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Eminent Domain

**A Step-by-Step Guide
to the Acquisition
of Real Property**

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CHAPTER ONE

Overview

Introduction and Objectives

Purpose of Land Acquisition for Public Use

Public projects for street improvements, water storage facilities, schools, drainage facilities, and civic buildings, among others, are common functions of local government. And public projects typically require the acquisition of privately owned land. In a perfect world, the public entity and the landowner would simply agree to a fair price and the land would be conveyed to the public entity by deed, and sometimes land is acquired that simply. But too often what starts out as a principled negotiation between well-intentioned participants ends up instead as a bitterly fought and costly eminent domain trial.

At one extreme are a few public agencies that may try to acquire private property for a public project at less than market value. No matter by negotiation or eminent domain, the representatives of public entities have a constitutional duty to pay **just compensation** (Cal. Const. Art. I, § 19) for property acquired, a duty that has been interpreted by our courts and state legislature to mean **fair market value** for the parcel acquired as well as **severance damages**, if any, to the owner's remaining property. Code Civ.Proc. §§ 1263.310, 1263.410.

At the other extreme are some landowners who have inflated notions of the value of their property or a few citizens who simply cannot accept that local government does indeed have the right to take their private property for a public purpose.

Given the good faith of both the acquiring agency and the property owner, the rational method for resolving valuation disputes is by mutual agreement. The state legislature directs public entities to "make every reasonable effort to acquire expeditiously real property by negotiation." Govt. Code § 7267.1(a). Where this goal cannot be achieved, the dispute between the acquiring agency and the property owner must be resolved using eminent domain procedures.

This book is a guide for dealing with these circumstances, with an emphasis on forced acquisition by eminent domain. It is designed to assist

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This book is designed to assist condemnors in making their way through the intricate process of land acquisition through eminent domain as well as how to meet associated legal challenges.

The preparation for and the trial of an eminent domain action is beyond the scope of this handbook.

condemnors (staff members of and attorneys for public entities engaged in acquiring private property for public use) in understanding and making their way successfully through the intricate process of land acquisition through eminent domain.

This guide ends with the filing of eminent domain proceedings and with obtaining physical possession of the required property so that construction of the public project may commence. After commencement of eminent domain proceedings, efforts should continue to negotiate a settlement short of a costly eminent domain trial. Nevertheless, a credible trial capability may be an important factor in bringing about a principled settlement.

Objectives

The field of condemnation law is sufficiently narrow so that, given a legal road map, a public entity attorney who does not have an active eminent domain practice or a sophisticated acquisition staff can avoid the most common traps. It is the purpose of this handbook to guide the practitioner and acquisition staff over and around the legal hurdles that may be less than obvious. This is a how-to-do-it manual.

The scope is limited to California eminent domain practices and to eminent domain proceedings brought in state courts. The preparation for and the trial of an eminent domain action is beyond the scope of this handbook, which ends when the condemnation **complaint** has been filed with the court and the acquiring agency has obtained physical possession of the required property.

History of Eminent Domain

Possibly the earliest known exercise of the power of eminent domain is found in the Bible at 1 Kings XXI. King Ahab sought to acquire Naboth's vineyard. Upon refusal to sell the subject property, Naboth was stoned to death.

The first known use of the term **eminent domain** (*dominium eminens* in Latin) seems to have been in the seventeenth century when Hugo Grotius wrote of the power of the state to alienate private property "for the ends of public utility." However, Grotius wrote "that when done the state is bound to make good the loss to those who lose their property."¹

While the power of eminent domain was well established in England before the American revolution for highway acquisitions, the adjudication of the "recompense" appears to have been determined in a proceeding wherein the propertyowner had no opportunity to be heard (an *ex parte* proceeding).²

Much of California's eminent domain law has its origins after World War II when public construction programs boomed and eminent domain trials became commonplace in the courtroom. In 1956, the legislature directed the California Law Revision Commission to study and recommend revisions to the California eminent domain law "to safeguard the property rights of private citizens."³

As part of the adoption of a comprehensive Evidence Code in 1965, the legislature enacted comprehensive rules of *Evidence of Market Value of*

Property as Article 2 of the Evidence Code, sections 810–823, applicable to eminent domain proceedings (as well as any action in which the value of property is to be ascertained).⁴ In 1975, 1978, and again in 1980, the Law Revision Commission recommended and the legislature enacted amendments to these valuation provisions of the Evidence Code.

In 1965, the state legislature recognized the need to modernize California eminent domain law and directed the California Law Revision Commission to recommend a comprehensive eminent domain statute.⁵

The 1976 product of the Law Revision Commission’s study was enacted by the legislature as the **California Eminent Domain Law** commencing at section 1230.010 of the Code of Civil Procedure. The “Law Revision Commission Comment” and the “Legislative Committee Comment” that follow most of the amended sections of both the Evidence Code and the California Eminent Domain Law are often cited as authority for judicial interpretation of the two statutes.⁶

Because no piece of legislation can cover every factual situation that may arise and because the legislature left to “judicial development”⁷ some provisions of the law, the law of eminent domain continues to evolve.

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Overview of California Eminent Domain Law

Just Compensation

Eminent domain is the power of government to take private property for a public purpose without the owner’s consent. The power of eminent domain is invoked only after every effort is made to acquire property through negotiation with the property owner and only as a last resort.⁸ The power of eminent domain is inherent in governmental sovereignty. It precedes the Constitution and is not constitutionally conferred.⁹ However, this inherent power of government to take private property is restrained by the Constitution.

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The only restraints imposed by the California Constitution are that the taking be for a **public use** and that just compensation be paid.¹⁰

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The measure of just compensation has been defined as fair market value.¹¹ The fair market value of the property taken is “the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, not obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.”¹²

The power of eminent domain is further *legislatively* limited and regulated by the California Eminent Domain Law, which is set out in Title 7 of the Code of Civil Procedure, commencing at sections 1230.010 through 1273.050. Except for condemnation of a public utility or property owned by a public utility (Cal. Const. Art. XII, § 5), eminent domain must be exercised only in accordance with the California Eminent Domain Law.

Total Taking and Just Compensation

Where the property taken is an entire contiguous ownership (**total taking**), then, *in addition* to fair market value, just compensation must include when factually appropriate:

- Court-created damages for precondemnation activity where unreasonable delay causes a diminution of value or prevents the economic use of the property¹³
- Interest on the compensation awarded from the date that the condemnor could take possession of the subject property under an **order of possession (OP)** (or when judgment is entered when there is no order of immediate possession)¹⁴

OP = Order of possession

Partial Taking and Just Compensation

Just compensation includes severance damages if the remaining property is diminished in value when compared with the same remainder before the taking (the before-and-after rule).

Where the property taken is part of a **larger parcel (partial taking)**, then in addition to the compensation awarded for the parcel acquired, additional compensation may include, when factually appropriate:

Severance damages if the remaining property (**remainder**) after the taking has been diminished in market value when compared with the same remainder before the taking (**before-and-after rule**). Code Civ. Proc. §§ 1263.410, 1263.420.

Benefits to the remainder are offset against severance damage. *See County of Los Angeles Metropolitan Trans. Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 66 CR 2d 630, abolishing the distinction between **special benefits** and **general benefits** and holding that all benefits arising from a project that are neither conjectural nor speculative may be considered in determining the market value of the remainder.

Additional Compensation Not Required by the Constitution: Loss of Goodwill, Moving Costs, and Litigation Expenses

In addition to the constitutionally required payment of just compensation, the California legislature conditionally requires additional compensation in the form of compensation for loss of business goodwill, relocation expenses, and litigation expenses.

In addition to the constitutionally required payment of just compensation, the California legislature conditionally requires additional compensation, when appropriate, in the form of compensation for loss of business goodwill, relocation expenses, and litigation expenses.

Since 1976 when the legislature enacted Code of Civil Procedure section 1263.510, California authorizes compensation for loss of business goodwill in both total and partial takings. *See* chapter 7.

In addition to constitutionally mandated compensation, the legislature provided in 1972 that an owner-occupant (as well as tenants) may also be entitled to statutory compensation for moving costs in the form of **relocation assistance**. Govt. Code § 7260 *et seq.* *See* chapter 7.

Under certain limited conditions, an owner may also be entitled to legislatively authorized **litigation expenses**. The court has the power to award attorneys fees, appraisal fees, and other costs to the owner when the court finds both that the condemnor's final offer made pursuant to Code of Civil Procedure section 1250.410 was unreasonable in the light of the ultimate award *and* the condemnee's final demand was reasonable.

Special Valuation Rules of Evidence

The rules of evidence applicable to the valuation of property acquired by eminent domain are found in Evidence Code, Article 2 (*Evidence of Market Value of Property*) commencing at sections 810 through 823. These special valuation rules of evidence purport only to regulate how value may be proved. However, these evidentiary rules can have an indirect substantive impact on the value of the property being acquired because the Evidence Code restricts matters upon which an opinion of value may be based. For example, Evidence Code section 822(a) provides that in an eminent domain proceeding certain matters such as offers are both inadmissible as evidence “and shall not be taken into account as a basis for an opinion of value of property.”

Summary

An equitable and principled acquisition requires that public entity counsel understand the steps necessary to establish the right to take and all of the elements of just compensation and conditional entitlements. This handbook will take the practitioner through the procedures required from early in the inception of the project to obtaining possession of the property required for the project. These steps may be broadly categorized as:

- Early considerations (*see* chapter 2)
- Assembling information needed to obtain a **resolution of necessity** and to file the complaint (*see* chapter 3)
- Obtaining the initial appraisal (*see* chapter 4)
- The hazardous waste review and contaminated property appraisal (*see* chapter 5)
- Complying with the California Environmental Quality Act (CEQA) as a condition to the right to take (*see* chapter 6)
- Handling fixtures, machinery, and equipment loss of goodwill and relocation assistance issues prior to filing (*see* chapter 7)
- Preparing and making the Government Code section 7267.2(a) offer (*see* chapter 8)
- Preparing and recommending the adoption of a legally adequate resolution of necessity (*see* chapter 9)
- Preparing the eminent domain complaint and obtaining an order of possession (*see* chapter 10)

An equitable and principled acquisition requires that public entity counsel understand the steps necessary to establish the right to take and all of the elements of just compensation and conditional entitlements.

CEQA = California Environmental Quality Act

Notes

1. *Nichols on Eminent Domain* (revised third edition, 2002).
2. *Nichols on Eminent Domain* (revised third edition, 2002).
3. Stats. 1956. Resol. Ch. 42; Dankert, *Condemnation Practice Handbook*, volume 14 of *California Real Estate Law and Practice* (Matthew Bender, 2002 edition).
4. These evidentiary rules replaced and modified statutory rules of evidence formerly enacted in 1957 and found in the Code of Civil Procedure before the 1965 enactment of the Evidence Code.
5. Stats. 1965. Resol. Ch. 130; Dankert, *Condemnation Practice Handbook*, volume 14 of *California Real Estate Law and Practice* (Matthew Bender, 2002 edition).
6. The Law Revision Commission’s comments to both the Evidence Code valuation rules and the Eminent Domain Law provisions found in the Code of Civil Procedure are reported in both Deering’s (Bancroft-Whitney) and West’s Annotated Codes following the individual code sections.

7. See, for example, *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 746, 25 CR 2d 480, 484.
8. Govt. Code §7267.1(a).
9. *Peo. ex rel. Dept. of Public Works v. Chevalier* (1959) 52 Cal.2d 299, 304, 340 P.2d 598, *Rose v. State* (1942) 19 Cal.2d 713, 719, 123 P.2d 505; *Nichols on Eminent Domain* (revised third edition, 2002).
10. Cal. Const. Art. I, §19.
11. *Sacramento S.R.R. v. Heilbron* (1909) 156 Cal. 408, 409, 104, p. 979.
12. Code Civ. Proc. §1263.320.
13. *Peo. ex rel. Department of Transportation v. Diversified Prop. Co. III* (1993) 14 Cal.App.4th 429, 17 CR 2d 676; *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 CR 1.
14. Code Civ. Proc. §1268.310.