



PROPERTY OWNER'S BILL OF RIGHTS: DON'T GET TAKEN IN A TAKING

by *Gary Van Cleve*

You've just received a letter from Humongous State Agency informing you that part of that well-positioned parcel you'd been holding for commercial development is going to be condemned—that's right, taken—for an important public project. Can you stop this from happening? Probably not. The government has the power to take private property for public use or a public purpose. But the Founding Fathers, in their infinite wisdom, provided in the Fifth Amendment to the U.S. Constitution that if the government does take some or all of your land, you have a right to be paid "just compensation".

The Minnesota Constitution, even more broadly, requires payment of just compensation for property that is "taken, destroyed or damaged" (Art. I, § 13). Minnesota statutes and case law elaborate further on what just compensation requires of the government when it takes your land. Accordingly, be advised of the following Property Owner's Bill of Rights:

1. You have a right not to have your property taken if it is not for a public purpose or a public use.

This became a hot-button issue after the U.S. Supreme Court's 2005 decision in the *Kelo* case. The case arose from the taking by a city of privately owned homes so that the property could be transferred to the New London Development Corporation as part of a comprehensive redevelopment plan, which

promised thousands of new jobs and increased tax revenues. To many, this smelled suspiciously like the taking of one person's private property for the benefit of another private party. Following *Kelo*, the Minnesota legislature was moved in 2006 to amend the eminent domain statutes to clarify that the public benefits of economic development do not by themselves constitute a public use or public purpose, even if the benefits include an increase in tax base, tax revenues, employment, or general economic health.

2. You have a right to a written offer from the condemning authority that is supported by an appraisal.

The government is required to "make a good faith attempt to negotiate personally with the owner of the property" for direct purchase instead of using eminent domain proceedings. While an offer may sound fair, there may be impacts and damages that have not been taken into account in the offer. Consider, for example, a 10-acre commercially-zoned undeveloped parcel; the government proposes to slice off several thousand square feet from a corner for a road improvement project and offers to pay what may appear to be a fair price for the land to be taken. But does the offer take into account the impact on the remainder of the property that is not being taken? The taking may create difficulties in maximizing the development potential of the remainder on account of setback or access issues. This is compensable loss in the form of "severance damages"—the loss in value to the remainder parcel that has not been taken.

How do you know whether the offer is fair? One way is to ask to see the government's appraisal and to get one of your own.

3. You have a right to see the appraisal that was the basis for the government's offer.

The government is required to obtain at least one appraisal for the property it seeks to acquire, to confer with the property owner in making the appraisal "if reasonably possible" and to provide the property owner with "a copy of each appraisal the acquiring authority has obtained for the property at the time the offer is made." The government must provide you with a copy of the appraisal "no later than 60 days" before filing a condemnation petition in court. Moreover, you have a right to demand that the acquiring authority make available to you all appraisals that were done on the property. It is a good idea to make this request to see whether another appraisal may have been done that reflects a different value for your property proposed to be taken.

4. You have a right to obtain your own appraisal for which you have a right to reimbursement.

Minnesota statutes allow the property owner to obtain an appraisal of the property proposed to be acquired and allow for reimbursement of the cost of the appraisal. The law allows for appraisal reimbursement of up to \$1,500 for single-family and two-family residential property and \$5,000 for other types of property.

5. You have a right to a commissioners' hearing.

After the filing of a condemnation petition in court, there is an initial proceeding to determine "the public use or public purpose, necessity, and authority for the taking." Once the court has ruled that this legal threshold has been met, it appoints condemnation commissioners who are required to be disinterested and knowledgeable in, or actively working in, the field of real estate. The commissioners are charged with inspecting the property and holding hearings to determine the fair market value of the damages you have suffered as a result of the governmental taking. The commissioners report their damages determination to the court.

6. You have a right to reject the commissioners' award and demand a jury trial in a court of law if you feel that the commissioners did not award you just compensation.

The law provides that any party may appeal to the district court within 40 days from the date the commissioners file their report. Filing by any party of such an appeal results in an entirely new proceeding in the district court where you have a right to a jury trial on the amount of damages.

7. You have a right to recover your attorneys' fees if you received too low an offer from the government.

Another 2006 amendment to Minnesota's eminent domain laws was a provision that requires an award of reasonable attorneys' fees to the property owner if the ultimate just compensation award is more than 40 percent greater than the last written offer you received from the government before the condemnation petition was filed in court. The intent of the legislature was to encourage good-faith offers from the government before the matter is forced to court.

8. You have a right to interest at a reasonable rate on the condemnation damages award.

Civil court judgments in Minnesota generally earn interest at a rate tied to federal treasury bonds. The Minnesota Supreme Court has recognized that an integral part of just compensation is interest based upon a reasonable rate of

return, which may not necessarily be reflected in the T-bond rate. Accordingly, the Court ruled that in condemnation cases, the landowner is entitled to a "reasonable rate" of interest, which may be a rate greater than the ordinary civil judgment interest rate. The Court defined a reasonable rate to be "what a reasonable and prudent investor would earn while investing so as to maximize the rate of return over the relevant time period, yet guarantee safety of principal."

9. You have a right in certain cases to "going concern" damages.

You may have a business or trade that is destroyed by the taking, in which case the law provides that you may be compensated for loss of going concern. Going concern under this law means "the benefits that accrue to a business or trade as a result of its location, reputation for dependability, skill or quality, customer base, good will, or any other circumstances resulting in the probable retention of old or acquisition of new patronage" The condemning authority can defeat a claim for going concern damages if it can show that the loss is not caused by the taking, that the loss can reasonably be prevented by relocating the business in the same or similar location, or that going concern damages would duplicate other takings damages being awarded.

10. You have a right in certain cases to damages caused by loss of driveway access.

The 2006 Minnesota legislature also added specific provisions allowing for damages caused by loss of driveway access. The statute requires proof that the taking "permanently eliminated 51 percent or greater of the driveway access into and out of a business and as a result of the loss of driveway access, revenue at the business was reduced by 51 percent or greater." The law specifies the way that loss of business revenues must be measured and shown. The law also includes an express exclusion that the installation of a median does not constitute the elimination of driveway access.

CONCLUSION

The Minnesota Supreme Court in a recent condemnation case stated, "A state's ability to use eminent domain to

take an individual's property is an awesome power." Armed with some knowledge about your rights in eminent domain, you can act to protect them in the face of the government's exercise of this "awesome power", ensuring that you do not get taken along with your land.

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