

THE GOVERNMENT WANTS YOUR PROPERTY... NOW WHAT?

The Basics of Eminent Domain for Property and Business Owners

- What Is Eminent Domain?
- What Are You Entitled To?
- What Do You Need To Do?

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Eminent Domain Basics

Eminent domain is the power of the government to take or condemn property for "public use," without the land owner's consent, upon paying just compensation. The "government" includes most federal, state, and local government agencies (e.g., Caltrans, a County, a Redevelopment Agency, a School District, etc.). For purposes of eminent domain, the "government" also includes certain quasi-public entities, such as public utility companies, that possess the power of eminent domain even though they are technically private companies (e.g., Southern California Edison, Pacific Gas & Electric).

You have the right to oppose the government's taking of your property. However, without special circumstances, challenging the government's right to take a particular property is generally unsuccessful.

Whether or not you challenge the government's taking of your property, you are entitled to compensation for the taking, which may include a number of damages, such as:

- The fair market value of the land taken;
- Improvements on the property, such as fixtures and equipment;
- Business losses suffered as a result of relocation;
- Costs to relocate;
- Damages resulting from excessive delay or unreasonable conduct by the government; and
- Interest, costs, attorneys' fees, and appraisal fees.

What Can You Expect To Happen?

When the government is interested in taking your property through eminent domain, the following events typically occur:

The Initial Contact

Though the government may hold meetings and engage in other less formal contacts with you about the proposed project, the first formal expression of interest in your property usually occurs when the government sends you a written "Notice of Intent to Appraise."

The government agency will then conduct an appraisal of your property to determine its value. You have the right to accompany the appraiser during his or her inspection of the property.

Following the appraisal, the government agency will make a written offer to purchase your property for what it deems to be "just compensation" based on its appraisal. You have a right to receive a summary of how the government arrived at its offer; however, the government will often refuse to share its actual appraisal report.

You do not have to accept the government's offer, and the government is required to negotiate with you (although the government will often use a take-it-or-leave-it approach to initial negotiations).

Public agencies are also required to offer to pay up to \$5,000 in reasonable expenses for you to obtain an independent appraisal of the property (this requirement may not apply to quasi-public agencies, such as public utility companies).

The Resolution of Necessity

If you do not reach an agreement with the government following its written offer, the next step is the government's adoption of a "Resolution of Necessity" at a public hearing, which is the government's formal decision to acquire property by eminent domain. In order for the resolution to pass, the agency must determine that the project for which it seeks to condemn (e.g., road widening or school):

- Requires your property;
- Is necessary and in the public interest; and
- Is located in a manner that will provide the greatest public good and the least private injury.

The agency's findings on these issues are usually conclusive.

You have the right to receive notice of the public hearing, and you have 15 days after the notice was mailed to file a written request to appear and be heard at the hearing.

At the hearing, you or your counsel may appear and raise objections about the steps the government has taken to acquire your property, and you may request that the government take additional steps before proceeding with the eminent domain action (which is also called a "condemnation" action). The government often ignores such requests and proceeds to adopt the Resolution of Necessity, authorizing the condemnation action.

If you do want to fight the government's condemnation action, it is crucial to raise any points of objection at the hearing on the Resolution of Necessity in order to exhaust what are known as your "administrative remedies."

The Initial Stages of the Lawsuit

Once the government adopts a Resolution of Necessity, it files a lawsuit (the "eminent domain" or "condemnation" action) and, usually, deposits with the court the probable amount of "just compensation" based on its initial appraisal.

You are entitled to withdraw the government's deposit of probable compensation after filing an application with the court and waiting at least 20 days. If you do withdraw the government's deposit, you will waive any challenges you have to the condemnation.

If the government wishes to take possession of your property before the lawsuit ends, it must serve you with a motion for possession. The court will usually set a hearing on this motion 60 days after you have been served if the property is unoccupied or 90 days after you have been served if the property is occupied. You have 30 days to oppose the motion. If you do not oppose the motion within 30 days, the court can grant the motion with only a minimal showing by the government. If you oppose the motion, the government must prove that it needs possession of your property before the end of the lawsuit, making it more difficult for the government to take possession early. At that hearing, the court must weigh the hardship you will suffer if the government gets possession early against the hardship the government will suffer if it cannot get possession early.

If the court grants the government's motion for possession, it will issue an order that will require you to leave the property with minimal notice (within 10 days for unoccupied property; within 30 days for occupied property). A relocation agent should contact you to assist in relocating your residence or business.

If forced to relocate, you are entitled to have certain relocation expenses reimbursed by the government. This happens through an administrative proceeding; it is not a part of the eminent domain lawsuit.

The Trial Proceedings

The court will hold an evaluation conference and set a trial date for determination of the amount of "just compensation" you should be paid.

You will need to hire an appraiser of your own to prepare an appraisal of your property. About 90 days before trial, you and the government will exchange your respective opinions concerning the value of the property.

Later (typically 20 days before trial), you and the government will exchange final offers to see if you can reach an agreement. The court may also hold a settlement conference to assist the parties in settling the case.

If no agreement can be reached as to the compensation to be paid, a trial will occur, where a jury will determine "just compensation."

What is "Just Compensation"?

You are entitled to "just compensation." This means you should receive the fair market value of your property. Fair market value is the highest price that would be agreed to by a willing buyer and seller.

Fair market value is an objective test to be determined by the jury. Any unique value or special affection you have for the property is not taken into consideration. The value is usually determined by real estate appraisers, although appraisers may disagree in their opinions of value. You may also be permitted to testify to your opinion of the property's value under certain circumstances.

What Other Compensation May the Owner of the Property Recover?

As part of and in addition to "just compensation," you may also be entitled to business losses, compensation for fixtures and equipment, precondemnation damages, relocation benefits, and interest, costs, attorneys' fees, and appraisal fees.

Business Losses

If you operate a business on the property, you may be able to recover for lost "business goodwill" and other business losses. Compensation for business losses is described more fully below.

Fixtures and Equipment

You are entitled to compensation for "all improvements pertaining to realty." This includes items installed for use on the property that cannot be removed without substantial damage to the property, such as machinery, fencing, or other equipment.

Precondemnation Damages

Where the government excessively delays in commencing the condemnation action after announcing its intent to take your property, or the agency engages in other unreasonable conduct, you may be entitled to "precondemnation damages." For example, you may be entitled to precondemnation damages if you are unable to rent your property at market rents because tenants are unwilling to move in as a result of the condemnation announcement. You may also be entitled to recover damages if your property decreases in value during the excessive delay.

Relocation Benefits

You are entitled to reasonable costs to relocate, subject to certain maximum payment limits. This includes moving costs, expenses in finding a replacement site, printing new stationery, and costs to reinstall and reconnect machinery and equipment. Recovery for these items typically occurs through an administrative proceeding, not in the eminent domain action itself.

Interest, Costs, Attorneys' Fees, and Appraisal Fees

The government is usually required to pay interest on any award of "just compensation" beginning on the date it takes possession. You are also entitled to recover normal "court costs," such as filing fees, deposition fees, and some witness fees. Attorneys' fees and appraisal fees may sometimes be recoverable in certain situations, but often are not recoverable.

What if the Property is Rented?

Anyone with an interest in your property, such as a tenant, is entitled to receive just compensation for his or her interest. However, many leases contain a "condemnation clause" which determines how the compensation between the owner and the tenant will be allocated. A tenant's just compensation may include business goodwill, fixtures and equipment, relocation costs, and possibly any increases in rent paid as a result of relocation.

What if Only Part of the Property is Taken?

Frequently, the government only takes a portion of your property. For example, the government may take a strip of land needed for a drainage channel, a utility line, or a street widening. In these types of cases, the property you retain may suffer damages because the partial taking diminishes the value of the portion not taken.

You are entitled to the value of the property taken plus any damages to your remaining property. The damages to your remaining property are called "severance damages." Severance damages are usually measured by the decrease in the market value of the remaining portion of your property.

What Compensation is Available to the Owner of a Business Operating on the Property?

If you own a business but do not own the property, for example, if you are leasing, you may not receive the government's "Notice of Intent to Appraise," notice of the hearing on the "Resolution of Necessity," or any written offer of compensation. However, you may well still be entitled to compensation. If you own a business that is displaced or otherwise suffers

from lost "business goodwill" as a result of the taking, you are entitled to be compensated for your losses.

A business may accrue "goodwill" as a result of its location, reputation, and ability to acquire and keep patrons. Compensation for business goodwill may be awarded if a business loses these benefits as a result of the taking. For example, business goodwill is recoverable if your business' profitability decreases as a result of being forced to move. Goodwill is usually determined by expert business appraisers who consider factors such as the nature of the business, reputation, length of time in the business, length of time at the location, and customer base. In order to recover goodwill, you are required to show a loss from the taking which cannot be prevented by relocation or other steps. Not all businesses possess goodwill.

You may also be entitled to recover relocation costs, the value of lost "Fixtures and Equipment," and, depending on the lease terms, you may also be entitled to part of the compensation for the real property.

What if the Government Takes or Damages Your Property Without Filing a Lawsuit?

Where the government agency takes or damages your property without filing a lawsuit, you may bring a lawsuit against the government. This is known as "inverse condemnation," e.g., it is the "inverse" of the situation where the government takes your property directly by filing a condemnation action.

Inverse condemnation can occur in many different situations in which government action damages your property rights. Typical inverse condemnation claims involve situations where the government:

- Places overly restrictive conditions on your property and your right to develop it;
- Impairs access to your property;
- Floods your property; or
- Interferes with your land stability.

While many of the legal principles in inverse condemnation cases are the same as those in "direct" condemnation cases, there are some key differences. In particular, while normal eminent domain cases typically focus only on the amount of just compensation to be awarded, plaintiffs in inverse condemnation cases must prove that the government has caused a "taking" or "damaging" of property before the plaintiff is entitled to any award of compensation. These liability issues do not exist in a normal eminent domain case.

What Should You Do?

Eminent domain is a specialized area of the law. You will likely obtain a better result if you are represented by counsel. The attorneys at Allen Matkins have successfully represented property owners and business owners in all aspects of eminent domain proceedings, including:

- Precondemnation planning that may start years before the government sends out its initial Notice of Decision to Appraise;
- Representation during the government's public hearing on the Resolution of Necessity and, if necessary, challenging the government's right to take the property;
- Representation during the initial phases of the litigation, including assisting with relocation issues and in the selection and preparation of appropriate appraisers and experts;
- Representation during the trial on "just compensation," asserting claims for the value of the property, precondemnation damages, fixtures and equipment, and business losses; and
- Representation in post-trial proceedings and on appeal.

For More Information

- Contact Rick Friess at rfriess@allenmatkins.com or (949) 553-1313.
- Visit our website at www.allenmatkins.com.

About Allen Matkins

For more than 30 years, Allen Matkins Leck Gamble Mallory & Natsis LLP has helped clients turn opportunity and challenge into success by providing practical advice, innovative solutions, and valuable business opportunities. The firm's more than 220 attorneys in seven locations across California operate in a wide spectrum of business sectors such as real estate, finance, healthcare, education, and hospitality. The firm does more than resolve problems; we help clients avert legal difficulty by providing responsive advice, preventive counseling, and corporate training. Through delivering the highest level of service and solutions specific to the needs of each client, Allen Matkins attorneys develop longstanding relationships with clients. The firm continually seeks innovative ways to manage our clients' legal affairs, advance their business objectives, and exceed client expectations with efficiency and dedication.

Eminent Domain and Valuation Practice

Allen Matkins, which *Chambers & Partners USA Guide* has ranked as the **number one real estate law firm in California** for the last eight years, prides itself on its in-depth expertise and reputation for success in eminent domain, inverse condemnation, leasehold valuations, and other real estate valuation litigation. We successfully represent property and business owners facing both full and partial takings and other valuation issues.

Allen Matkins' Eminent Domain and Valuation Practice includes trial attorneys with experience in all aspects of eminent domain and valuation law and with all types of property and businesses. The breadth and depth of our experience allows us to handle every stage of eminent domain litigation, from detailed precondemnation planning, to final resolution, whether through settlement, jury verdict, or published appellate opinion.

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