

Eminent domain raises questions when used on behalf of the private sector

Phillips Murrah attorney Jennifer Ivester Berry discusses the what, when, how, and why of eminent domain.

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Q: What is eminent domain?

A: Eminent domain, condemnation, taking power – these words sound ominous and forceful, as if the party on the receiving end has no choice but to succumb to the directive of the imposing party and give up something for nothing. However, stop for a moment and remember that with most constitutionally created powers come some series of checks and balances. Eminent domain, in its most simplistic form, is the power to acquire private property for a public use, provided that the property owner receives just compensation. Some of the most recognizable uses of the eminent domain power are for the establishment of roadways, hospitals, railroads and utilities. In more recent years, the use of eminent domain for purposes of economic development has sparked a public policy debate that will no doubt continue for years to come.

Q: When can eminent domain be used?

A: The power of eminent domain originates from the state's constitution, and the Oklahoma Legislature enacts statutes that set out the manner, purpose and through whom such power may be exercised – a system of checks and balances. For

example, municipalities are granted a general power of condemnation under the state statutes, so long as the taking is for a public use and the property owner is adequately compensated. There are certain circumstances and uses that the Legislature has identified as being for the benefit of the public and thus created specific statutes covering them, for example, the removal of dilapidated buildings, the improvement of water and sewer systems, and urban renewal. The Legislature also conferred the power of eminent domain on utility companies, public enterprises and common carriers. Private individuals or companies also may utilize the power of eminent domain for agricultural, mining and sanitary purposes, as well as for establishing private roadways where access is an issue.

Q: How does eminent domain work?

A: The party seeking to condemn property will usually have attempted to negotiate with the landowner to acquire the property. That said, if a municipality or utility company is dealing with numerous parcels of land with countless owners, using the condemnation proceeding can simplify the process and avoid negotiations that may or may not be successful. Once the condemnation proceeding is filed, the court appoints three individuals (commissioners) who will examine, evaluate and inspect the property. The commissioners are instructed to return an award to the court that reflects the fair market value of the property taken, as well as any injury to any part of the property not taken. The award is payable to the landowner even if the landowner contests the award. If, as a result of a contest, a jury finds the fair market value of the property to be an amount in excess of 10 percent of the commissioners' award, the landowner may be entitled to reasonable attorneys and expert fees.

Q: Why do we need eminent domain?

A: Using eminent domain to obtain property for roadways and utilities is rarely a source of contention, even if ultimate

ownership of such property is by a private party. The more controversial issue is whether the government can use its eminent domain power to aid a private party. The U.S. Supreme Court has blessed the use of eminent domain as a governmental incentive for economic development. However, numerous states, including Oklahoma, have taken a more narrow view and require that the use of eminent domain power for economic development must involve the removal, elimination or prevention of blight. Proponents of this power, whether the broader or more narrow application of it, argue that without it being available as an incentive for private development, economic development would be stifled significantly. Others, however, feel that failure to value individual property rights actually dissuades potential residents and business from moving into a community and as such cripples any potential for economic growth. One thing is clear, eminent domain will continue to be used for economic development and as such continue to be a debatable issue in the private sector.



[Jennifer Ivester Berry](#) is an attorney with a solid reputation in guiding real estate transactions with a focus on development, financing and energy. She represents individuals, and privately-held and public companies in connection with a wide range of commercial real property matters.

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