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Eminent domain and condemnation

5 essential steps to protect your commercial property

There is nothing simple or painless when the Department of Transportation (DOT) or a municipality needs your land or building for a road-widening project or to construct a new road. Whether you are a shopping-center owner, national retailer, bank, restaurant or small-business owner, there are some basic steps you can take to protect your business and commercial property interests.

Eminent domain is the government's legal right to take your private property for public use. The process begins when

Step 1: Legal analysis

If you receive notice that a roadway project is going to impact your commercial property, it is important that you seek legal advice from an attorney experienced in eminent domain law. Such an attorney will help you determine your legal rights, maximize your recovery and, in the process, protect your remaining property's value and handle issues that may arise during the construction. It is important to seek legal advice as soon as you know that a project will impact your property. If you

Step 2: Road design

In the vast majority of cases the government will only need a portion of your property. In those situations the roadway's design can be critical to how your remaining property functions after the work is done. Most commercial property owners and tenants are concerned about how the new road design and traffic patterns will affect their customers' ability to access the property. In these instances, your attorney may engage the services of an experienced traffic engineer to help ascertain the impact of the road's design on traffic flow and access.

If the roadway design is still in the planning stage, the DOT or municipality may be persuaded to modify the road design to preserve access to your commercial property. We have helped our clients maintain or even improve traffic patterns. We have worked with the DOT to redesign portions of projects to reopen driveways that were slated to be closed, allow full access turns where medians were going to block access and even create access points that did not exist before. In one instance, we were able to keep a bank's drive-thru access open. In another, we were able to move a national fast-food restaurant's driveway from one location to another to avoid the access being permanently closed. Once we persuaded the DOT to break a controlled-access highway to keep a drugstore from going out of business.

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you receive a notice from the taking authority (usually a state or local government) indicating that it intends to acquire some or all of your property for a public project. The government or its agent must submit a monetary offer to purchase the property it needs. If you do not accept the initial offer, the government can proceed with a "condemnation lawsuit," which is a lawsuit to seize your property. You may negotiate a settlement of the lawsuit or demand a jury trial to determine your "just compensation." What essential steps should you take when this happens to you?

wait until you are served with the condemnation lawsuit to get a lawyer, you will drastically limit what your lawyer may be able to do to help you. Many law firms will work on a contingent fee basis (meaning you do not pay for the services until you are compensated for your land, buildings and property rights taken — and then the fee is based on the amount of money you receive from the government). Other firms will work on an hourly basis to help you through the process. Talk with your attorney about a fee arrangement that best suits your needs.

entious public servants who are concerned with: 1) safety, 2) traffic flow, and 3) being good stewards of our public resources. When your eminent domain attorney teams up with an experienced traffic engineer they can often persuade the DOT to revise their roadway plans so long as there is no compromise to safety or adequate traffic flow. Such concessions will also benefit the government if they reduce the damage to the property's value that would otherwise be paid in a condemnation lawsuit. Every case is different, and there are no guarantees. But you will never know unless or until your attorney asks.

In rare instances, your attorney may persuade the DOT that it no longer needs to acquire your property. In most cases, however, a road redesign will only partially mitigate the damage to your property. You and your attorney will still need to work with the condemnor to ensure that you receive the appropriate amount of compensation.

Step 3: Valuation

The United States Constitution and North Carolina law provide that you are entitled to "just compensation" when the government takes your private property for a public use. The government will hire an appraiser and offer to purchase your property based on that appraiser's valuation of your property. You are not required to accept the amount the government offers. We never advise accepting this number without an independent valuation. An independent appraisal will help guide your strategy going forward and give you a sound negotiating position with important independent expert evidence should the case proceed to trial.

A condemnation appraisal is more specialized and complex than a purchase or financing appraisal. The appraiser must be able to pinpoint the market value of your property using methodology that will be recognized

as competent in court. The appraiser must be prepared and able to testify at depositions or trial if necessary and be qualified and experienced in this field. Also, an appraiser experienced with condemnation cases will best be able to value the unique property rights often taken by the state, such as temporary construction easements and permanent easements for utilities, drainage, grading and slopes. Your attorney can help you retain an experienced commercial condemnation appraiser.

Step 4: The lawsuit

In the event of a condemnation lawsuit, the government agency will be the plaintiff and you and anyone else with an interest in your property (lender, tenant, easement holders, etc.) are the defendants. The government will deposit with the court the amount of money that it believes is "just" for the property rights acquired, and you must choose whether to accept that amount or litigate over whether the property was truly acquired for a "public purpose" and/or whether the deposit constitutes "just compensation." All of the rules of court and rules of evidence apply, though the time deadlines and certain legal motions are different in a condemnation case. Your attorney will help you navigate the legal process, draw down

the deposit (if appropriate), prove the value of your property and either negotiate a settlement or try the case in court.

Step 5: Apportionment

If there are multiple defendants in a condemnation action, you must apportion the settlement or judgment proceeds among these multiple interest holders. This can be tricky. Many commercial leases and deeds of trust provide for the distribution of the proceeds from a condemnation award. The language of these agreements will likely govern the split of the award. If the lease or deed of trust is silent as to apportionment, common law rules will apply to divide the award among the stakeholders. The guidance of an experienced condemnation attorney is essential to ensure that you receive the full amount to which you are entitled, whether you are a lender, owner or tenant.

Conclusion

The condemnation process can be long and confusing with risk and uncertainty, even for savvy landowners and business people. Understanding these five steps can help you take control in navigating this process. With an experienced condemnation attorney as your guide, you can ensure the best possible outcome for your business and property interests.

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Together they represent national retailers, regional developers and lenders, including McDonald's Corp., Rite Aid Corp., BB&T Corp., CBL & Associates Properties and American Asset Corp. in dealing with real-property disputes, eminent domain and condemnation. For more information about their practice, please call 919-821-7700 or visit their website at www.howardstallings.com.