

Eminent domain Know and assert your power

By Stacy Freeborg

If your commercial property is acquired by eminent domain, don't take the first dollar amount offered, lawyers say. Your real estate could be worth more. And due to discussions set in motion in the wake of a landmark Supreme

Court decision, displaced property owners may eventually garner even greater compensation.

Last summer the court ruled that "public use," as defined under the U.S. Constitution's eminent-domain clause, allowed state and local officials to seize private property for purely economic reasons, such as higher taxes from redevelopment.

"The shackles are off government. They can go and condemn anything for any reason so long as they say, 'we can make more money as a result,'" says George Kroclic, partner in the eminent domain

and land valuation practice with Duane Morris in Philadelphia.

In June 2005, the Supreme Court ruled against families in New London, Conn., who sought to protect their homes from seizure by local officials. Those officials invoked eminent domain because they wanted to bulldoze private homes and turn the land over to developers, who intended to build luxury condominiums and office buildings.

In the backlash of the case, property owners raised concerns about just compensation for their acquired land. Discussions underway in several states suggest looking at the replacement costs as a means to decide how to value property fairly.

"Generally speaking, the way to value real estate is by the comparable-sale method. If you were selling your home today, you'd want to know what comparable prices for homes in the city sold for recently. That is the comparable-sale method, but it does not take into account what it would cost to replace what you have that is being taken," Kroclic says.

One of Kroclic's clients, the owner of an auto-repair business, had been at the same location for 30 years when he was notified that his building was being taken for an improvement project. "We've been offered a certain amount of money based on the fair market value of his building," he says. "But he's gone out and tried to find a replacement, and the replacement is about three times what's been offered."

During the Supreme Court argument of the New London case, one justice suggested it might be fair to pay four times the market value for property of displaced owners. Kroclic thinks this would be a fair starting point.

If your property is acquired by eminent domain:

- It's nothing personal. Redevelopment and improvement projects are not done on a lot-by-lot basis but by entire blocks. Even if your business is doing well, the government has the power to take an entire area and is unlikely to carve out parcels that aren't blighted, says Drew Kapur, partner in the eminent domain and land valuation practice at Duane Morris.
- Know that you will most likely not be compensated for lost profits, business or goodwill for your acquired property.
- Call a lawyer early in the process to see what—if any—types of changes to the project are possible with the condemning authorities.

Today's reality

Drew Kapur, partner in the eminent domain and land valuation practice at Duane Morris, says blame the nature of the transaction when it comes to the current low payments for acquired land.

"Condemnation is a real estate action so you get paid for the value of your property. You don't get paid for the value of your business," he says. "That's a bitter pill for many franchisees to swallow because if they have to go somewhere else, they'll lose all of the goodwill they've established and if they have to go even a couple blocks away, they're starting from scratch."

As a general rule, property owners currently do not receive compensation for lost business, profit or goodwill when their land is acquired for eminent domain. The state of Florida, Kroclick says, is one exception; it requires that property owners be reimbursed for lost profits and attorney's fees.

But while most states don't require businesses to be compensated for lost business and profits as part of eminent domain, Kapur says there are ways to successfully argue greater compensation for the annexed property.

Duane Morris represents several gas stations that have been acquired through eminent domain. When this happens, Kapur has appraisals for the real estate based on how much fuel is sold at that location. In response, government officials often argue that method relates to business profits and is non-compensable.

"The trick is how do you get around that," Kapur says. "Suppose it's a great site. Suppose they're pumping 1.5 million to 2 million gallons per year. We think the evidence of the amount of gas being sold at that location is evidence of the superior location, which is an attribute of the real estate...It's a matter of how you package it." [FT](#)