

A Property Owner's Guide to the Condemnation Process and Just Compensation in the District of Columbia

This may be the first time your property has been taken by condemnation. If so, this guide should give you a basic understanding of what is involved in the condemnation process. While we trust this guide will prove helpful to you during your case, there are some important matters, which we ask that you keep in mind:

The questions and answers in this guide are -- by necessity -- general and not intended to apply specifically to your case. The facts of every case vary. Please utilize this guide as it was intended to be used: as a general overview and not a precise opinion on any particular issue in your case.

This guide should not serve as a substitute for consultation with an attorney. Whenever you have a specific question about the condemnation process or the particulars of your case, always discuss it with a qualified eminent domain attorney. This summary is intended to serve as only one of several means of providing you with the information you need to understand your case and enable you to make well-informed decisions.

What is condemnation?

Condemnation is the power to take private property for a public purpose. The power to take private property through the power and force of the government is also

known as the power of eminent domain.

Who can take my property?

Federal, state and local governments have the power to condemn private property, and this power has been delegated to many governmental agencies. The government has also delegated the power of eminent domain to public utilities and in certain, very limited, situations to private companies and individuals. For example, a government agency, housing authority, natural gas company or public utility company may have the power to condemn your property.

Can the District Federal Government take my property for any reason?

No. The condemning authority may only take your property for a public use, not a private use.

Who decides whether the condemnation of my property is for a public or private purpose?

Only a judge can decide. Even if the condemning authority believes the condemnation is for a proper public use, a judge can rule otherwise and deny the government the power to take your property.

How will I know whether the government really wants to take my property?

In most cases, you will learn far in advance of the proposed construction date of a project that may require the taking of your property. Your first knowledge of the project may come from reading a newspaper article or talking to a neighbor.

In many cases, the public agency will hold a public hearing at which the agency will describe the boundaries of the project, so that you will be able to determine whether your property is needed for the project.

Generally, the condemning authority will also give you a written notice that your property is needed and will give you a written offer to purchase your property prior to filing a condemnation action.

Does the government or condemning authority have the power to take my property?

It depends.

While a specific governmental body or public utility may have the power of eminent domain, that does not necessarily mean that it is authorized to take your specific property or to take your property at this time. A governmental body or other entity may exercise the power of eminent domain only if a legislative body has specifically authorized it to take property. Once the legislature grants a condemning authority the power of eminent domain, the condemning authority may exercise the power only in the manner and for the purposes provided by the legislature. A condemning authority must satisfy certain prerequisites and conditions, and comply with various statutory requirements before it is authorized to exercise its power of eminent domain. Although a condemning authority possesses the power of eminent domain, it cannot exercise that power on property owners until it satisfies all the appropriate legal requirements.

If you do not want your property taken, only the court can require that your property be condemned. If, for example, a condemning authority claims that it needs a portion of your property for its project, it may not take your property unless you give your consent or the court enters an order allowing the taking.

If you do not consent to the condemnation, the condemning authority must prove to the court that your property is reasonably necessary for a permissible public use. The burden on the landowner challenging a condemnation is very high. While condemning authorities have most often prevailed in litigation to take property, there have been several occasions in which the courts have denied the condemning authorities the right to take the owner's property.

Should I be doing anything before my property is condemned?

Is your property likely to be affected by a highway or other

government taking? If it is, the time to act is now, not after the process has already begun.

Once the taking actually occurs and papers are filed, it may be too late to make critical decisions that could have an impact on your ultimate compensation. Documents establishing the legal status of ownership and any leasehold interests, for example, should be reviewed and sometimes modified up front. Under your attorney's guidance, input from an appraiser or other consultants can often be obtained quite inexpensively. Your response to preliminary overtures from government representatives can affect the final outcome.

The impact of a road project often involves more than initially meets the eye. Beyond the value of the square footage taken, often overlooked are such things as environmental problems and a serious reduction in value of the property that remains.

In general, it is wise for an owner to seek the advice of an attorney when considering precondemnation actions, since the actions a property owner takes before the property is condemned may help or hurt the case.

The property owner should avoid taking positions, especially written positions, which may be used against him or her in the condemnation proceeding. If the property owner contests the tax assessment, for example, stating that the property is worth less than the county's or city's estimate, that appeal may be used against the property owner if, in the condemnation case, the property owner asserts a higher value.

The property owner should avoid contracts of sale or sale offers that might attach a value to the property before a condemnation proceeding. The property owner should avoid appraising the property before consulting with a lawyer.

Be careful, also, if you attend a public hearing about an upcoming project. These hearings are a good source of information for property owners. They can provide helpful information about the scope and time of public projects.

Remember, however, that any statement you make may be used later if you go to trial. Previously in the Norfolk Circuit Court trial of Commonwealth Transportation Commissioner of Virginia v. DAWA Corp., at law number CL99-1293, the Virginia Department of Transportation (VDOT) attempted to use a property owner's statement at

a public hearing against the property owner at trial. The property owner gave a brief written statement at a public hearing and commented favorably on some aspects of the proposed project. At the trial, VDOT attempted to use those statements against the property owner.

Leases and other agreements signed by the property owner prior to condemnation may reduce the portion of the final award to which the property owner will be ultimately entitled. The property owner's attorney should be consulted on condemnation clauses contained within these documents. Further, the property owner should never produce leases, contracts, offers, and bids to the condemning authority without seeking the advice of an attorney.

The property owner should maintain the appearance and condition of the property. Visual impressions, even to sophisticated professionals, are important, and the condemning authority's appraisers will be inspecting the property long before it is condemned. The property owner should always keep the property looking as good as possible and never defer maintenance. Landscape and curb appeal are important. Improvements made to the property will affect its fair market value, upon which just compensation is based.

Favorable land use permits often enhance the value of the property. Where it is practical and prudent, the securing of a rezoning, plat approval, or building permit may result in a higher valuation of the property. The property owner should not interrupt development plans solely because of a pending condemnation. The decision of whether to apply for land use permits must always be weighed against the effect that a potential denial will have on the case. It is thus wise to seek the advice of an attorney before proceeding with a land use application.

How is the property appraised?

Appraisers generally use three methods of appraisal to estimate the value of real estate: the market approach, the cost approach and the income approach. Appraisers also determine, during partial takings by the condemning authority, the extent (if any) of damages to the remaining property.

Often the greatest element of compensation is not for the property taken, but for damages to the remainder. This

is particularly true in road widening cases and instances where the condemning authority is only acquiring an easement. It is important that you retain an appraiser who understands the concept of damage to the remainder and will include this damage in his or her appraisal.

In federal court, just compensation is the difference in the value of the entire property before the taking and the value of the property remaining after the taking. This equation takes into consideration the damages to the remaining property because the damages often drastically diminish the value of the property remaining after the taking. The following is the equation for just compensation:

Value of Entire Property (Before the Taking) – Value of Remaining Property (After the Taking) = Just Compensation

If I don't agree with the condemning authority's offer, who decides how much money I get?

Federal law allows the landowner to demand that a jury determine the amount of compensation to be paid to the owner who loses his or her property through condemnation. However, federal law gives judges the discretion to appoint a commission consisting of three persons to decide just compensation.

If the judge chooses to appoint a commission, he is required to advise the landowner of the identity and the qualifications of each commissioner. The judge typically allows the landowner to question or examine the commissioners to determine if the commissioners have any bias or lacks the ability to be impartial. Additionally, the landowner has the right to object to the selection of any commissioner, and to have commissioners struck for cause if they are unable to be impartial or have a bias. The jury or commission only determines the issue of just compensation, and the judge determines all other matters.

Do I pay taxes on my award?

It depends. A condemnation is considered an involuntary conversion and is treated differently from other sales and other cases.

You will have a period of time to reinvest the proceeds of the case and defer your tax obligation until a later date.

If a portion of your award is considered severance damages (compensation for damages to property you continue to own), you may be able to defer the payment of taxes on that portion of your award.

Portions of the award attributable to interest are taxed as ordinary income.

The tax-deferral benefits of condemnation are also available to sales in lieu of condemnation. You may thus defer the payment of taxes on a sale to the condemning authority even if you settle the dispute without the government being required to file a condemnation action.

The Changing Legal Landscape

The law of property rights is changing extremely rapidly. The United States Supreme Court has specifically acknowledged that, under the Constitution, property ownership is on a par with personal liberty. See *Lynch v. Household Finance Corp*, 405 U.S. 538, 92 S. Ct. 1113 (1972).

Closer to home, *Waldo & Lyle* has been on the cutting edge of two relatively recent decisions by the Supreme Court of Virginia, both of which advance the rights of property owners in condemnation proceedings. These cases, each of which was argued successfully by Joseph L. Lyle, Jr., promote the positions of developers of commercial real estate and billboard companies.

In *Revocor Corp. v. Commonwealth Transportation Commissioner*, decided in March 2000, the Supreme Court held that an owner/developer was entitled to show, through the testimony of a professional engineer, a myriad of difficulties and expenses amounting to almost \$400,000 caused by the change in the configuration of the remaining property after the taking. These expenses were in addition to the value of the property that was actually taken.

In *Snyder Plaza Properties v. Adams Outdoor Advertising*, decided in April 2000, the right to compensation to a billboard company which was a short-term tenant was held to include the "expectancy," based on past history, that the lease would continue to be renewed even after its

expiration date. The Supreme Court rejected the argument that the billboard company couldn't recover for what might or might not happen in the future. This decision is a legal boost to the billboard industry, in which the billboard company often operates under short-term leases. In this important decision, the Supreme Court of Virginia plowed new ground and departed somewhat from courts' traditional rejection of recovery for "what might happen" as being unduly speculative. The decision was received enthusiastically by the billboard industry.

The Short Answers to Frequently Asked Questions:

What is the Power of Eminent Domain?

The Government, its agencies, and certain monopolies have the power to take an individual's property for a public use, so long as they pay the individual just compensation.

What is just compensation?

Just compensation is the amount of money needed to place the owner in the same financial position in which the owner would have been had the government or its agencies not condemned the owner's property for a public purpose.

Fair market value for property taken is only one basis for determining just compensation. Principles of equity and fundamental fairness also govern the determination of what amount of money constitutes just compensation.

The value of property taken is based on the highest and best use of the property, which is not necessarily its existing use at the time of the take. For example, land used for agriculture may be valuable as a residential subdivision or for commercial uses. The owner is entitled to the highest value.

When can the condemning authority take your property?

The government or its agents cannot take an owner's property until it makes a bona fide offer for the property and, after that, files with the court a pleading for taking the property and serves the pleading on the owner. In Virginia, if the value of the property taken is \$10,000.00 or more, the condemning authority must prepare a bona fide appraisal and give a copy of it to the property owner.

What if the government takes only part of the

owner's property?

When the government makes a partial take, the owner is entitled to just compensation for the property condemned and any decrease in the value of the property remaining after the partial taking of property. Moreover, if the government takes the use of the property temporarily, the property owner is entitled to compensation equal to the rental value of the property temporarily taken for the duration of the take and for damage to the value of the remainder during the time of the temporary taking.

What happens when the government immediately takes property and deposits money with the court to pay the owner for the property taken and damaged?

Procedures are available for property owners to withdraw the money the government deposits with the court and still retain the right to seek additional compensation by trial if the amount deposited is inadequate to compensate the owner justly.

What should a property owner do before the government takes property for a public purpose and condemnation has yet to begin?

- Maintain the property, including all building structures and landscape, in the same manner if you were attempting to sell the property on the open market and showing the property to potential buyers. If you paint the property or make any other alterations, use colors that are conservative and modest.
- Maintain a single notebook with a running log of all conversations with the condemning authority or its agents. Write the name of any persons you speak to, the date and the time of the conversation, and the content of the conversation.
- Save all correspondence and documents the condemning authority provides to you in one folder. Keep all information that you receive in this folder.
- DO NOT sign anything. Condemning authorities often try to take more rights in a settlement than they have the right to take by law. For example, a condemning authority such as a gas company may have the legal right to construct one pipeline on your property, but it may attempt to reach a settlement giving it the right to construct two pipelines.
- Regardless of whether your tax assessment increases dramatically, DO NOT contest the tax assessment. The assessed value of your property does NOT represent the fair market value of the property. The eminent domain appraisal done for purposes of just

compensation is not the same as the appraisal done for tax assessment purposes. Consequently, the tax assessment is inadmissible at trial against the landowner unless the landowner has contested the tax assessment.

- Consult an attorney regarding the filing of any subdivision plats or other documents that may be filed on record.
- DO NOT change or alter any nonconforming uses, such as signs, which have been grand fathered under the zoning laws.
- Consult an attorney about title to the property being taken and title to any adjacent properties that may be used in connection with the property being taken.
- Consult an attorney regarding any leases that are on the property. Condemnation provisions in the leases may have significant effect on condemnation proceedings.
- Take photographs of the property on a nice sunny day so that the pictures are clear, crisp and pleasant.
- DO NOT obtain an appraisal before consulting an attorney. An eminent domain appraisal done for the purpose of just compensation requires special skill and knowledge.
- Continue to make all necessary repairs that do not require you to expend a substantial amount of money. Think in terms of what repairs you would make if you were selling your property to private a party.