

# Bond

## The Eminent Domain Process

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## Introduction

- A. What is Condemnation
- B. The Condemnation Process
- C. Public Use
- D. Negotiation for the Acquisition of Property
- E. Access to Real Property Prior to Condemnation
- F. Process for Filing Acquisition Map
- G. Just Compensation



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## What is Condemnation

### ***What is Eminent Domain?***

***Eminent domain is the power vested in the state as sovereign to **take private property for public use** without the consent of the owner whenever necessity demands, upon making **just compensation** and observing **due process**.***



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## Types of Condemnation

Constitutional provisions:

“nor shall private property be taken for public use, without just compensation”

US Constitution, Fifth Amendment

“Private property shall not be taken for public use without just compensation”

NY Constitution Article 1, § 7



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## Authority to Condemn

- Who May Exercise the Power of Eminent Domain?
  - The State of New York
  - Political Subdivisions of the State
  - Public Authorities
  - Governmental Agencies
  - Public Benefit Corporations
  - Transportation Corporations



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## Types of Condemnation

1. Eminent Domain - Direct Condemnation
  - Public entity seeks to acquire property
  - Transportation corporations (includes gas and electric companies)
2. Inverse Condemnation
  - Property owner claims public entity took or damaged property



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## EDPL Process

- Overview of the Acquisition Process
  - Public Hearing Notice
    - Notice
  - Determination and Findings
    - Need for project
    - Location
    - Environmental impacts
  - Preliminary Purchase Offer



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## EDPL Process

- Right of Access
- Filing the Acquisition Map
  - Title vests
- Claim for Additional Compensation



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## The Eminent Domain Process

### **Public Hearing Requirement**

- ***New York State Eminent Domain Procedure Law (EDPL) Section 201 states that prior to acquiring an easement by eminent domain, a condemnor must hold a public hearing.***
- ***Such a hearing must be conducted at a location reasonably proximate to the property which may be acquired for the project.***



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## The Eminent Domain Process

### **Public Hearing Exemptions**

1. Pursuant to other state, federal, or local law or regulation, condemnor has to submit similar factors to a government agency, board or commission
2. Condemnor obtains a certificate of environmental compatibility and public need under the Public Service Law
  - Public Utilities/Transportation Corporations rely on this
3. Pursuant to other law or regulation, condemnor undergoes, conducts or offers to conduct prior to an acquisition one or more public hearings upon notice to the public and owners of property to be acquired, using similar factors



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## The Eminent Domain Process

### Public Hearing Exemptions (cont)

4. In the condemnor's opinion, the acquisition is de minimis in nature so that the public interest will not be prejudiced by the construction of the project
5. Because of an emergency situation, the public interest will be endangered by any delay caused by fulfilling the public-hearing requirement
6. Condemnor complies with the procedures contained in a provision of the Mental Hygiene Law (concerning site selection of community residential facilities for the disabled)



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## The Eminent Domain Process

### Meeting Notice

- Must give notice of purpose, time and location
- Must be at least 10 days, but no more than 30 days prior to the hearing
- Must be published in daily newspaper for 5 successive issues
- Must serve notice to each assessment record billing owner or her attorney of record



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## The Eminent Domain Process

### **Public Hearing**

- ***At the public hearing the condemnor shall outline:***
  - *the public use to be served by the proposed public project; and*
  - *the impact on the environment and residents of the locality where such project will be constructed.*
- ***Any person in attendance shall be given a reasonable opportunity to present an oral or written statement concerning the proposed public project***



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## The Eminent Domain Process

### **Determination & Findings**

- ***Within 90 days after the conclusion of the public hearings, the condemnor shall make its determination and findings concerning the proposed public project***
- ***Must publish in 2 successive issues of an official newspaper and serve of all assessment record billing owners or their attorney of record***



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## The Eminent Domain Process

### **Determination & Findings**

1. *The public use, benefit, or purpose to be served by the proposed project;*
2. *The approximate location for the proposed project;*
3. *The reasons for the selection of the location;*
4. *The general effect of the proposed project on the environment;*
5. *The general effect of the proposed project on the residents of the locality;*
6. *Such other factors as the condemnor deems relevant.*



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## Judicial Review

- *Jurisdiction → Appellate Division embracing the county wherein the property is located*
- *Timing → 30 days after completion of the publication of the determination and finding*
- *Determined as expeditiously as possible and with lawful preference over other matters*



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## Judicial Review

*The scope of review shall be limited to whether:*

- (1) the proceeding was in conformity with the federal and state constitutions,*
- (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,*
- (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and*
- (4) a public use, benefit or purpose will be served by the proposed acquisition.*



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## Public Use

- What is a Public Use?
  - “Use by the Public” vs. “Public Purpose”
  - *Kelo v. City of New London* (2005)
  - New York’s “public purpose” standard
    - IDA’s – economic benefit
    - URA’s – blight



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## Public Use

- Implications for Developers
  - The State's eminent domain powers can be harnessed by private developers
  - Requirements:
    - Private developer must partner with a public benefit corporation with the power of eminent domain
    - Development plan must coincide with the corporation's eminent domain powers



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## Negotiation for Acquisition of Property

### Policy

The condemnor, at all times, "shall make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement."

EDPL § 301



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## Negotiation for Acquisition of Property

New York courts do not require a petitioner to plead or prove, as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the subject property owners.

- *Matter of Village of Saranac Lake*, 93 A.D.3d 971 (3d Dept. 2012);
- *Nat'l Fuel Gas Supply Corp. v. Town of Concord*, 299 A.D.2d 898 (4th Dept. 2002).



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## Negotiation for Acquisition of Property

### Offer

- Establish an amount which it believes to represent just compensation
- Make a written offer for 100% of the valuation
- Wherever practicable, condemnor must make offer prior to acquiring the property
- Wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property



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## Negotiation for Acquisition of Property

### Advance Payment

1. The offer constitutes the amount of the condemnor's highest approved appraisal of the just compensation for the property
2. That payment will be made together with appropriate interest



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## Negotiation for Acquisition of Property

### Advance Payment (cont.)

3. A condemnee may reject the offer as payment in full and instead elect to accept such offer as an advance payment, and that such election shall in no way prejudice the right of a condemnee to claim additional compensation
4. If the condemnee elects to claim additional compensation, such claim must be made within 3 years of service notice of acquisition or vesting, whichever is later, pursuant to EDPL § 503(A) and that failure to do so is deemed acceptance as payment in full



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## Negotiation for Acquisition of Property

- If the offer is not accepted in 90 days, it is deemed rejected
- If the offer is rejected, the obligation to pay interest is suspended until either the offer is accepted or the appropriate papers are supplied



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## Access to Real Property Prior to Condemnation

- Real property to be acquired by the exercise of the power of eminent domain shall be appraised on behalf of the condemnor by an appraiser.
- In order to adequately prepare an appraisal, the condemnor has the right to, upon written request:
  - inspect the property
  - examine necessary books and records



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## Access to Real Property Prior to Condemnation

“Failure of the owner to comply with this section shall suspend the condemnor's obligation to make an offer to such owner pursuant to article three until such time as this information is provided.”

EDPL § 302



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## Access to Real Property Prior to Condemnation

- ***Upon notice, the condemnor has “the right to enter upon the affected land for the purposes of making surveys, test pits, and borings, or other investigations, and also for temporary occupancy during construction”***
  - ***Effective Notice***
  - ***Objections to Entry by Property Owner***
- ***The condemnor shall be liable to the owner for any damages caused as a result of the entry***



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## Process for Filing Acquisition Map

### Filing of Acquisition Map(s)

- ***The condemnor may commence proceedings three years after conclusion of the later of:***
  - (1) publication of its determination and findings***
  - (2) the date of the order or completion of the procedure that constitutes the basis of exemption***
  - (3) entry of the final order or judgment on judicial review***



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## Process for Filing Acquisition Map

### EDPL § 402(A) – State of New York

- File original tracing of acquisition map in the main office of the agency, department, or authority or public benefit corporation for which the acquisition is being made
- notify condemnees by first class mail that the condemning party is now taking steps to acquire such property
- file a certified copy of such acquisition map in the office of the county clerk



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## Process for Filing Acquisition Map

### EDPL § 402(B) – All Others

- Obtain an order to acquire such property and for permission to file a map
- File a notice of pendency
- Serve notice to owners of record
- Present a verified petition to Supreme Court



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## Just Compensation

### File a Claim

- Taking by the State in the Court of Claims → 3 years
  - Filed in Court of Claims
- Taking by anyone else in Supreme Court → determined by the court
  - Filed in Supreme Court



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## Just Compensation

- When is Compensation “Just”?
  - Case-by-Case Analysis
  - Market Value
    - Highest and best use
  - Valuation Date
    - Date of taking
  - Methods of Valuation
    - Comparable sales
    - Income approach
    - Cost approach



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## Just Compensation

- Other Issues
  - Leaseholds
  - Partial Takings/Consequential Damages
  - Other Items of Damage



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## Just Compensation

- The judge is not charged with deciding whether the government may take the property.
- Instead, the judge must decide the valuation of the property.



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## Just Compensation

- Attorneys must understand their client's objectives
- Property Owner → obtain full compensation for land and improvements
- Condemning Authority → ensure that the public does not pay more than is just



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## Just Compensation

- Because condemnation proceedings focus on valuation, expert testimony is often a critical part of the case
- Credibility of an expert may be deciding factor in whether their valuation is accepted as true
  - Foundational maxim of property law:

“No two properties will ever be identical”

- Experts that carefully select comparable sales are often far more powerful than those willing to stretch for his side.



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## QUESTIONS



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