[27] and how your applicable laws approach the valuation of "partial" takings.

For partial takings, there are two generally accepted approaches for determining just compensation: the "before and after" rule and the severance damage rule.[28] The before and after rule compares the fair market value of the entire tract of land before the taking with the fair market value of the land remaining after the taking.[29] The mathematical difference between the "before" value and the "after" value constitutes the just compensation owed for the taking. The severance damages rule is a variation of the "before and after" rule.[30] Under this approach, the value of the portion of property

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that is physically taken is calculated first and then a separate "severance damage" calculation is added to account for the diminution in value, if any, to the property with which the landowner is left."[31] The issue of severance damages, also known as damages to the remainder, is among the most common issues in dispute in land condemnation lawsuits that involve partial takings. Attorneys representing property owners are keenly aware of this reality. A careful study of applicable statutory requirements and case law will help you navigate severance damages claims arising from public infrastructure projects.

3. Inverse Condemnation.
An in-depth discussion about inverse condemnation is outside the scope of this article, but it is worth noting some basic concepts as they might apply to public infrastructure projects. In *San Diego Gas and Electric Co. v. San Diego*, 450 U.S. 621, 101 S. Ct. 1287 (1981), Justice Brennan in his dissent described the remedy of inverse condemnation as follows:

> The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the governmental entity.[32]

In the context of municipal infrastructure projects, the key is to understand, and perhaps anticipate, what types of scenarios might give rise to an inverse condemnation claim. A common scenario that gives rise to an inverse condemnation claim is where the condemnor's contractor exceeds the physical limits of an easement area.[33] The government does not have to physically enter one's property, however, to give rise to an inverse condemnation claim. Interferences or intrusions caused by the government's "nuisance-like" activities may be substantial enough to constitute a compensable taking. Depending on your jurisdiction, examples of such takings may include:

- Odors from an adjacent sewage disposal plant.[34]
- Rock blasting incidental to the construction of city sewer line.[35]
- Discharge of foul matter from sewage disposal plant onto private property.[36]
- Discharge of improperly treated sewage into stream.[37]
- Cutting trees on private property.[38]
- Pollution caused by City's maintenance of filthy drain on adjoining lot.[39]
- Impoundment of stormwater caused by grade of road maintained by the City.[40]
- Air pollution from tunnel ventilator that discharged smoke on private property.[41]
- Foreseeable increase in propensity for flooding on private property.[42]
- Elimination of direct access to property.[43]

There are many reasons to avoid inverse condemnation claims. In North Carolina, for example, property owners are entitled to recover their costs (including reasonable attorney, appraiser, and engineering fees) where they obtain a judgment in their favor from an inverse condemnation claim.[44] While cost recovery provisions can assist property owners in obtaining compensation for the trouble of having to pursue an inverse condemnation action against a condemnor, they are often used by attorneys representing property owners as a tool for negotiating settlement of claims, including
"regular" condemnation claims that are linked to a counterclaim for inverse condemnation.

Conclusion

It is important to understand the constitutional limitations of eminent domain and the applicable procedural requirements that must be followed in condemning property for public infrastructure projects. Fortunately, there are many resources available to develop your knowledge in land condemnation and, therefore, provide your municipal client with competent representation.

1. Regulatory takings under the Fifth Amendment's Takings Clause are outside of the scope of this article, though I do provide a brief overview of inverse condemnation actions arising out of "nuisance-like" activities that are tied to public projects.
2. Nichols on Eminent Domain, Ch.1, §1.11 (Matthew Bender, 3rd ed., 2024); Black's Law Dictionary 562 (8th ed. 2004); *See also* N.C. Gen. Stat. §40A-2(3)(2024) (defining "eminent domain" as "the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested"); State v. Core Banks Club Properties, Inc., 275
N.C. 328, 334, 167 S.E.2d 385, 388 (1969) ("The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just

compensation for property condemned.").
3. Black's Law Dictionary 310 (8th ed. 2004).
4. In condemnation litigation, the governmental unit exercising the power of eminent domain is considered the "condemnor". The property owner whose land has been taken is the "condemnee."
5. U.S. CONST Amend. V.
6. U.S. CONST Amend. XIV, sec.1; *see* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581 (1897).
7. Nichols on Eminent Domain ®, Special Alert Responses to *Kelo* – Eminent Domain Reform Legislation and Selected Cases §AS.01 (Matthew Bender, 3rd ed., 2024).
8. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 430, 364 S.E.2d 399, 401 (1988).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 432, 364 S.E.2d at 401 (1988).
13. *See* R&J Holding Co. v. Redevelopment Auth., 670 F.3d 420, 425 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2792, 183
L. Ed. 2d 653 (2012); United States v. 103. 38 Acres of Land, 660 F.2d 208 (6th Cir. 1981); Kohl Indus. Park Co. v. County of Rockland, 710 F.2d 895 (2d Cir. 1983); United States v. 91. 90 Acres of Land, 586 F.2d 79 (8th Cir. 1978); United States v. Sowards, 370 F.2d 87 (10th Cir. 1966); Almota Farmers Elev. W. Co. v. United States, 409 U.S. 470, 93 S. Ct. 791 (1973); United States v. 71. 29 Acres of Land, 376 F. Supp. 1221 (W.D. La. 1974).
14. *See* Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Please consult your local state bar's ethics rules for guidance specific to your state.
15. Nichols on Eminent Domain, Ch.4, §12.02 (Matthew Bender, 3d ed., 2024).
16. *Id.*
17. *See* Bly v. Story, 241 P.3d 529, 536 (Colo. 2010) (fact finder may consider evidence of market value based on three established real estate appraisal methods: (1) the comparable sales method, which considers recent sales of comparable properties; (2) the cost of construction method, which estimates value based on the cost of reproducing or replacing a particular improvement; and (3) the income method, which considers the property's earning power).
18. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice*, https://www.appraisalfoundation.org (last visited March 10, 2024).
19. I recommend starting with the "Basic Appraisal Procedures" course offered by the Appraisal Institute.
20. U.S. Department of Justice, Environmental and Natural Resources Division, Condemnation, https://www.justice.gov/enrd/condemnation (last visited March 10, 2024).
21. 40 U.S.C. §3114 (2023).
22. *See* N.C. Gen. Stat. §40A-41 (2023).
22. *See* N.C. Gen. Stat. §40A-43 (2023)("The condemnor, at the time of the filing of the complaint containing the declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved is located and said memorandum shall be recorded among the land records of said county.").
24. *See* N.C. Gen. Stat. §§40A-41(7) (2023)(The condemnor's complaint shall include a "statement as to such liens or other encumbrances as the condemnor is informed and believes are encumbrances upon the property and can by reasonable diligence be ascertained.).
25. *See* United States: Tenn. Gas Pipeline Co., LLC v. Permanent Easement for 7.053 Acres, 931 F.3d 237, 244 (3d Cir. 2019) (under the Fifth Amendment, just compensation generally means "the fair market value of the property on the date it is appropriated" and nothing more); United States v. 269 Acres, 995 F.3d 152, 163 (4th Cir. 2021) (relevant "value" is "fair market value" of property, which is what willing buyer would pay in cash to willing seller at time of taking).
26. Nichols on Eminent Domain ®, Ch.4, §14.01 (Matthew Bender, 3d ed., 2024); *see also* N.C. Gen. Stat. §40A-64 (2024)(measure of compensation for a partial taking is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken).
27. Common factors at issue include the scope of easements and whether easements taken are permanent or temporary in nature.
28. Nichols on Eminent Domain ®, Ch.4A, §14.02 (Matthew Bender, 3rd ed., 2024).
29. *Id.*
30. *Id.*
31. *Id.*
32. 450 U.S. at 638 n.2, 101 S. Ct. at 1297 n.2, 67 L. Ed. 2d at 554 n.2 (dissenting opinion of Justice Brennan, with Justices Stewart, Marshall, and Powell joining). *See also* United States v. Clarke, 445 U.S. 253, 255–258, 100 S. Ct. 1127, 1129–1130, 63 L. Ed. 2d 373, 376–378 (1980) (inverse condem-

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nation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." 445 U.S. at 257, 100 S. Ct. at 1130, 63 L. Ed. 2d at 377–378); St. Bernard Par. Gov't v. United States, 887 F.3d 1354, 1359 (Fed. Cir. 2018) (in a physical takings case, explaining inverse condemnation as the means by which landowner may recover just compensation under the Fifth Amendment for taking of his property when condemnation proceedings have not been instituted).

33. Your municipality's contract with the contractor should include indemnification language that protects the municipality in this type of scenario.

34. Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932).

35. Guilford Realty & Insurance Co. v. Blythe Brothers Co., 260 N.C. 69, 131 S.E.2d 900 (1963). *See also* Nichols on Eminent Domain ®, Ch.4A, §9.03 (Matthew Bender, 3rd ed., 2024) (taking land for a highway projects sometimes includes the compensated right to blast and throw debris on adjacent property).

36. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); *see* Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965); Eller v. Board of Education, 242 N.C. 584, 89 S.E.2d 144 (1955).

37. Moser v. Burlington, 162 N.C. 141, 78 S.E. 74 (1913). *See also* Stoddard v. Western Carolina Regional Sewer Auth. 784 F.2d 1200, 1206 (4th Cir. 1986) (holding that foul odors, human sewage, dead fish, algae growth, and other conditions created by discharges from respondent's sewage treatment plant amounted to a taking of a landowner's riparian rights).

38. Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E.2d 40 (1960); *but see* State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965). *See also* N.C. Gen. Stat. §§ 40A-11 and 136-120 (2023)(granting condemnor right of entry prior to condemnation to make surveys, borings, or examinations).

39. Downs v. City of High Point, 115 N.C. 182, 20 S.E. 385 (1894).

40. Midgett v. State Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

41. Richard v. Washington Terminal Co., 233 U.S. 546 (1914).

42. Lea Co. v. North Carolina Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

43. Dep't of Transp. v. Harkey, 308 N.C. 148, 152, 301 S.E.2d 64, 67 (1983); State Highway Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 *adhered to*, 264 N.C. 139, 141 S.E.2d 10 (1965); *see also* N.C. Gen. Stat. §§ 136-89.53 and 136-89.52 (2023)(governing compensability of damages caused by 'controlled access facilities' imposed on existing highways or on new locations).

44. *See* N.C. Gen. Stat. §§136-119 and 40A-8 (2023).

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