

REAL ESTATE DEVELOPMENT FROM BEGINNING TO END: EMINENT DOMAIN

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1. What is Eminent Domain?

Power that enables government to take property, generally private property, for itself and for its delegates.

2. Power of Eminent Domain

- a. Inherent in sovereign (legislature)
- b. Power is set out in both federal and state constitutions
- c. Must have public use and just compensation must be paid
- d. Legislature may delegate eminent domain power to administrative bodies through statutes
- e. Tax Increment Allocation Redevelopment Act (TIA)
 - i. Enacted mid-twentieth century because many Illinois cities were becoming rundown and blighted due to the Depression and a lack of new construction after World War II.
 - ii. TIA is a statutory scheme for municipalities to establish TIF districts
 - iii. TIA allows for condemnation of properties located within designated redevelopment areas inside the TIF districts
 - iv. must be blighted or about to become blighted
 - v. redeveloped districts do not come back onto pre-redevelopment real estate tax roles for many years – the taxes saved by the developers are used to help finance the new development
 - vi. often, condemned property is immediately transferred from the condemning government entity to a private developer
 - vii. such a practice was sustained by the First Appellate District in 1991

- f. *Kelo v. City of New London, Connecticut*, 545 US 469 (2005)
 - i. U.S. Supreme Court held that taking of private property for economic development was a proper public use of the power of eminent domain (City of New London allowed to condemn privately owned homes and deliver them to a private developer to develop a hotel/office/retail complex)
 - ii. Nationwide outcry. Claimed government ability to abuse eminent domain power. Some claimed abuses in Illinois were: unfairness of valuation dates; after paying attorneys fees, appraisers' fees and other costs, property owners were not receiving just compensation; TIF districts were established for 23 years so condemnation could occur decades after creation of the district; lack of notice when area declared blighted; no right to jury trial to object to formation of TIF district; no provisions for relocation damages

- g. Illinois Eminent Domain Act (735 ILCS 30/1-1-1), May 3, 2006
 - i. codifies standards for determining public use (about 400 pages long)
 - ii. sections 5-5-5 (b)-(f) defines five new categories in which the exercise of eminent domain power is authorized
 - iii. Condemnation must fit within one of the categories to be permissible
 - iv. The condemnation complaint must specify which category the taking fits in
 - v. Condemning authority has the burden of proof in each (prior to this Act, property owner had burden of proof)
 - vi. 5-5-5(b): Property to be publicly owned, used for a public purpose
 - 1. condemning authority must prove:
 - a. acquisition is necessary for a public purpose (by a preponderance of the evidence), and
 - b. property will be owned and controlled by government entity
 - vii. 5-5-5(c): Property to be privately owned but used for public purpose
 - 1. condemning authority must prove (by clear and convincing evidence) the acquisition for private ownership and control is:
 - a. primarily for benefit, use or enjoyment of the public, and

- b. necessary for a public purpose
 - 2. elimination of blight is rebuttably presumed to satisfy both factors
 - viii. 5-5-5(d): Property to be privately owned; acquired primarily to eliminate blight
 - 1. applies to TIFs established after 4/15/06
 - 2. condemning authority must:
 - a. prove by a preponderance of the evidence that acquisition for private ownership is necessary for a public purpose
 - b. prove by a preponderance of the evidence that the property is located in a blighted area or conservation area
 - c. if blight is challenged (within 6 months of filing complaint):
 - i. prove by a preponderance of the evidence that the factors of blight exist in the area so designated, and
 - ii. prove by a preponderance of the evidence one of the following:
 - 1. existence of a written development agreement where private developer agrees to undertake project in blighted area that details reasons condemned property is necessary for the project
 - 2. condemnation is consistent with land use plan adopted within last five years, or
 - 3. deed restricting limiting use of condemned land for 40 years to purpose within approved plan
- ix. 5-5-5(e): Property to be privately owned and controlled for one of the listed specific purposes
 - 1. condemning authority must prove by a preponderance of the evidence that:

- a. Acquisition is necessary for a public purpose, and
 - b. An enforceable written agreement exists that assures the project will remain consistent with the applicable purpose for 40 years
- x. 5-5-5(f): Property to be publicly owned but used for private business
- 1. prove by preponderance of the evidence that:
 - a. acquisition is necessary for a public purpose
 - b. property will be owned by government entity, and
 - c. property will be controlled by private business related to condemning authority's operation of things listed in the statute
 - xi. valuation date is date of filing (unless abusive delay by condemnor)
 - xii. municipalities exercising eminent domain under this statute must follow the statute to the letter
 - xiii. meant to limit eminent domain power being used for private development (much more restrictive on TIF districts)

3. Pre-Condemning Procedure

- a. Hire Appraiser
 - i. Fair market value
- b. Walk the property
- c. Surveys
- d. Environmental Assessment
- e. Know the parties and who occupies the property
- f. Attempt to agree as to compensation
 - i. Good faith offer required

4. Appraiser Role as an Expert

- a. uniform standards
- b. landowner permitted to be with appraiser during inspection
- c. date of value
- d. highest and best use and reasonable probability of rezoning – evidence required
- e. exclusion of project influence
- f. special benefits from public improvements
- g. sales comparison approach, most widely accepted by courts
- h. Valuation
- i. Remainder damages
- j. Environmental issues

5. Exercising Power of Eminent Domain

- a. Must make good faith offer to purchase from owner
- b. Section 5-5-5 of Eminent Domain Act
- c. File complaint
 - i. What has to be included in Petition
 - ii. Lis Pendens
- d. Trail
 - i. Discovery to Satisfaction of Judgment

6. Quick-Take

- a. Statutory method used by condemnor to obtain early possession of property in a condemnation action.
- b. Meant to avoid the delays of valuation and allow for quick construction
- c. Authorized by section 20-5-5 of the Eminent Domain Act (Plaintiff may file written motion for possession or title – called Motion for Immediate Vesting of Title – any time after filing of the Petition)
- d. Procedure
 - i. File motion any time after Petition
 - ii. Contents
 - 1. describe property with “reasonable certainty”
 - 2. interest to be acquired
 - 3. plan of operation for condemnor’s project
 - 4. relation of the property to the plan
 - 5. necessity for quick-take
 - 6. any statutorily required approvals must be obtained
 - iii. Quick-Take Hearing
 - 1. set at least 5 days after filing of motion
 - 2. court sets the date
 - 3. service of notice done in any way permitted under Illinois law
 - 4. Proofs at Hearing (burden on condemnor)
 - a. right to condemn
 - i. condemnor authority to condemn
 - ii. property is subject to condemnation
 - iii. authority is being properly exercised
 - b. quick-take is necessary
 - c. establish preliminary amount of just compensation
 - iv. Order Fixing Preliminary Just Compensation
 - v. Deposit of Funds and Vesting of Title
 - vi. Withdrawal of Preliminary Just Compensation
 - vii. Appeals
 - 1. only appealable issues are whether:
 - a. condemnor authority to condemn

- b. property is subject to condemnation
 - c. authority is being properly exercised
 - 2. if Plaintiff appeals, further proceedings are statutorily stayed
 - 3. if Defendant appeals, further proceedings are stayed only upon court order
 - 4. if Defendant wins appeal, title re-vests in Defendant and gets damages, costs, expenses and attorneys fees
- viii. Subsequent Proceedings
 - 1. Quick-Take matters not admissible at trial
 - 2. Abandonment
 - a. Any time before Plaintiff takes possession after the vesting of title, the plaintiff may dismiss the Petition, thereby abandoning the proceedings