

Washington Eminent Domain Law In a Rapidly Changing Region

By Kinnon W. Williams

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In-migration to our region is changing the way we live and how we traditionally practice law. This is as true for attorneys involved in eminent domain as for those focused on legal issues typically identified as matters of race and social justice.

Today, more than 4 million people call the Puget Sound area home. By 2050, the Puget Sound Regional Council expects the combined population of King, Snohomish, Pierce and Kitsap counties to approach 6 million people. With such growth comes momentous cultural and economic diversification.

The Puget Sound region is diversifying at a faster pace than the nation as a whole. People of color today comprise 35 percent of the region's total population compared to 15 percent in 1990. In King County, people of color are the majority in several cities, among them Bellevue, Redmond, Kent, Renton, SeaTac and Tukwila. Countywide, 22 percent of all residents are now foreign born.

This growth and the accompanying influx of capital and increased community needs have already resulted in greater opportunity and demand for more and improved infrastructure. Although a significant amount of the ever-growing demand will continue to be met by private industry, there will doubtless be immense pressure on local governments to expand their planning, financing and building for the public benefit.

Such growth and subsequent development do not automatically provide equitable benefits. In point of fact, they may threaten the welfare of some — especially low-income communities of color.

There is little dispute that improvements to our transportation and utility systems are necessary, and that new parks, trails, schools and public safety facilities are crucial to maintain our quality of life. Debates, however, rage over about how and where these projects should be built.

Although the where and how are determined over the course of years of planning, the impacts on individuals and businesses are often measured only at the end of the process, immediately prior to construction. In newly or highly diverse communities, this can lead to unintended or even unimagined consequences.

A recent example occurred in Tukwila. The city put considerable resources into siting a new regional justice center, but stopped short of reaching out to affected immigrant business owners to ensure they understood the project would result in their dislocation. Tukwila wound up defending itself in the media against charges of racial bias. Eventually, Tukwila resolved this matter with its immigrant community, providing relocation assistance and funds to affected business owners.

Individuals, or even small groups of individuals, are quite often limited in their ability to shape large projects, in part, because the benefit to the public is generally a paramount consideration. That does not mean the potential risks of gentrification and displacement related to public investment can be treated lightly; they certainly will not be overlooked by the local community.

In the most basic of terms, this means government, businesses and their counsel can and should do all they can to assure property owners and tenants are made aware of a potential taking early on, are compensated fairly, and that they receive all the relocation benefits they are legally entitled to receive.

To that end, cultural literacy is key. It is especially important for government to demonstrate cultural competency. Governments exist to benefit their citizens. It can be argued that the intent of relevant state and federal laws is to provide fair and consistent administration of the law to all people — and that requires an understanding of the citizenry. Indifference on the part of agencies to the changing needs of a diversifying population may be interpreted as bias against citizens of color and may tarnish the governing body's reputation and undermine faith in the justice system.

It is not enough to rely on a practice-as-usual approach. For the attorney involved in eminent domain actions, it is increasingly important to consider racial and social equity throughout the eminent domain process — whether representing a governmental entity or a private individual. This may be as straightforward as having interpreters available at meetings or as complicated as advising an agency to consider alternative sites for development.

Washington's Eminent Domain Process Unique and nuanced

In Washington, an eminent domain action occurs in three phases: first, the determination of public use and necessity; second, the amount of compensation to be paid; and third, the payment of the just compensation and the transfer of title to the condemning authority.¹ Just compensation is determined judicially; relocation assistance, which can be equally if not more important to tenants, involves an administrative process.

While the process appears fairly straightforward, it is unique and nuanced. So much so that King County Superior Court has recently adopted a specific case schedule for eminent domain matters.

Although RCW Title 8 sets forth the bulk of the statutory procedures related to eminent domain, it is important to note that there are several specific statutes related to actions involving regional transit and highway mega projects, e.g., RCW chapters 47 and 81. However, the process is essentially the same.

Just Compensation

A determination of just compensation can be a lengthy process, beginning with the filing of a petition of eminent domain and concluding with a judicial ruling. Adherence to the rule of law throughout is crucial to avoiding unrealistic expectations and unnecessary conflict, and to secure an outcome all parties can live with.

Petition of Eminent Domain

Eminent domain actions are initiated by filing a petition. The petition:

- (1) is filed in the county where the property is situated;
- (2) sets forth with reasonable certainty the description of the property;
- (3) states the objective for which the property is to be acquired;
- (4) names each and every owner with an interest in and to the property;

(5) asks that the court declare the purpose for which the property sought is a public use and that it is necessary; and

(6) asks that the court or jury ascertain the amount of compensation to be paid for the taking or damaging of the property. No answer is required.² However, a notice of appearance must be entered to avoid default.

Hearing on Public Use and Necessity

What is a public use is a question of law.³ “It is the use to which the property is applied, and not the ownership, that marks such use as public or private.”⁴

The question of necessity, although determined by the court, is essentially legislative. Absent a showing of arbitrary, capricious or fraudulent action, the legislative decision is always upheld. In this context “necessity” means reasonable necessity under the circumstances, not an “immediate, absolute or indispensable need, but rather considers the right of the public to expect or demand that certain services be provided.”⁵ Necessity also includes “reasonable anticipation of future needs.”⁶

Although the determination of public use and necessity is made after a hearing, live testimony is not required and can be established by declarations.⁷

Any appeal of an order declaring public use and necessity must be made promptly — within five days of the order for state actions and 30 days for those involving cities. (See RCW § 8.04.070 for state; RCW § 8.08.040 for counties; RCW § 8.12.090 for cities.)

Possession and Use

Following entry of the order adjudicating public use and necessity, the acquiring agency generally seeks possession and use of the property. First and foremost, agreeing to give possession and use does not in any way prejudice the property owner’s right to contest the amount of compensation being offered.

However, the property owner has only 15 days from the date of the entry of the order adjudicating public use to stipulate to possession or waive any right to obtain attorney fees and costs pursuant to RCW § 8.25.070.

Discovery

Although most, but not all, agencies now consider it the best practice to provide appraisal information with the initial offer, that is not yet required by law. While other forms of discovery may immediately be used, RCW § 8.25.120 requires that appraisal information be reciprocal and contemporaneous.

Therefore, before engaging in other forms of discovery, it is always best to wait and exchange appraisal information first, so you can gauge the amount in dispute.

Trial and Witnesses

The sole issue in an eminent domain trial is to determine just compensation. This requires the expert testimony of a real estate appraiser who can testify regarding the potential uses of the property, known as highest and best use.⁸ While evaluation of the property generally must be made in terms of uses permitted under existing zoning regulations,⁹ an exception is available if there is a reasonable

probability of a zoning change.¹⁰ Experts may not rely on assessed values, nor on sales made under threat of condemnation.¹¹

Property owners are normally permitted to testify as to fair market value of their property upon the assumption that they are familiar with their property and the uses to which it is adaptable.¹² However, an owner's testimony may be excluded if it is not based on sound valuation principles.¹³

Jury instructions for a condemnation case are set forth in Washington Pattern Jury Instructions, WPI 150 to 151.¹⁵ While the jury may view the property, the viewing is not considered evidence under WPI 150.¹²

Following trial, the court shall award reasonable attorney and expert witness fees to the property owner, provided no written offer in settlement has been served 30 days prior to trial or the judgment exceeds by 10 percent or more the highest written offer in effect 30 days prior to trial. Further, under RCW § 8.25.070, the condemnee is only entitled to reasonable attorney and witness fees if the condemnee grants immediate possession and use of the property.

Once just compensation is determined, a decree of appropriation is entered, vesting legal title to the property in the condemning agency under RCW § 8.04.020. A certified copy of the decree should be filed with the county auditor in the same manner as a deed pursuant to RCW § 8.04.120.

The condemning authority is required to pay the just compensation into the registry of the court as a condition of transferring title. The condemning authority waives its right of appeal of the award by paying it into the registry of the court prior to filing a notice of appeal.¹⁴ Likewise, a property owner who draws down the award paid after decree of appropriation, waives the right of appeal.¹⁵

The parties in interest may thereafter seek to withdraw those funds pursuant to RCW § 8.04.140. When there are conflicting claims, the court will make an order directing payment to the claimants following a motion or hearing on the claims. Conflicting claimants may include mortgage holders, lien holders, tenants and judgment creditors.

Relocation Assistance

Relocation assistance for people and businesses displaced by public projects is codified under RCW Chapter 8.26.

A major shift in the law in 2017 now prohibits what was known as the "local opt out" for projects not using federal funds. Under RCW § 8.26.010, relocation assistance must be paid to displaced persons and businesses in all acquisitions made under threat of eminent domain. In passing the law, the Legislature recognized the inherent unfairness of the "opt out" provision.

Prior to the passage of legislation in 2017, under RCW Chapter 8.26, "Real Property Acquisition Policy," state and local governments were required to offer relocation assistance only if the projects in question were funded in whole or part by federal monies. This provision had been included in an effort to provide relief to jurisdictions undertaking programs and projects of limited impact. Many municipalities interpreted the default as justification to withhold relocation assistance. Some even went so far as to break large projects into parts and segregate funding to avoid paying relocation costs. That is no longer allowed.

Relocation payments are vital to tenants and in some instances exceed the just compensation for the taking. Relocation assistance has three basic components: advisory services; moving costs; and business re-establishment expenses. All expenses must be reasonable, actual and necessary. There is also a distinction between how businesses and homeowners are reimbursed for expenses. It is important to note that while business moving costs are unlimited, re-establishment expenses are limited to \$50,000.

When working to establish costs, it is crucial that clients' expectations be based in the law — and not headlines or wishes. Just like appraisers in eminent domain proceedings, relocation experts are invaluable in making sure that reimbursement requests are properly categorized to maximize reimbursement.

The goal for all lawyers in eminent domain proceedings should be to assure that all affected parties be fairly and justly compensated. That goal can be attained by understanding the process, staying up to date on the law, including available benefits, and respecting our increasingly diverse communities. ☐

Kinnon W. Williams' practice focuses on eminent domain. He is co-author of the WSBA Real Property Desk Book Chapter on Eminent Domain, acts as a mediator and arbitrator in eminent domain actions and most recently presented on the challenges of mass relocation of immigrant businesses at the American Law Institute annual conference on eminent domain.

Williams and Bart Freedman will be the co-chairs of the annual "Eminent Domain and Condemnation Conference" on May 10 at the Washington Athletic Club in Seattle.