Introduction

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History of Eminent Domain

Eminent domain has a long and distinguished legal history, dating from the first limits on sovereign power in the Magna Carta. Just compensation is a newer concept, and court decisions such as *Kelo v. New London* make the exercise of eminent domain controversial. Can government condemn property to increase its tax base? Can the state transfer property from one private owner to another for incidental public benefit, and does this constitute "public use"?

Eminent domain traditionally was used to acquire property for roads, waterways, defense installations, government and public buildings, and the interstate highway system; more recently, it has been a favored tool in developing urban areas, creating shopping malls, and building big-box retail stores. We hope with this book to introduce general practitioners working for condemnors and property owners alike to the many intricacies of condemnation practice.

The term "eminent domain" was coined by Hugo Grotius (1583–1645), a Dutch jurist and philosopher of natural law, to describe the power of the state over natural property.[1] "Eminent domain or condemnation is the power of the sovereign to take private property for public use without the owner's consent."[2] This inherent power allows the sovereign to shape the property's use as it deems fit.[3] Eminent domain law in the United States is steeped in colonial understandings of land use. In fact, the government's power of eminent domain was long established by the time the United States was founded.

Today, condemnees are compensated through the Fifth Amendment's takings clause, but this was not always true. Just compensation is a limit on the inherent power of the sovereign, not a grant of power.[4] "The principle that the state necessarily owes compensation

when it takes private property was not generally accepted in either colonial or revolutionary America."[5] Uncompensated takings were frequent, justified both by appeals to the Crown, whose officials "justified uncompensated takings by appealing to royal prerogative and limitations contained in original land grants," and by republicanism, the ideology of the American Revolution.[6]

The first colonial settlers to obtain land rights derived title from some public entity: a chartered company, a provincial land office, or a town.[7] "When distributing land, these public entities sometimes required settlers to perfect their ownership by making certain improvements on their land, such as building a house or clearing an acre of land."[8] Some argue that when these conditions on settlers' rights were enforced, they were not viewed as diminishing the owners' legal interests, "because the rights received by the original grantees were qualified by the grants."[9] Colonial officials justified stripping title to undeveloped land by maintaining that the landowners had not honored the conditions on land ownership.[10]

Colonial legislatures routinely took private property without compensating the owner.[11] Undeveloped land was simply transferred to another person.[12] Such uncompensated takings were mostly to build public roads and generally promote economic growth.[13] All colonies except Massachusetts allowed undeveloped land to be taken for roads without compensation.[14]

Few precedents exist for the Fifth Amendment's takings clause.[15] The 1215 Magna Carta limited the absolute power of the English sovereign to take land but did not require payment of compensation. The Fifth Amendment, an extension of the Magna Carta, further limited the sovereign's power by requiring just compensation. This requirement was not generally recognized at the time of framing. No colonial charter or state constitution recognized that regulations could give rise to a compensation requirement.[16] Colonial charters that protected personal or real property did so by a procedural law rather than by substantive right.[17] These provisions can be traced back to the 1215 Magna Carta, Article 39: "No free man shall be . . . dispossessed . . . except by the legal judgment of his peers or by the law of the land."[18] Thus a decision-making body, either a jury or state legislature, determined when to take property and when to compensate.[19] Authorizing statutes typically provided that juries could award compensation for land taken,[20] but colonial governments often took private property without doing so.[21]

State Constitutions

The earliest Revolution-era state constitutions followed colonial precedent, with only three containing eminent domain clauses and none containing just compensation requirements.[22] "The three simply echoed Article 39 of Magna Carta, providing that the consent of the owner *or* of the legislature was needed for the state to exercise its eminent domain power."[23]

Two states, Vermont and Massachusetts, ratified constitutions with compensation requirements in 1777 and 1780, respectively. Both states provided for compensation when private property was taken for public use.[24] Moreover, the Northwest Ordinance of 1787 stated, "Should the public exigencies make it necessary, for the common preservation, to take a person's property, or to demand his particular services, full compensation shall be made for the same."[25]

In England during this era, compensation was now "the law of the land" and was incorporated into due process and takings clauses.[26] William Blackstone, author of the *Commentaries on the Laws of England* (1765–1769), advocated compensation for takings, and his work was widely read in America.[27] In addition, controversial situations during the Revolutionary War may have led to a desire to protect the propertied classes.[28]

The Fifth Amendment's Takings Clause

Although the Northwest Ordinance of 1787 set a precedent for a constitutional compensation requirement, states did not demand such a limitation on the federal government in the Bill of Rights.[29] "Regardless of political belief, few initially felt that [a] just compensation requirement was a necessary restraint on a federal government that would have little occasion to take property."[30] Nonetheless, James Madison, author of the just compensation clause in the Fifth Amendment, realized the importance of national ratification of the requirement and included it in the constitutional amendments he proposed to Congress.[31] Madison had two reasons to propose the clause. First, he wanted "to bar the uncompensated taking by the national government of chattel and real property"—the same bar that existed in Vermont, Massachusetts, and the Northwest Ordinance.[32] Second, he hoped that the clause would "impress on the people the sanctity of property."[33] Madison explained in his essay "Property" that the Fifth

Amendment committed the government to the proposition that "no land or merchandize" shall be taken directly, even for public use, without indemnification to the owner.[34]

The Fifth Amendment states in part: "nor shall private property be taken for public use, without just compensation." This language has been interpreted in every jurisdiction to require that property cannot be taken for private use. "It is now well settled in every state in the union that the prohibition against the taking of property for the public use without just compensation impliedly, but none the less definitely, forbids a taking of property for private uses."[35] The meaning of "public use" has been subject to much debate and litigation. According to some, the term "defies definition."[36] "Interpretation of the clause has relaxed considerably with time and circumstance. Public use does not necessarily mean public ownership, although it once did; it can countenance private ownership, so long as the plan serves some controlling governmental purpose."[37]

The public use requirement relaxed with the advent of urban renewal in the 1940s and 1950s.[38] "For the first time, government proposed large-scale condemnation of residential property with the intention of reconveying it to private developers."[39] Nearly all jurisdictions addressed the constitutionality of government condemnation that took private property and did not give it to the public.[40] These initiatives were not for the benefit of the private developers, although they sought results that the private landowners "could not or would not achieve."[41] With that in mind, "with few exceptions the courts agreed that, whatever the proposed use of the property in question, elimination of slums was in and of itself a valid public purpose."[42]

The definition of public use expanded in *Poletown Neighborhood Council v. City of Detroit*.[43] The Michigan Supreme Court held that a large tract of land being conveyed to the General Motors Corporation, a private entity, as a site for construction of an assembly plant served "the essential public purposes of alleviating unemployment and revitalizing the economic base of the community."[44] The court further found that the "project [was] warranted on the basis that its significance for the people of Detroit and the state has been demonstrated."[45]

The *Poletown* decision was overruled 23 years later, however, in *County of Wayne v. Hathcock*.[46] Here the Michigan Supreme Court found that the condemnation of the landowners' properties for a 1,300-acre business and technology park was unconstitutional[47] because Wayne County intended to "transfer the condemned proper-

ties to private parties in a manner wholly inconsistent with the common understanding of 'public use' at the time our Constitution was ratified [1963]."[48] The court found that *Poletown*'s "economic benefit" rationale "would validate practically *any* exercise of the power of eminent domain on behalf of a private entity."[49]

Overview of This Book

This book explores how the practice of eminent domain law continues to evolve, and is a practical guide for lawyers applying modern land-use doctrine in takings cases. Chapter 1 discusses the evolution of the public use requirement from "use" to "purpose." In *Kelo v. New London*,[50] private property owners challenged the city's exercise of eminent domain power on the grounds that the takings were not for public use. The city of New London intended to transfer the property to a private, for-profit developer. The Supreme Court held that the city's exercise of such power to further its economic development plan satisfied the constitutional requirement,[51] reiterating a "broader and more natural interpretation of public use as 'public purpose.'"[52]

Chapter 2 is a guide for determining the amount of compensation a landowner should receive in a condemnation proceeding—the fair market value of the property at the time it is taken. This is the amount that the property would reasonably be worth on the market in a cash sale to a willing buyer if offered for sale by a prudent willing seller. The price offered must be what a reasonable buyer would pay for the highest and best use of the land, even if it is not currently being used for this purpose. The "highest and best" rule is commonly used in the United States, and its requirement is implicit in section 1007 of the Model Eminent Domain Code.

Chapter 3 discusses the various kinds of damages that the practitioner should be prepared to claim or defend against in condemnation litigation. Where there is a partial taking, many states apply the "before and after" rule, in which "the measure of compensation is the greater of (1) the value of the property taken . . . or (2) the amount by which the fair market value of the entire property exceeds the remainder immediately after the taking."[53] The value of the land to the owner and taker generally has no relevance.[54] Other compensable property rights are less obvious. Chapter 4 discusses damages to property resulting from takings, especially from partial takings.

In chapters 5 and 6, the book outlines the prelitigation process; provides a practical look at the pleading and process components of a condemnation proceeding; and goes on to describe the practical issues lawyers face in preparing for and conducting an actual trial, examining such issues as the burden of proof, jury instructions, attorneys' fees, and abandonment.

In chapters 7 and 8, the book then moves to a discussion of inverse condemnation, a claim often brought by property owners in response to flooding and erosion resulting from government actions. "Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[55] As the name suggests, the action is procedurally the inverse of a condemnation proceeding, and the entire doctrine is predicated on the proposition that a taking may occur without the formal proceedings of the typical takings actions to condemn property.[56]

Last, we've included an appendix surveying current laws relating to public use and public purpose across the states. Please read on, and good luck with your eminent domain practice.

Notes

1. Jacob Beuscher & Robert Wright, Land Use 709 (1969).
2. Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking"—A Proposal to Redefine "Public Use,"* 2000 L. Rev. M.S.U.-D.C.L. 639, 643 (quoting 1 John J. Delaney et al., Land Use Practice and Forms: Handling the Land Use Case 21-1 (2d ed. 1999)).
3. Kulick, *supra* note 2.
4. *Id.*
5. William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 Yale L.J. 694, 694 (1985).
6. *Id.* at 695.
7. John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine,* 109 Harv. L. Rev. 1252, 1259 (1996) (citing Marshall D. Harris, Origin of the Land Tenure System in the United States 76–79 (1953)).
8. *Id.* at 1259.
9. *Id.*
10. Treanor, *supra* note 5, at 697.
11. *Id.*

12. *Id.*
13. Treanor, *supra* note 5, at 695–96. *See also* 1 Nichols on Eminent Domain § 1.22 (rev. 3d ed. 1993).
14. William M. Treanor, *The Original Understandings of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995).
15. *Id.*
16. *Id.*
17. *Id.* at 786.
18. *Id.* at 787 (citing Magna Carta art. 39, *reprinted in* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) [hereinafter Sources of Our Liberties]).
19. Treanor, *supra* note 14, at 787.
20. *Id.* (citing William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 579–83 & nn. 88–94 (1972)) (referencing examples of colonial statutes authorizing condemnation of land and building materials for roads).
21. Treanor, *supra* note 14, at 787.
22. *Id.* at 789. *See* Md. Const. of 1776, art XXI, *reprinted in* 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1686, 1688 (Francis N. Thorpe ed., 1909) [hereinafter The Federal and State Constitutions]; N.Y. Const. of 1777, art. III, *reprinted in* 5 The Federal and State Constitutions, *supra*, at 2623, 1632; N.C. Const. of 1776, art. XII, *reprinted in* 5 The Federal and State Constitutions, *supra*, at 2787, 2788.
23. Treanor, *supra* note 14, at 789.
24. *Id.* at 790–91. *See* Vt. Const. of 1777, ch. I, art. II, *reprinted in* 6 The Federal and State Constitutions, *supra* note 22, at 3737, 3740. *See also* Vt. Const of 1786, ch. I, art. II, *reprinted in* 6 The Federal and State Constitutions, *supra* note 22, at 3749, 3752. *See also* Mass. Const. of 1780, pt. I, art. X, *reprinted in* 3 Federal and State Constitutions, *supra* note 22, at 1888, 1891.
25. Treanor, *supra* note 14, at 791. *See* Northwest Ordinance of 1787, art. 2, *reprinted in* Sources of Our Liberties, *supra* note 18, at 392, 395.
26. Wayne McCormack, Lochner, *Liberty, Property, and Human Rights*, 1 N.Y.U. J. L. & Liberty 432 (2005).
27. Fred Bosselman, David Callies & John Banta, The Takings Issue 59, 101–04 (1973).
28. *Id.*
29. Treanor, *supra* note 14, at 791.
30. Treanor, *supra* note 5, at 708–09.
31. *Id.* at 709.
32. *Id.* at 710–11.

33. *Id.* at 712.
34. *Id. See also Property*, Nat'l Gazette, Mar. 27, 1792, *reprinted in* 14 J. Madison, The Papers of James Madison 212, 267 (R. Rutland ed., 1977).
35. Mark C. Landry, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419, 423 (1985) (citing 2A Nichols on Eminent Domain §7.01).
36. Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 410 (1983).
37. *Id.*
38. *Id.* at 415.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* (citing Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 142–43, 104 A.2d 365, 369 (1954); Randolph v. Wilmington Hous. Auth., 37 Del. 202, 213–14, 139 A.2d 476, 482 (1958); People *ex rel.* Gutknecht v. City of Chicago, 414 Ill. 600, 612–14, 111 N.E.2d 626, 634–35 (1953); Crommett v. City of Portland, 150 Me. 217, 232–35, 107 A.2d 841, 850–51 (1954)).
43. 304 N.W.2d 455 (Mich. 1981).
44. *Id.* at 459.
45. *Id.* at 460.
46. 684 N.W.2d 765 (Mich. 2004).
47. *Id.* at 770.
48. *Id.*
49. *Id.* at 786.
50. 545 U.S. 469 (2005).
51. *Id.*
52. *Id.* at 480.
53. Model Eminent Domain Code § 1002.
54. Model Eminent Domain Code cmt. § 1004; *see also* 1 Orgel, Valuation under Eminent Domain § 38, at 175–77 (1953).
55. 29A C.J.S. *Eminent Domain* § 381 (2005).
56. *Id.*