

Your Rights Under Condemnation in Missouri

Stephen F. Matthews and Timothy W. Triplett
Department of Agricultural Economics
College of Agriculture

Each year federal, state and local government units condemn many acres of land. Farmers and others faced with this prospect must be familiar with the meaning and procedures of condemnation.

Condemnation refers to the legal power of the government to take private property for public use. The government acquires such property under the power of eminent domain. For example, a governmental agency might acquire a strip of land from you to construct a new highway, but you will be paid for it. This process is called *condemnation*, regardless of whether actual court action is involved.

This guide explains this procedure and outlines your rights under condemnation. However, it is only a general statement of the law and is not intended as a substitute for legal counsel.

If you are faced with the prospect of having some or all of your property condemned, don't hesitate to consult your attorney to determine your rights. If you know the nature and extent of your rights, you are in a much better position to negotiate successfully with the representative of the condemning authority.

Source of Eminent Domain

Eminent domain did not arise from any specific power granted in either the federal or state constitution. Rather, most authorities have said it is an *inherent* power of government. That is, even though the power was not granted specifically by the constitution, the law has long implied the existence of the power simply because government could not operate efficiently without it.

If the power did *not* exist, government could buy only those lands which the owners had offered for sale. This would create problems in constructing highways, utility lines and other public services.

It is generally agreed that a government *must have* the power of eminent domain in order to serve its citizens. However, as an inherent power, it is limited by both the state and federal constitutions. The limitations on this power exist for the protection of private individuals and constitute the primary source of disputes which may arise between the parties to a condemnation proceeding.

Limitations on the Power

Who Has the Power? Under federal and state constitutions, the power to take land under eminent domain is limited. In Missouri, the legislature has the primary authority to condemn. This authority may be delegated to other governmental units, such as a city or county government, the state's own agencies, private corporations, or individuals, under limited circumstances. The latter will not be discussed in this publication.

The federal government also has authority to delegate the power of condemnation to subordinate units. Many state and federal statutes empower various governmental subdivisions to bring a condemnation proceeding. Unless the power of eminent domain is delegated to a given governmental unit by an enabling statute, the power cannot be exercised.

Projected Use of the Land. Assuming that such authority has been granted to an agency, there are two other limitations imposed by the state and federal constitutions. The first is that the land must be taken for public use. Public use means that the public must derive a benefit from the taking. It is not necessary that the land be open to the general public. However, property may not be taken for trade purposes or for the benefit of some select group.

Public use should be distinguished from public necessity. While one of the limitations on eminent domain is whether a *public use* exists, a landowner has no legal right to challenge *public necessity* in Missouri. Public necessity refers to *how much* land is being appropriated and the right to appropriate more than the landowner feels is needed. In Missouri this is considered to be a *political* question and as such is decided by the political process.

Usually a commission is set up to hold hearings regarding public necessity. This is the *only* method of challenging such action. The landowner has no right to refuse to sell the property on these grounds. Examples of challenges to public necessity are questioning the width of land to be taken for building a road or objecting to the method of construction of a bridge.

Right to Just Compensation. Another important limitation on eminent domain is the right of the landowner to receive

just compensation for the property taken. The three elements used to determine just compensation to the landowner are *fair market value*, *special damages* and *special benefits*. Using these factors, a jury can determine an amount to be paid to the landowner that will be just compensation for the damages that he has suffered as a result of the taking.

The formula used in Missouri to determine just compensation is the fair market value of the entire tract of land before the taking minus the fair market value of any land that remains after the taking. The difference in the "before" and "after" values of the land is the amount of damages you should receive.

If all of your land is taken, the landowner is entitled to the *fair market value* of the land before the taking. Fair market value generally is defined as what a willing buyer would pay a willing seller for a tract of land. This means that no payment is required for feelings of personal loss one might have in giving up the land. He is treated as if he were willing to sell. On the other hand, this value does not refer to the value of land as if the seller were forced to sell in order to pay his debts.

When only a partial taking of your land occurs, the landowner is entitled not only to the fair market value of the land taken, but also to any *special damages* to the remaining land caused by the project. Special damages can be figured separately or can be taken into consideration when figuring the "after value" of the remaining land. Either way, a landowner must be paid for special damages when a partial taking occurs.

Special damages may be broken down into two categories: *severance damages* and *consequential damages*. Severance damages result from dividing property that was once one tract of property into two or more plots. This may lower the value of the property that remains; therefore, the owner must be compensated for this damage.

Consequential damages may occur when only a part of the property is taken but the remainder of the property has less value because the proposed public project will destroy or impair the fair market value of the remainder. For example, one property right is lateral support for property from adjacent landowners (e.g., if your neighbor digs a basement near your boundary, he must not permit your land to fall or slide into the excavation negligently). If such support is impaired or destroyed because of a public taking, then consequential damage has occurred which should be compensated.

Another example of consequential damage is the construction of a road or bridge that interferes with drainage so as to cause flooding of remaining land. In general, anything that lowers the fair market value of the remaining land after a taking may be considered consequential damage.

The final element in determining just compensation for land taken is *special benefits*. Special benefits are those things which increase the fair market value of the land that remains after the taking. Special benefits are basically the opposite of special damages. Special benefits increase the value of remaining land, whereas special damages decrease the value of the remaining land.

For example, if the state takes part of your land for the purpose of improving drainage in a given area, you must be paid just compensation for the land taken. However, if the property remaining is more valuable due to the better drainage, you have experienced a special benefit. The value of this special benefit may be deducted from the fair market value of the land taken for construction of the ditches and from any special damages you also may have suffered.

It is important to note, however, that no deduction from your award will be made for benefits that are general—those where the benefit is not unique to you. The same logic is true of special damages. If the damages to your property are

general in nature—that is, the damages are not unique to you—no special damages will be paid to you. An example of general damages may be increases in traffic or noise caused by a new highway. General damages are sometimes also referred to as "inconsequential damages" and will not affect the determination of just compensation.

Eminent Domain Procedure in Missouri

Non-Judicial Determination of Damages. When the government takes property by condemnation, it must follow certain legal procedures. The whole process begins when a representative of the condemning agency approaches a landowner concerning sale of the property. The landowner and the agent then bargain, each trying to reach a fair value. In the vast majority of cases, the process ends at this point. An agreeable price is negotiated by the landowner and the agency, and nothing remains but the conveyance of the property.

Before a landowner makes a final agreement to sell the property, even though he feels a fair value is offered, it is wise for him to seek competent legal counsel so that he may be fully informed of his rights. The lawyer knows the peculiarities of both real estate law and eminent domain law and can guide the landowner in reaching his decision. His advice in such matters may prove valuable in determining how much compensation must be paid.

Judicial Determination of Damages. If no agreement can be reached, the court procedure begins. The first step occurs when the condemning agency files a petition in circuit court. This is the same method by which any lawsuit begins, since a condemnation proceeding carries a guarantee of trial by jury of all factual issues.

The petition names the condemnation agency as plaintiff, and those having compensable property interests as defendants. It also contains a statement setting out the statute which enables the agency to take land. The clerk of the court will then issue a summons giving interested parties notice that a hearing will take place. The notice may, under extraordinary circumstances, be made by publication in a newspaper in a manner specified by law.

Regardless of whether notice is given personally or by publication, the initial hearing gives the landowner the opportunity to challenge the agency's legal procedure as well as its power to condemn property. If the proper procedure has been followed, the judge will then appoint three disinterested freeholders (property owners) as commissioners to assess the damages.

After examining the property, these commissioners file a report with the court. At least two of the commissioners must concur in the report before it is returned to the court. The clerk of the court then gives all parties to the condemnation proceeding notice of the report.

The agency and the landowner have 10 days after such notice to file exceptions to the report. If exceptions are filed, then a trial by jury will follow to determine just compensation. However, if neither party objects to the report, the agency pays the landowner the amount listed in the report, and title to the property is conveyed to the agency.

Even if exceptions are filed to the commissioners' report and the case is to be tried before a jury, the condemning agency can take immediate possession of the land by depositing with the circuit clerk the amount set by the commissioners as just compensation. If the jury should later set the award higher than the commissioners' award, the amount set by the jury will be the just compensation.

Only a small percentage of condemnation procedures initiated actually result in a trial. More often, a settlement is reached long before the trial stage.

When the United States government or its agencies condemn property, the procedure differs somewhat from Missouri judicial procedure. If the enabling statute requires that a tribunal has the power to determine just compensation, then their determination will be final on that issue. However, other issues may be taken before the federal courts, such as whether a public use exists or whether the statutory authorization exists.

If the statute does not require a tribunal to determine just compensation, the federal District Court, at its discretion, will appoint commissioners to determine just compensation or hold a trial on the issues with a jury to make the findings. If empaneling a jury and holding a trial would place a hardship on jurors and the circumstances surrounding the evaluation of the property appear to require special knowledge, the District Court will appoint commissioners.

Damages Which Must Be Compensated

Ownership of property does not imply that the owner can use his land in any way he wishes. Zoning and public health laws are examples of limitations placed on use of property that *need not* be compensated. But where the public is taking legal title or an easement across land, compensation is required.

Perhaps the primary question in the minds of persons whose land is being taken is what sorts of things must be compensated. In general, any interference with a *possessory interest* in property must be compensated. Such interference may occur when the property owner is deprived of any of the following property interests:

- loss of land and improvements (buildings, fences, etc., are considered only to the extent that they add value to the land);
- loss of right to use water because the natural channel of a stream is changed;
- easements (e.g., right of passage across another's property);
- unreasonable impairment of access of right of way to the general system of roads and highways;
- loss of natural drainage due to a public improvement; and
- alternation of road grade which lowers value of abutting property (this does not include the loss of convenience to landowner; he may recover only for the lowering of the value of his property).

This list does not include all of the possibilities for which you may be compensated. However, it should give you an idea of the sorts of damages which are compensable. Remember that a compensable loss occurs as listed above only when such loss lowers the value of the owner's interest in the property.

Inconsequential Damages: No Compensation

Certain damages have been held by the courts to be what is referred to as general or inconsequential damages. As noted earlier, a landowner has no right to be compensated for general damages. Examples of such damages include:

- increased chances for personal injury because of a public improvement;
- obstruction of a street for repairs;
- loss of profits of a business while in the process of moving, even though condemnation forced the owner to move his place of business;
- costs of additional fencing (however, loss of value of the *land* needing additional fencing may be recovered);
- increases in traffic, dust or noises (except if some type of trespass or nuisance occurred);
- loss of sentimental value;

- speculative value because the land is being condemned;
- decrease in traffic in front of your business; and
- the fact that you are now on a service road instead of having direct access to your property from the main highway (if you still have reasonable access to your property).

Of these examples, speculative value is most often the subject of confusion, even though Missouri law in this regard seems to be fairly clear. Land being condemned is valued as if it were being used in the most profitable way at the time of the taking.

For example, suppose a tract of land is currently being used for agricultural purposes, but it is located to permit residential development. If its fair market value for residential purposes is greater than its value for farming at the time the land is condemned, the owner is entitled to be paid on the basis of its value for residential use. However, the owner isn't entitled to be paid for the increase in the value of the property because of the public improvement.

Moving Expenses

The amount of money you will receive as just compensation for your property, whether set by commissioners or by a jury, will not include an amount to compensate you for your costs in moving from your property or acquiring replacement housing. However, in 1970 Congress enacted the "Uniform Relocation Assistance and Real Property Acquisition Policies Act." The purpose of this Act was to establish a uniform policy for the fair and equitable treatment of persons displaced from their property when *federal* funds are used for the project.

The Uniform Act provides for monetary payments for people displaced from their homes to help defray the costs of moving and acquiring a new home. This Act is explained in UMC Guide 501, "Protection for You When Your Real Property Is Taken by Federally Financed Programs." Consult that publication for a discussion of when the Uniform Act applies and for a more detailed explanation of possible payments available to you if you are forced to move from your property.

Persons to Whom Compensation Must Be Paid

Persons to whom compensation must be paid include not only those who have a present ownership interest but also those who have or may have a future interest in the property. Lien holders, owners of future interests in the land and, in some cases, tenants must be compensated, as well as the person holding the present title or possession. The value of the land is distributed among those holding such interests in proportion to the value of their respective interests. If a tenant holds a lease worth \$2,000 and the land's fair market value is \$10,000, the owner of the land would receive \$8,000. This represents the value of the landowner's interest in the leased property.

This distribution among the respective interest holders is not, however, made by the jury hearing the condemnation suit. The jury will set only a lump-sum award for the property, leaving the interest holders to decide how the award will be divided.

Land Taken for Public Use Without Proper Procedure

Occasionally, the public has begun using private property without authorization from the owner and without following the proper legal procedure. Under such circumstances, the landowner is required to begin legal action at his own expense to prevent the public from using the property. He may bring

court action to recover damages and also may get an injunction to force the public to cease its use until the land is acquired by the public legally. Such a lawsuit is referred to as an *inverse condemnation* proceeding.

If such use occurs and is not challenged for a long period of time, the landowner runs the risk of not receiving damages. In addition, the public may obtain the right to continue using the property by virtue of such extended use under some circumstances. This is known as the "adverse user" doctrine. Therefore, if members of the public are presently making an uncompensated and unauthorized use of your property, it would be wise to consult your attorney about your rights.

Additional Information— Court Costs, Interest, Legal Fees

The condemning agency may take possession of the property being condemned at any time after the filing of the commissioners' report by paying the amount called for by such report into court. Up to this point, all costs associated with the condemnation case are paid by the condemning agency in Missouri. All other costs of the judicial proceedings are distributable by the court between the parties as it deems just. Each party must pay his own attorney's fees.

If the jury ultimately determines that your property is worth more than the amount listed in the commissioners' report, the agency must pay interest at the statutorily prescribed rate of six per cent for any amount in excess of the commissioners' assessment.

Summary

When you are approached by an agency having the power to condemn property, make certain you know your rights. Familiarize yourself with the value of property in your area. If you cannot reach an agreement on the price or if you feel the agency has no right to take your property, seek the advice of an attorney.

Another important factor of which you should be aware is the federal income tax treatment of the money you receive for property taken by condemnation. You legally can avoid paying any income tax on this money if you purchase qualified replacement property within the period of time specified by the tax laws.

For information concerning the tax aspects of condemnation, see Internal Revenue Service Publication #549, "Condemnation of Private Property for Public Use," available at your local IRS office.