Legally Relevant

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Use of eminent domain in Kansas

Few topics can excite folks like eminent domain. There seems to be something about the idea of government taking people's land without their consent that makes them hopping mad.

This article will cover the uses of eminent domain, basic rules about how it works, and some practical suggestions.

Eminent domain is considered an inherent power of government, with roots that precede the founding of our nation. Even when America declared its independence, founded on principles of individualism, the government was not prohibited from acquiring property by eminent domain, but instead the Fifth Amendment to the new Constitution declared that the taking of such property could be done only upon the payment of just compensation.

What is eminent domain, and who can do it?

Eminent domain is the right of government to acquire property for governmental purposes through a process provided by law. When the government cannot acquire land by gift or purchase, it can use eminent domain to do so. Most large scale projects such as highways and reservoirs invariably involve some use of eminent domain to acquire the necessary land.

For purposes of this article, we are focusing on acquisition of land, or interests in land such as easements, by water and waste water systems. Most of these utilities are operated by cities and rural water districts. As units of local government, they have been granted specific authority by the legislature to use eminent domain. There are restrictions on this use, as will be discussed more fully below, but the basic premise is the same – the water or waste water utility may acquire land or interests in land through the use of eminent domain – the taking of land for a governmental purpose.

What are the limitations?

The limitations on the use of eminent domain (often also referred to as "condemnation") varies according to the type of entity. Cities' authority is broad, and stems from a number of sources. The city's attorney should be consulted regarding a specific use, but in general, cities have authority to use eminent domain both in and outside of the city limits for most any need associated with a water or waste water system.

Rural water districts are not so lucky. Their authority to use eminent domain is limited to land located within their boundaries. Public wholesale water supply districts can use eminent domain both "within and without their boundaries" (which in itself is kind of interesting since PWWSDs do not have any boundaries – but try to explain that to the legislature). Sewer districts likewise have no geographical limitations on their ability to use eminent domain.

How does eminent domain work?

Kansas has adopted a uniform act that prescribes a procedure to be followed in virtually all eminent domain cases. This act is at K.S.A. 26-501 et. seq. That statute contains a complete procedure to be used in eminent domain cases.

Eminent domain cases begin by filing a verified petition in the district court of the county in which the land to be taken is located. The law is very specific about what is to be included in the petition, consisting of:

1) The authority for and the purpose of the taking;

2) A description of the land to be taken;

3) The name of the owner, mortgagees and persons in possession (such as tenants).

As a practical matter, what this means is that preliminary to filing anything in the court, the governing body of the city or district needs to formally make a finding describing the land that is needed and the reason why, and adopt a resolution reciting those facts and that the governing body finds it necessary to acquire this land or interest in land for the lawful purposes of the city or district. A search also needs to be made, such as by a land title company, of the official records to get the other information needed for the petition.

Once the petition has been filed, notice must be mailed to all interested persons and published in the newspaper. The statute contains specific times by which this must occur. The next step in the process is for the district court judge to hold a hearing for the appointment of appraisers. This is not supposed to be a hearing or trial where the property owners can contest the need for the taking, or the unfairness of it all (more on that later), but instead it is to be for the specific purpose stated in the statute – the appointment of appraisers.

The court is to appoint three appraisers, at least two of whom need to have experience in valuing land. They do not need to be certified appraisers. They do all have to be residents of the county where the land is located. The practice for the appointing of appraisers varies widely from county to county, but the statute says the judge is to hear suggestions from the parties as to who should be appointed, and only if the parties can not agree on a panel of three does the judge actually make the selection.

Once appointed, the appraisers receive their instructions from the judge. For the purposes of the case, they are considered officers of the court and do not work for either party, although their fees and expenses are to be paid by the governmental entity doing the taking (not the landowners). The appraisers are required to physically view each tract of land being taken, and hold a public hearing. Unless extended by the court, they are required to complete their work and submit their report to the court within forty-five days of the date of their appointment.

What the appraisers are instructed to do is to consider the factors that may bear on the value of the land being taken and determine how much the governmental entity is going to be required to pay. In the case of "partial takings", such as pipeline or water well easements where the land will remain under the landowner's ownership but

subject to the easement that has been taken, the appraisers get a special instruction. In those cases they are instructed to value the tract of land before the government takes any interest in it, then determine the value of the land assuming the government has taken its interest (such as the easement), with the difference being the amount of the award to be paid. The appraisers have to come to a unanimous decision.

Once the appraisers have entered their award, the governmental entity then has thirty days in which to pay the amount of the award, plus the appraisers' fees and expenses. If it fails to do so, it is considered to have abandoned the acquisition or be forced to start all over again. As soon as the money is paid, the governmental entity has rights in the land. The landowners can later appeal, but that appeal is limited to the amount of the award, not whether the governmental entity had any right to acquire it or not.

Do the landowners have any right to question the taking?

Landowners have no right within the eminent domain case to question the taking. If they think that the governmental entity lacks authority to acquire their land, or that the taking is otherwise improper, they have to file a separate lawsuit asking the judge to issue an injunction against the governmental entity, preventing the eminent domain action from proceeding. Even in these cases, the burden on the landowner is extremely high in that they must show the court that the governmental entity lacks statutory authority for the taking, is engaged in fraud or is abusing its discretion. The abuse of discretion standard is high, as the law makes it very clear that there is no desire to put district court judges in the position of second guessing whether a water tower or sewage lagoon would be better located at one place than another. Instead, those decisions are to be left to the governmental entity charged with making them (the city or district), and only in cases where it can be shown that that decision was completely without any reason, such as locating the site for a water well by throwing a dart at a map on the wall, is it sufficient to cause the court to overrule that decision.

Why is eminent domain used and what really happens?

Our clients have used eminent domain to acquire interest in land for a wide range of purposes across the state. These have included sites for water wells (including some where they already had a well, that had been producing water for the district for years, but due to errors had wound up on land where the district had no right to be), pipeline easements, pump stations, sewage lagoons, and everything in between. Every case is unique. In many of these cases, cash offers were made that exceeded the amount ultimately awarded by the appraisers. In some cases the appraisers determined there was going to be no loss or damage to the property owners, and the appraisers awarded them zero dollars. In some others the appraisers were overly generous and gave the property owners a lot more than what they were due.

Lessons learned

A few lessons can be learned from these experiences. First, careful consideration needs to be given to the use of eminent domain, and then only after every reasonable effort has been made to acquire the land, or interest in land needed, through a negotiated purchase. There is a high political cost paid any time eminent domain is used, and sometimes that cost is not limited to just the people whose land has been taken. The public is generally adverse to government acquiring land by eminent domain, and the decision to proceed under eminent domain should probably be one that can be defended based on the fact that all other reasonable efforts failed and the site is necessary to an important purpose for the city or district.

Second, eminent domain is expensive, and seems to be more so all of the time. The governmental entity doing the condemnation will be responsible for the payment of its attorneys' fees, title research fees, publication fees, court filing fee and the appraisers' fees and expenses. With many of the eminent domain actions we have been involved with, these fees and expenses exceed the award that the appraisers give to the property owners (in some instances, by a factor of

several times as much). Landowners may likewise have attorneys' fees and expenses. Obviously, if the land is essential and reasonable efforts have failed, there may be no alternative, but remember that use of eminent domain is generally not the most efficient way to acquire land due to these expenses.

The public's resistance to the use of eminent domain, even for such relatively unobtrusive uses as temporary easements for test well drilling and pipeline easements, seems to be higher than ever. This heightened public awareness of the use of eminent domain, and a general dislike for the process, is further increasing these costs.

Finally, be prepared for a few surprises. Although essentially administrative in nature (the court's only direct roll is in the appointment and instruction of the appraisers), it is a process over which you have no direct control. You can help avoid surprises by hiring a qualified appraiser to do an appraisal of the tract before you file the condemnation action. This appraiser may help you learn something you might have otherwise overlooked until it was too late, and at least in the case of larger or more valuable land, this appraiser may serve as an expert to help you to present your side of things to the court appointed appraisers.

Conclusion

Eminent domain is a valuable tool available to cities and districts in fulfilling their responsibilities. It is a relatively quick and dependable process, but not without its risks. There are expenses involved in the use of eminent domain that make it an inherently inefficient system for acquiring land, and one that for both political and financial reasons, should be used only as a last resort when all other efforts have failed.