

**New Jersey
N2K Hour:
Eminent
Domain Laws in
New Jersey**

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What is eminent domain?

- Eminent domain is the power of the state or federal government to acquire property for public purposes, and it is derived from the Takings Clause of the Fifth Amendment of the U.S. Constitution.
- The U.S. Supreme Court has held that the federal government and each state has the power of eminent domain – the power to take private property for “public use” provided that just compensation be paid.
- The term “public use” is a highly controversial issue, and any takings that are not directly covered under the public use doctrine will likely violate due process rights under the 14th Amendment of the U.S. Constitution.

What is eminent domain? (cont.)

- Courts will determine if a taking is covered under the public use doctrine.
- The current statutory authority for condemnation proceedings in NJ is found in the Eminent Domain Act of 1971 (N.J.S.A. 20:3-29).
- Under the 1971 Act, just compensation must be provided to the property owner(s) for the taking of private property.
- This Act is supported by the federal and state constitutions as well.

Condemning Authorities in NJ

- In NJ, the Department of Transportation, state colleges, housing authorities, and utility companies are all agencies that may condemn private land for public use.
- Municipalities and boards of education can also acquire land for redevelopment projects.
- Typically, these entities will acquire land for the construction of churches, schools, hospitals, nursing homes, public utilities, highways, railroads, and cemeteries.
- In NJ, the government entity only has to negotiate in good faith as to the purchase of a property with the property's record owner. (*Borough of Merchantville v. Malik & Son, LLC*, 218 N.J. 556 (2014)).

The 1971 Eminent Domain Act

- Under the 1971 Act, the condemnor (government entity) is required to enter into negotiations with the condemnee (property owner).
- The 1971 Act provides a four-step condemnation process, which includes (1) bona-fide negotiations; (2) final judgment on authority for and due exercise of power by condemnor; (3) non-binding arbitration by Commissioners; and (4) jury trial on appeal from Commissioners' Report.
- During a jury trial, the jury is only concerned with the just compensation issue.
- All other issues are adjudicated by the court on appeal.

Negotiation Process

- If negotiations are successful, the parties will record a Deed in Lieu of Condemnation, which is still subject to the liens and encumbrances of record, unless they are discharged or released.
- However, in most cases where negotiations are unsuccessful, the condemnor is required to file suit in the Superior Court, Law Division to proceed with a condemnation action.
- The biggest obstacle in a negotiation process is the issue of valuation, which is often disputed by the parties and will cause a negotiation to break down, resulting in a condemnation action by the condemning authority.

Condemnation Action

- Pursuant to N.J. Stat. § 20:3-8, an action should be instituted by filing a verified complaint and should demand judgment that the condemnor has duly exercised its authority to acquire the property being condemned, and for an order appointing commissioners to fix the compensation required to be paid.
- The condemnor must also file a notice of lis pendens against the property.
- Property owners and occupants do have a right to an attorney from the moment that they are informed that the property is considered for condemnation.

Valuation Process

- When a condemnation action commences, NJ follows a two step process for valuating the property.
- The first step in the valuation process is the appointment of three commissioners by the court to determine the compensation to be paid.
- The commissioners will either be residents of the county in which the property is being condemned or active attorneys practicing law in that particular county.
- The second step is the appeal process, in which the property owner can appeal the award by the commissioners, within 20 days of receipt of the award.

Redevelopment Projects

- N.J.S.A. 20:3-38 provides that the value of a blighted area shall be no less than the value as of the date of the declaration of blight by the governing body upon a report by a planning board.
- When a municipality initiates a redevelopment project, an ordinance must first be introduced declaring an area in need of development.
- A public meeting will then be held to adopt the ordinance.
- Once the ordinance is adopted, the municipality hires a redeveloper in accordance with the proposed plan.
- A property owner has 45 days from the adoption of the ordinance to contest its validity.

Partial Takings

- In some instances, the government may only want to take a portion of the property, which is considered a partial taking.
- A common example is a road widening, in which the condemnor would take only the portion of land needed to increase the size of the road.
- In regards to just compensation, the valuation process is a little more complicated with a partial taking.
- The government must not only provide just compensation for the land that was actually taken, but also severance damages for any decrease in value to the remaining property.

Eminent Domain as a Title Exception

- Eminent domain is a covered risk in ALTA 2006 policies.
- However, the covered risk only applies if notice of a condemnation proceeding is found in the public records as of the policy's effective date.
- An appropriate exception should always be included in the title commitment or policy if a searcher finds any recorded document in connection with a condemnation proceeding.
- Please consult your Underwriter for further guidance on this issue.

Insuring Title from a Condemnation Proceeding

- When reviewing an abstract, you should always check that (1) all necessary parties have been joined in the condemnation action, and (2) all statutory procedures have been followed in order to insure title through a condemnation action.
- Title may be vested in the insured by means of a Deed in Lieu, Declaration of Taking, or Report of Commissioners.
- The notice of lis pendens also serves as a record of title, so it should never be discharged.
- Lastly, proof is required that the award has been paid to the condemnee(s).

Requirements for Insuring Title

- Reviewing an abstract of proceedings or certificate of regularity for a condemnation proceeding is similar to reviewing a chancery abstract for a foreclosure action.
- You will need to confirm that the condemnation proceeding was regularly conducted and that each defendant was properly served, which includes any lienholders who may have an interest in the property.
- Similar to a foreclosure proceeding, the interests of the parties will only be cut off if they are given proper notice.
- Covenants and restrictions should also be set up as exceptions on the title commitment, since it is unsettled whether they are cut off in an eminent domain proceeding.

Inverse Condemnation and Regulatory Takings

- An inverse condemnation is initiated by the property owner when the government exacts a taking without following the eminent domain procedures.
- This can occur when the government temporarily or permanently takes possession of private property for public use, and so greatly damages the use of the property that it becomes the equivalent of condemnation.
- The property owner can challenge any development restrictions which have the effect of denying the owner's beneficial use of the property.

Inverse Condemnation and Regulatory Takings (cont.)

- A regulatory taking occurs when overly-burdensome environmental or land use regulations have rendered the property unusable.
- The property owner can seek to recover damages on account of these burdensome regulations.
- Inverse condemnation and regulatory takings are usually not within the scope of title insurance, and are not very common in NJ.
- However, if such an issue comes up on your transaction, you should consult your Underwriter for further guidance.

Examples of Eminent Domain Abuse in NJ

- In 2012, the Township of Bloomfield took possession of a 0.62 acre property to renovate a local train station.
- The train station had been unused for 20 years and fell into disrepair, but it has now since been renovated.
- The former property owner had sought to build a mix of residential housing and commercial properties on the site under a plan that both fell within the existing zoning and would not have disrupted the 107-year-old train station.
- When the Township seized control of the private property, an appraisal expert valued the property at \$440,000.

Examples of Eminent Domain Abuse in NJ (cont.)

- However, the case dragged on for 7 years, and a second jury trial resulted in a verdict which required the Town of Bloomfield to pay \$1.16 million to the former property owner.
- Another case involved the City of Garfield, in which eight property owners had been facing the potential loss of their homes and businesses through condemnation.
- In February of 2018, the property owners filed suit to argue that their 1st Ward properties should not be considered in need of redevelopment and that resolutions designating them as such should be overturned.

Examples of Eminent Domain Abuse in NJ (cont.)

- City officials wanted to redevelop the area around the city's Passaic Street train station with the hope of it being designated as a transit village.
- The proposed redevelopment area would include two single-family homes, four two-family homes, 28 apartment units, a fire department, two houses of worship and the Alfred J. Thomas Home for Veterans Program, an eight-bed transitional housing program for homeless veterans.
- The court ruled in favor of the property owners, so the City of Garfield could not use eminent domain to enforce the redevelopment plan without negotiating first with the property owners.

The Necessity Test – *Glassboro v. Grossman*

- New Jersey follows the necessity test for redevelopment projects, in which the government agency must support its claim that the taking of private property is a necessity.
- The necessity test was first established in the case of *The Borough of Glassboro v. Grossman*, and has been further supported in the case of *Casino Reinvestment Development Authority v. Birnbaum*.
- In January 2017, the Borough of Glassboro instituted condemnation proceedings to acquire a mostly vacant, nearly one-acre lot located within a duly-designated redevelopment area and subject to an adopted redevelopment plan.

The Necessity Test – *Glassboro v. Grossman* (cont.)

- The property was approximately a block from an ongoing substantial mixed-use redevelopment consisting of “190,600 square feet of retail space, 81,000 square feet of classroom space, 1,870 student-housing beds, 109 apartments, and a 1.75-acre park” with an estimated value of \$450 million.
- In 2016, the Borough obtained an appraisal of \$125,000 for the property and after unsuccessfully pursuing negotiations with the owners to acquire the property, a condemnation action was filed pursuant to New Jersey’s Eminent Domain Act.

The Necessity Test – *Glassboro v. Grossman* (cont.)

- While the trial court rejected the Borough's position that it was authorized to acquire any property within a designated redevelopment area without providing a specific reason, it found that the asserted need of public parking was sufficient to show that the taking of the property was "reasonable and necessary to effectuate the redevelopment plan."
- The Borough asserted that "public parking is only a possible use, and that the property might be used for some other purpose related to redevelopment," and that "it is often necessary during redevelopment activities to 'assemble' parcels in order to complete the overall plan."

The Necessity Test – *Glassboro v. Grossman* (cont.)

- The New Jersey Appellate Division reversed the trial court’s decision and held that a municipality exercising its power of eminent domain to acquire private property, pursuant to the Local Redevelopment and Housing Law (LRHL) must establish that the property is “necessary for a redevelopment project.”
- The Appellate Division further held that necessity must be supported by evidence that “articulate[s] a definitive need to acquire the parcel for an identified redevelopment project ... [which] must be more specific than the mere ‘stockpiling’ of real estate that might, hypothetically, be useful for a redevelopment project in the future.”

Casino Reinvestment Development Authority v. Birnbaum

- Another case involving the Necessity Test is *Casino Reinvestment Development Authority v. Birnbaum*.
- The Birnbaum family had owned a three-story home in Atlantic City since 1969.
- However, in June 2013, the CRDA attempted to buy the property for \$238,500 as part of the Authority's South Inlet Mixed Use Development Project.
- Birnbaum refused to sell the property, and the CRDA filed suit seeking a judgment that the Authority had duly exercised its power of eminent domain.

Casino Reinvestment Development Authority v. Birnbaum (cont.)

- In November 2014, the trial court first granted the CRDA's application to use eminent domain, but on a motion for reconsideration, the trial court then reversed its decision.
- The trial court held that the CRDA had a conceptual idea for the development project, but lacked a viable plan that was unlikely to occur in the foreseeable future.
- On February 15, 2019, the Appellate Division upheld the trial court's ruling based on the *Glassboro* decision, and supported the trial court's findings that "approval of the condemnation could well leave the Birnbaum property vacant for an indefinite period of time, as the CRDA "wait[s] for the right project to present itself."

Federal v. State Courts

- The recent U.S. Supreme Court decision (June 21, 2019) in *Knick v. Township of Scott* held that any plaintiff alleging that local governments have violated the takings clause may proceed directly in federal court, rather than first litigating in state court.
- Knick was a PA resident, owned 90 acres with a small family graveyard, and challenged a Township ordinance requiring that all cemeteries be open and accessible to the public during daylight hours.
- The ordinance also authorized Township employees to enter property to determine the existence and location of a cemetery.

Federal v. State Courts (cont.)

- The Supreme Court ruled, in favor of *Knick*, essentially giving all citizens another way to pursue a lawsuit against state or local governments over property rights issues.
- Instead of filing lawsuits in state and local courts first, citizens with property grievances can now go directly to federal court.
- The *Knick* decision overruled the 34-year-old precedent in *Williamson County Regional Planning Commission v. Hamilton Bank*, which held that the plaintiff could not bring a takings claim in federal court until the plaintiff had pursued an inverse-condemnation action in state court.

Wrap Up and Review

- Eminent domain is a covered risk in ALTA 2006 policies (subject to certain conditions).
- The condemnor is required to enter into negotiations with the condemnee before a condemnation proceeding even takes place.
- An abstract of proceedings is always required when insuring transactions in which title was vested by eminent domain.
- Always check your title search to see if there are any recorded documents in connection with an eminent domain proceeding, so an abstract can be ordered and reviewed for the transaction.

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