

## EMINENT DOMAIN WHAT EVERY ARIZONA PROPERTY OWNER SHOULD KNOW

### 1. What is “Eminent Domain”?

Eminent domain is the legal term for the government’s power to condemn private property and use it for the public good. Entities with the authority to condemn include the state, counties, cities, towns and utilities. When the government exercises its power of eminent domain, it is required to pay “just compensation.”

### 2. What is the “right to take”?

To condemn property, the government must show public use and necessity. This is commonly called “the right to take.” Right to take challenges are rare because in most condemnation cases the public use is obvious, such as for a road widening, utility easement or new freeway. Only in the most unusual circumstances will a court deny the government the right to take.

### 3. How does a condemnation action start?

By law, the government must make an offer to purchase, supported by an appraisal, before condemning property. An owner does not have to accept the offer, or may try to negotiate for a higher amount. If the owner and the government cannot reach an agreement, then a condemnation lawsuit probably will be filed. It may be advisable to consult with a lawyer and/or real estate appraiser as soon as discovering that the government intends to make a pre-condemnation offer.

### 4. How does “immediate possession” work?

In order to move forward with construction while a condemnation action is pending, some government entities can ask the court for early possession by filing an application for an Order for Immediate Possession (“OIP”). To obtain an OIP, the government only needs to demonstrate that there is public use and necessity and agree to deposit cash or a bond in the amount of the probable damages, which in most cases will be the amount of the government’s pre-filing offer. OIPs almost always are granted, so much so that the property owner typically stipulates to allow

the government’s early possession. The property owner may withdraw all or a portion of the immediate possession deposit. The amount of just compensation ultimately awarded to the property owner at the end of the lawsuit may be higher or lower than the amount of the immediate possession deposit.

### 5. Does an OIP convey title to the condemning body?

In Arizona, an OIP effectively takes control of the condemned property away from the property owner, but it does *not* pass title from the property owner to the government. The property owner remains the title holder until the case is over, either by trial or settlement.

### 6. What damages are recoverable as just compensation?

If the condemnation takes all of the land, the property owner is entitled to be paid fair market value for the entire parcel. Fair market value is defined as the most probable price a willing buyer would pay a willing seller on the open market. If the condemnation takes part of a parcel of land, the property owner is entitled to be paid the fair market value of the part that is taken, and damages for the decrease, if any, in the market value of the remainder caused by the taking or the construction of the government’s project. The damages to the remainder are called “severance damages.”

### 7. Are economic damages recoverable in a condemnation case?

As a general rule, damages for loss of business during or after construction, loss of business goodwill, and other economic damages are not recoverable under Arizona law.

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**EMINENT DOMAIN Con't****8. What is the “date of valuation” in a condemnation case?**

Under Arizona condemnation law, just compensation is based on the fair market value of the property and severance damages, if any, as of a specific date, called the “date of valuation.” Except under unusual circumstances, the date of valuation is the date the government files the condemnation lawsuit. So, even if a trial is held years later, just compensation is typically calculated based on the market conditions that existed when the lawsuit was originally filed.

**9. Does a property owner have rights when the government announces a future project that will require the condemnation of property?**

The government can announce a future public project that will require future condemnation of someone’s land, and it is not liable for damages even though the land that is “targeted” may in fact greatly decrease in value as the result of the announced public project. However, if the land is ultimately condemned for the project, it must be valued without any increase or decrease caused by the anticipated taking.

**10. Can a property owner build in the path of a future public project?**

The owner of property that is in the path of a proposed project which has been publicly announced (such as a freeway) can build or improve a building in the path of that project and still get paid for the building if and when the government condemns the land. The government cannot, simply by announcing a public project that may involve condemnation, restrict the rights of the owner of the land to use or develop his land. However, to be entitled to compensation for the improvement, the owner must act in good faith.

**11. Is a property owner entitled to legal fees and expert witness fees?**

When land is condemned and the property owner decides to contest the amount of compensation rather than accept the government’s offer, the property owner ordinarily has to bear his own legal fees and expert witness fees. This is true even if the property owner obtains

compensation (by settlement or at trial) that is much greater than the government’s offer. Some attorneys will accept certain condemnation cases on a contingency fee basis.

**12. What about moving costs?**

If a business is condemned for a public project, the property owner or tenant is entitled to be reimbursed some expenses by the government for moving, re-establishing his business and other relocation costs. Homeowners also are entitled to some moving expenses. However, the relocation assistance generally will not reimburse a property owner for all or even most of their moving expenses.

**13. Is there interest on a condemnation award or settlement?**

If the government takes immediate possession of the property, then the ultimate condemnation award bears interest at the prime rate from the date of the OIP until the date of final payment. If the OIP deposit is withdrawn, the property owner is entitled to interest only from the date of the OIP through the date of withdrawal. If at trial or in settlement the property owner obtains more compensation than the government’s deposit, the property owner is entitled to interest on the amount in excess of the deposit. If the award is less than the OIP deposit and the owner withdrew the deposit, then the owner must repay the difference with interest.

**14. Who else might be entitled to condemnation payment?**

Normally we talk about compensation to the property owner, but other parties – such as tenants and lienholders – may have compensable interests in the condemned land as well.

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