Don't be *Taken* By Surprise When Eminent Domain Occurs

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Introduction to Eminent Domain.

Eminent domain, sometimes called condemnation or a taking, is the government's ability to take private property for public purposes. Federal, state, and local governments have this ability to condemn private property. Applicable law may also allow quasi-governmental entitles or even private parties to undertake eminent domain. For example, under Colorado's eminent domain law, a private pipeline company has the ability to take other private property for pipeline easement purposes. Applicable law may also allow the property of local or state governments to be taken by condemnation in certain circumstances.

The Fifth Amendment to the United States Constitution requires that just compensation be provided to the property owner for such a taking. State constitutions typically have a similar provision. Due to the strong history of private property ownership in the United States, condemnation is an issue that people can get passionate about. Every few years the United States Supreme Court decides an aspect of condemnation law as to what the government can and cannot do (and such decisions typically generate quite a bit of interest among property rights groups and sometimes state legislators revise applicable state statutes to address perceived problems resulting from unpopular Supreme Court decisions).

General Overview of Colorado Condemnation Procedure.

Colorado, like many other states, provides specific statutory procedures to follow to undertake condemnation. In Colorado, the following procedures are typical. First the condemning authority must negotiate in good faith in an attempt to acquire the property. If those negotiations are not successful, the condemning authority can file a petition in the district court where any part of the property to be condemned is located. If the condemning authority would like to acquire possession of the property quickly, it can seek a court order granting possession prior to the conclusion of the condemnation action (though the condemnor must deposit with the court the fair market value of the condemned property). At the trial, the amount of just condemnation and any other damages are determined. Once the condemnation damages are determined, the court issues an order which is recorded in the county real estate records. Upon the recording of such order, Colorado law deems that the title to the property has transferred to the condemnor.

Interaction of Condemnation on Commercial Leases and Purchase Contracts.

Condemnation issues can affect buyers and sellers of real estate and landlords and tenants of rental property. In commercial transactions, most well-drafted purchase and sale agreements and leases will address what happens if and when an eminent domain action is filed. The parties in these types of commercial transactions should consider this issue and make sure that the contract or lease addresses such potential situations. Although condemnation is not a likely occurrence for a particular piece of private property, many times the parties to a contract or lease do not focus on the possibility that this can occur and if it does actually occur, the results can be dramatic.

For example, if a tenant is leasing a site for a fast food restaurant and the state government condemns part of the restaurant's parking lot to expand the adjacent road, what impact does such condemnation have on the tenant's and landlord's rights under the lease? Does this taking terminate the lease? If not, does it change the rent? Does the landlord or the tenant get the condemnation award? Instead of allowing the uncertainty of what may happen when condemnation occurs, the parties are generally free to decide in advance specific rights of each party by addressing them in their documents.

Typical clauses in leases or purchase contracts will address: (1) which party is entitled to the condemnation award or how any award is shared (as there may be award components based on the loss of real property or personal property or fixtures, moving expenses, loss of business, and other relocation-type costs), (2) whether the lease or contract will automatically terminate or will survive, (3) if either or both the parties have the right to terminate it if they so chose, (4) if there are any thresholds (typically size based) before termination will or can occur, (5) the relevant date to determine new rights of the parties, (6) any changes to the lease or purchase contract (if it is not terminated) as a result of the taking, such as reduction in rent or the purchase price, (7) what sort of communication or notices are required of the parties to one another regarding the condemnation process, (8) what happens for a temporary taking (rather than a permanent taking), and (9) what is to occur in the event of a conveyance made under threat of condemnation.

Loans encumbering real property may also be affected by condemnation. Similar to leases and purchase contracts, loan documents should also address what occurs during a taking. Parties may need to compare the condemnation provisions of different documents (such as a landlord or tenant reviewing the condemnation provisions under a deed of trust or mortgage prior to drafting the condemnation provision in the lease to ensure no conflict).

If a party does not carefully analyze these items ahead of time, it can create serious consequences for that party. For example, a shopping center lease may give the landlord the right to terminate the lease even when a small portion of the shopping center is condemned. If a portion of the shopping center is condemned (such as part of the parking area which may not even affect a particular tenant), the landlord in such a situation would have the ability to terminate the lease (and the tenant could be substantially harmed if it will lose hard-earned goodwill generated for such location or the tenant improvements that it made). A landlord could even try to use such threat of termination as leverage to attempt to negotiate a more favorable lease with the tenant if condemnation occurs.

Conclusion.

Condemnation is a significant power provided to the government and other parties. Fortunately, when exercising this power, the condemnor must pay the property owner just compensation. As the impact of eminent domain can be profound, commercial parties should ensure that their leases and purchase contracts anticipate this possibility and specify in advance the rights of the parties. This will prevent any uncertainty and unexpected results due to this occurrence.