

# EMINENT DOMAIN IN A DOWN ECONOMY

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In eminent domain law, where the main issue is the value of the property taken, the date used to calculate that value is critical. When land values are rising, landowners don't mind using a more current valuation date because it usually means a higher value. But where land values have plummeted as much as they have in Nevada, landowners subject to eminent domain actions seek to use an earlier valuation date to take advantage of more favorable land prices. However, to take advantage of those higher land values, landowners must persuade the courts to expand existing law to hold the government liable to landowners for planning activities. Otherwise, landowners must convince the court to award them pre-condemnation damages. This article discusses the legal issues landowners must overcome in both of these scenarios.

The government's public planning process is uncertain and it is an accepted risk of property ownership that at any point it may be taken by eminent domain or otherwise affected by a government project. Usually, there is no basis for government liability until a formal taking occurs. Nevada law states that land taken by eminent



domain shall be valued as of either the date on which a defendant is first served with process in a condemnation case or the date on which trial begins. However, this does not account for the amount of time between planning a project and actually condemning the land. Accordingly, landowners are at risk that land may be affected by a condemnation action before the action even begins. The dramatic decline in land values over the past several years has sparked a challenge to this traditional view. Landowners are now attempting to reach back in time, isolate the government action that occurred when land values were higher, and use the then-existing land values as the measure of today's damages. This article discusses two devices that are being used to reach this end. First, landowners may allege that governmental planning of projects constitute a taking without just compensation (i.e. inverse condemnation or a de facto taking). Second, landowners may seek pre-condemnation damages. Nevada law, however, presents substantial impediments to recovery under these strategies.

## Planning Is Not a Taking

The Nevada Constitution, Nev. Const. art. I, § 8, prohibits government from taking private property for public use without paying just compensation. So too does the takings clause of the Fifth Amendment to the Federal Constitution. In Nevada, government typically "takes" private property for a public use by initiating an eminent domain action under the authority of NRS 37. If the government uses private property for a public purpose without bringing a condemnation action, and the landowner brings an action for just compensation, it is called an inverse condemnation or de facto taking.

The valuation statutes of NRS 37 apply to both formal eminent domain proceedings and to inverse condemnation actions. In a stable or rising real estate market the landowner is satisfied with the statutory



rule that the date of value is the date of service of process or date of trial. However, a fair argument exists that the valuation dates of NRS 37.120(1) ought to not apply to inverse condemnation cases in a declining real estate market and that the government, not the landowner, should bear the risk of declining real estate values per the valuation dates set forth in NRS 37.120(1). The notion that the government bears the risk in inverse condemnation actions of declining land values due to economic downturn has been, in some jurisdictions, a recognized principle for decades. Frequently, the government conduct alleged to be a taking is really nothing more than the government's ordinary public planning process. However, basing an inverse condemnation action on planning is problematic for the Nevada landowner because the government is not liable for a taking for the implications of its planning activities.

As matters now stand, the government is not liable in Nevada for drawing lines on a map, estimating the cost of acquiring land for the project, complying with environmental assessment

statutes and regulations, or otherwise undertaking planning activities that implicate private land for acquisition. Therefore, absent legislation expanding the definition of a "taking" under the Nevada Constitution, inverse condemnation actions founded on governmental planning activities will likely continue to be untenable.

### **Pre-Condemnation Damages**

Another way to reach back in time to the higher land values is by way of pre-condemnation damages. As the phrase suggests, pre-condemnation damages are losses arising from government conduct that occurs prior to the filing of an eminent domain case. These damages are recoverable even if the government never condemns the land and it is a liability theory distinct from taking jurisprudence, but usually found along with a takings claim. In *State ex rel. Dep't of Transp. v. Barsity*, 113 Nev. 712, 941 P.2d 971 (1997), the court ruled that a landowner can recover pre-condemnation damages by establishing that the government left the

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planning stage and entered the “acquiring stage.” The acquiring stage is marked by taking steps toward condemning the property, such as officially announcing its intent to condemn or filing condemnation proceedings. The second element of pre-condemnation damages is that the government acted unreasonably or oppressively after entering the acquiring stage and, as a result, the market value of the property declined.

Because project planning often takes many years, the landowner may be able to identify government actions, which took place when property values were much higher. If the government entered the acquiring stage and should have, but unreasonably failed to file an eminent domain lawsuit within a reasonable period of time from the start of that stage, the landowner may seek to create a new measure of damages not previously awarded by any court, as the difference between the land’s value as of the date the government should have filed an eminent domain suit and the value of the property when government finally serves process in a formal eminent domain action. This theory is not without obstacles. First, the pivotal issue in a pre-condemnation damages case is whether the government left the planning phase and entered the acquiring stage. Government is not liable for decreases in value due to general real estate market conditions prior to a condemnation.

Nonetheless, landowners may pursue a modification of this rule, asserting that government planning has “frozen” their land or rendered it unmarketable and seek compensation accordingly. Government enters the “acquiring stage” by taking condemnation-related steps toward the property at issue (e.g. passing a resolution of condemnation). The government ordinarily follows standard procedures in the planning process before it condemns land and it is rare for a government not to bring a condemnation action within a few months after taking the initial steps toward condemnation. It may be tempting for a landowner to argue for the following new and expanded definition of the phrase “acquiring stage:” One which begins when the government starts to acquire any land it needs for the project, by any means, rather than when it takes condemnation-related acts toward the property at issue. The landowner would argue that the government entered the acquiring stage by appraising land (owned by him or someone else) as a preliminary step to buying it by negotiation or by acquiring such land by condemnation. The landowner would expand the existing law by changing the rule to state that, as long as the government somehow makes a prefatory move to obtain a parcel of private land for a project, the landowner has proved the first element of a pre-condemnation damages action. This proposed modification,

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however, would impact the government's ability to purchase property from willing sellers and also to plan and construct large projects in several phases.

Another obstacle to recovery in a pre-condemnation damages suit is proving causation. The landowner must prove that the market value of the land declined because of unreasonable or oppressive governmental conduct. Often the cause of a decline in value is a general economic downturn, for which the government is not responsible. The risk of a downturn in the economy is one that every landowner assumes, not just those whose land is within the ambit of a public project. But where the government should have filed a condemnation action sooner, the landowner may be able to show that it is unfair for the government to wait and acquire the land at a lower price. However, as the government assumes the risk of a decline in land value due to economic downturns after it takes property by condemnation, landowners typically bear the risk of declines in land value due to general economic conditions prior to condemnation.

In all, landowners who seek to recover just compensation today based on yesterday's real estate market face difficult challenges. Given the number of such claims pending in Nevada's district courts, the Nevada Supreme Court will likely revisit the subject soon. ■



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