



EMINENT DOMAIN

WHAT TO KNOW WHEN
THE GOVERNMENT TRIES
TO TAKE YOUR LAND

A WHITE PAPER PRESENTED BY
DALLAS & TURNER, PLLC



Imagine that you own a farm or other land that has been in your family for decades. You received notice from the state or federal government that they are exercising eminent domain to build a new road through your property. They include an offer of compensation with their appraisal attached to it.

You're left with numerous questions. Can the government even do that? Can you fight it? Is the compensation reasonable?

What will happen to the rest of your property once the new road is built?



The important thing is to *not do anything* until you've spoken with a lawyer. Chances are that the government's offer is way too low. You may have strong grounds to pursue additional compensation that leaves you on much better financial footing.



EMINENT DOMAIN: Understanding The Basic Legal Framework

If you're surprised to learn that the government has the constitutional power to take your property for public use, you're not alone. This oft-forgotten fact from high school Civics class is called eminent domain. The Fifth Amendment implicitly grants the federal government this power: "[N]or shall private property be taken for public use, without just compensation."¹

Each state also has its own legal framework for eminent domain. In general, at both the state and federal levels, there are two requirements that the government must meet in order to exercise eminent domain and take your land:

	1. The taking must be for public use.
	2. The government must provide just compensation.

Let's break these down further. ▼





PUBLIC USE

All government takings must be for “public use.” However, that phrase isn’t as narrow as you might think.

In a landmark case, the U.S. Supreme Court held that the government could take property for the benefit of a private enterprise so long as it enhances economic development, indirectly benefitting the public.²

However, each state has its own standards and case law around what amounts to public use.³ In most cases, the public use is obvious and indisputable. Examples include taking land for:

- Roads
- Utilities like powerlines, pipelines, and sewers
- Bridges
- Water treatment plants

Areas of rapid growth and development often require more infrastructure, which, in turn, results in more cases of eminent domain.

Should you desire to contest whether the use qualifies as a public

use, you will need to retain an attorney to conduct discovery in litigation to find out more about the project.

If the project is, in fact, found to be a public use, then the case will be set for a jury trial on value only.



JUST COMPENSATION

To exercise its eminent domain power, the government must provide “just compensation” to the landowner. This is often the crux of the issue.

In many cases, the government will start with a lowball offer to try and secure the property at minimal cost. Yet accepting this offer invariably leaves landowners shortchanged. Many property owners don’t realize that they have the right to say no at this stage and, in fact, have a right to a jury trial on the value of the government taking. By turning down the government’s offer, you can start to lay the legal groundwork for getting a fairer result.

HIGHEST AND BEST USE

Just compensation means fair market value based on the “highest and best use” of the property. While market value is often a familiar concept (i.e., comparable sales), highest and best use is not. Highest and best use is a critical distinction because, in many cases, the government will offer you compensation based on the way you’re using the property *now*. But that may not be the most lucrative value for your property. You’re entitled to compensation based on the more lucrative value of how your property *could* reasonably be used. This nuance is what makes compensation *just* in an eminent domain case. For that reason, government appraisers often ignore this rule altogether.

Four factors go into determining what amounts to the highest and best use.⁴ To qualify as highest and best, the proposed use must be:



As you can see, determining the highest and best use involves a complex analysis. Yet, that analysis is worth it because it can yield significantly greater compensation.



HIGHEST AND BEST USE EXAMPLE

Suppose your family has been farming on your property for decades, but in recent years, the land was rezoned for commercial use or the master plan indicates it will be rezoned to a higher use in the future. You are entitled to compensation based not on the value of how the property is currently used (as a farm), but as a far more lucrative property – which could mean it's worth millions more than what you initially thought.

TOTAL VS. PARTIAL TAKINGS

When exercising eminent domain, the government may try to take all your land – what's referred to as a "total taking." These cases are generally more straightforward because the appraiser's task is simply to value the property as a whole.

More commonly, however, the government will only take a portion of your land – called a "partial taking." These cases are more complex and pose the most potential for the landowner to get shortchanged because the law recognizes that partial takings can seriously damage the value of the property that is left with the landowner.



TOTAL VS. PARTIAL TAKINGS (CONTINUED) ▲

When the government takes only a part of your land – as in the example of the family farm mentioned above – it can have a tremendous impact on the rest of your land. Perhaps it introduces privacy and security concerns stemming from greater public access. Perhaps it makes the remaining property inaccessible, too small, too steep, or completely unusable, leaving you with the burden of a property that may not even be marketable. Almost certainly, it will substantially drive down the value of what you have left, and in certain instances, can render the land an “uneconomic remnant.” If you’ve ever seen an abandoned concrete pad or former gas station in a commercial district, then you’ve seen an uneconomic remnant.

Partial takings have the most potential for there to be a sizable gap between what the government is offering you and what you’re legally entitled to receive for just compensation. The government will likely try to minimize or completely deny the impact that the taking will have on the rest of your property. In these cases, strong legal counsel is all the more essential to ensure that you get a fair outcome.

CALCULATING DAMAGES FOR PARTIAL TAKINGS

When the government takes only a part of your property, how is just compensation calculated in a way that takes into account the devaluation of the rest of your property?

The calculation method will depend on the agency doing the taking – whether it’s state or federal. State laws differ slightly. Most states, including Kentucky, follow the “before and after” method of calculating damages, which involves:









- Establishing the fair market value of your property as a whole (in its highest and best use) before the partial taking
- Establishing the fair market value of your property that is remaining after the taking is complete (called the “residue”)
- Compensating you for the difference between those values



WHAT MUST THE GOVERNMENT COMPENSATE YOU FOR?

Not everything is compensable in eminent domain cases. Some of the things that you would think are compensable from a commonsense perspective actually aren't, legally speaking.

WHAT'S COMPENSABLE VS. NOT?

COMPENSABLE		NOT COMPENSABLE	
	The value of the property being taken and the reduction in value of your remaining property		Lost profits for businesses, even if those losses are directly tied to the taking
	Loss of access to the property as a result of the taking		Reduced access or more difficult access to the property
	Necessary fencing costs		Itemized damages for specific losses such as wells, septic tanks, etc. (instead, the property must be viewed as a whole)
	Damage to personal property that is destroyed or reduced in value		Bad faith negotiations

A hand is shown in the foreground, holding a small, detailed miniature model of a two-story house. The model has a grey roof, white shutters, and a white porch. In the background, a real house with similar features is visible, along with other houses and a clear blue sky. The image is overlaid with a dark, semi-transparent rectangular area containing text.

THE 'PROJECT RULE'

A trap for the unwary appraiser is that, when determining the highest and best use after the taking has occurred, the influence of the government project itself can't be taken into account. Any increase in value as a direct result of the government's taking must be disregarded. Essentially, the property must be viewed in a vacuum, apart from the underlying purpose of the taking. This is a common problem, given that the potential future value of land may be tied to the economic benefits of the project to the surrounding area – such as a new and improved road. Indeed, there are some scenarios where the taking makes the property more valuable (called “enhancement”).



CHALLENGING THE GOVERNMENT: WHAT IT TAKES TO BE SUCCESSFUL




Challenging the government's right to take your land in the first place is generally difficult to accomplish. These cases often boil down to the amount of compensation you get. The goal is ensuring that it's a fair amount – and an amount that doesn't leave you shouldering the burden of unusable land.

What exactly does it take to accomplish that?

Expert witnesses are essential for winning these cases. Because “highest and best value” is inherently a professional analysis, appraisers play an essential role in providing expert opinions and evidence as to what the land is worth for its highest and best use.

THREE APPRAISAL METHODOLOGIES

Appraisers generally have three approaches to coming up with a valuation:

	Comparable sales approach , which factors in recent sales of a similar properties
	Income approach , which focuses on the potential income-generating value of the property (more applicable to income-producing properties)
	Cost approach , which centers on the cost to rebuild or replace improvements to the property

The comparable sales approach is the most common method to arrive at fair market value. Indeed, much of any trial consists of determining which sales are truly comparable and which are not.

THE BATTLE OF THE EXPERTS

As with other types of witness testimony, when it comes to a “battle of the experts,” it often comes down to who’s more credible. The government typically has a roster of appraisers who devote a significant percentage of their careers to these cases. As a result, their expert witnesses are often not credible and definitely are not independent.

While appraisers factor heavily into establishing key valuation evidence, they often aren’t the only ones a landowner will need to build a strong case. Others include:

- **Architects** to create site plans that reflect a more accurate valuation for highest and best use or to analyze building and zoning codes
- **Engineers** to determine access feasibility
- **Real estate brokers** to provide market analyses
- **Surveyors** to establish the legal boundaries of the land in question
- **Specialists** such as hydrologists and geologists when necessary to illuminate site conditions and limitations
- **Contractors** to provide estimates on construction costs (especially in “cost-to-cure” cases)

Ideally, each of these experts will provide a puzzle piece of evidence that fits together with the evidence of the others to create a cohesive, well-supported big picture. This “layering of experts” is a critical tactic to cover all your bases in presenting a solid case backed by thorough and detailed evidence.



THE ADVANTAGE OF PRESENTING YOUR CASE TO A JURY

Eminent domain cases involve an obvious imbalance of power. On one side, the government has vast resources and the legal ability to force a sale of your property. On the other side is you, the individual landowner or business owner as the underdog.

Juries are often quick to pick up on that disparity. A well-selected jury will be favorable to property owners because juries do not like abuses of power. As long as the expert evidence on your side is well grounded – and not inflated or overreaching – you will almost certainly have the upper hand when it comes to winning over a jury.

THE KEY TAKEAWAY

As you can see, eminent domain cases are complicated. But, as a landowner, you have many important rights. Foremost among them is the ability to say no to the government's offer of compensation. When you do so, the government will be forced to sue you, which gives you the ability to present a strong case before a jury.

The best way to protect your rights is to contact an attorney with extensive experience in this niche area of law.



ATTORNEY JAMES RYAN TURNER

Mr. Turner is a partner at the law firm of Dallas & Turner, PLLC. He is a strong ally for landowners facing eminent domain proceedings and a well-respected authority on eminent domain law.

Mr. Turner is skilled at taking on powerful opponents, such as government agencies, in litigation. His multimillion-dollar case results reflect the high level of dedication he brings to every case. That dedication to clients has earned him national recognition, such as selection for inclusion in Kentucky Rising Stars and [Kentucky Super Lawyers](#) for multiple years. Based in Florence, Mr. Turner handles eminent domain cases throughout Kentucky as well as Ohio.



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SOURCES

¹U.S. Constitution, Fifth Amendment.

²Kelo v. City of New London, 545 U.S. 469 (2005).

³See, e.g., Ohio Rev. Code §163.09; Kentucky Rev. Stat. §416.660

⁴Uniform Appraisal Standards for Federal Land Acquisitions, 1.4.5 (2016).

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