

BUILDING BLOCKS

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DESIGN PROFESSIONALS & EMINENT DOMAIN

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In addition to politicians, it is certainly conceivable that design professionals (architects, civil engineers, land planners and landscape architects) may be involved with the land use control mechanism known as eminent domain. A design professional may have a client that owns land, when at the same time, the government wants to acquire their terra firma. (*from Latin, literally "firm land"*).

The source of eminent domain is rooted in the US Constitution's 5th Amendment (1789), and has been employed by our courts throughout the land.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy¹ of life or limb; nor shall be compelled in any criminal case to be a witness against himself,² nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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So, for example, your A/E firm is retained to provide consulting services to develop a master plan to design a connecting roadway link between two urban areas that are underdeveloped. Your services could include identifying properties that could be used for the roadway and limited access points. Your firm could also provide additional services to engineer the roadway, since your firm is intimately familiar with area. Such a project is underway known as Cleveland's "Opportunity Corridor," linking the end of Interstate 90 at East 55th Street to University Circle that includes Case Western University, the Cleveland Clinic and University Hospitals.

The private property land owners involved in such a roadway project could voluntarily sell their land for fair market value. However, if a private property owner refuses to sell or holds out for an unreasonable amount of money, eminent domain could be utilized. Your A/E firm could even find itself as an expert for the fair market value of the individual private properties.

THE OPTION TO USE EMINENT DOMAIN

If eminent domain is employed to acquire private property, a two part analysis must occur.

First, the land in question must be used for "public use."

Secondly, the private land owners must be "justly compensated."

Let's put the two part analysis to the test. Historically, eminent domain has typically been used to acquire land to construct roads, tunnels and bridges. This part of the analysis is met with a roadway project, since the transportation project is for "public use."

Eminent domain has also been used in situations there is a need to acquire private land for unusual situations, such as when the National Parks Services (NPS) took the site of Flight 93's crash in Shanksville, PA on September 11, 2001. The "public use" analysis would be met since the sacred memorial site would be used for the public. (The land owner initially wanted to use the site for a for-profit museum.) There was no doubt that the NPS would eventually take the land. The question was: "What was the just compensation to be paid?" The dispute as to what "just compensation" was litigated in the courts, and was finally resolved with a payment of \$1.5 million. (The land owner had demanded to be paid \$23 million.) A design professional could be involved in such a situation to investigate mineral rights to determine if there was coal, oil or natural gas that would impact the fair market value such as the Shanksville site.



In lower Manhattan, the land acquired for the twin towers was also the subject of an eminent domain dispute. However, the World Trade Center (WTC) was not for "public use," such as highway. Rather, the WTC site was owned by a developer, and involved commerce. The Courtesy Sandwich Shop owner did not want to sell his business, but by the theory "public purpose," the WTC land was acquired. The courts in New York stretched the 5th Amendment's "public use" to "public purpose." Ironically, that regrettable

Memorial of Flight 93 marked with a large boulder.

Photo: <https://nypost.com/2014/10/03/fire-burns-three-buildings-at-flight-93-memorial-site/>

day of 9/11 involved two private properties hundreds miles apart, both with a history of eminent domain.

“Public purpose,” as opposed to “public use” is not without controversy. A line of court cases have been decided against it, and to this day, some states have crafted legislation such as the following:

Ohio Senate Bill 167 (2005)

Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task force to study eminent domain issues.

Ohio Senate Bill 7 (2007)

Stipulates that public use for which eminent domain may be exercised does not include conveyance of property to a private commercial enterprise, for economic development purposes or solely to increase tax revenue. Increases from a majority to 70 percent the percentage of parcels that must be blighted before an area can be designated as a blighted area, and adds a detailed definition of what constitutes a blighted parcel. Prohibits a determination that a property could generate more tax revenue as the basis for designating a parcel as blighted. Requires an agency to adopt a comprehensive plan describing the need to take property in a blighted area before exercising eminent domain and requires local legislative approval.

UNDERSTANDING EXPECTATIONS

In conclusion, if a design professional has a client that owns property and is asked to sell their land to the government for some “public use,” an A/E should have a general understanding of the land use mechanism known as eminent domain. That understanding can help establish the expectations with the client, and avoid misunderstandings when providing professional services.

¹ Known as the “Double Jeopardy Clause.”

² Known as your “Miranda Rights.”

About the Author

Eric O. Pempus, FAIA, Esq., NCARB, ORSA has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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Mark your calendars for Eric's upcoming Continuing Education Programs:

Webinars:



“Project Delivery for Engineers”
Cleveland Engineering Society Webinar
April 24, 2019 - 11:30 a.m. – 12:30 p.m.

Conference Seminars:

“Solar Access Rights/Cast No Shadow on my Solar Collector”
2030 Districts, Cleveland
Building Education Series 2019 – Solar & Wind Technology
Oswald Building, Cleveland
March 21, 2019 – 8:00 a.m.



“Empowering your Ethics in a Changing Architectural Culture”
Quebec City Conference

Ontario Association of Architects, Quebec, Canada
May 23 and 24, 2019 - 10:30 a.m. – 12:00 p.m.

“Engineering Law & Ethics”
Half Moon Education Seminars, Middleburg Heights, OH
May 30, 2019 - 8:30 a.m. – 5:00 p.m.



“Practice Management Case Studies: From Disaster to Resolution”
AIA National Conference on Architecture 2019, Las Vegas, NV
June 5, 2019 - 1:00 p.m. – 5:00 p.m. Workshop

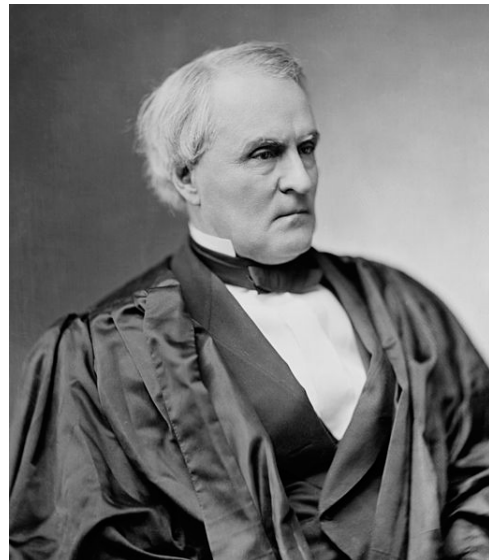
FUN FACT:

Eminent Domain

Kohl v. United States (1876)

For approximately the first 100 years in U.S. history, eminent domain lay dormant.

The U.S. Supreme Court first examined federal eminent domain power in 1876 in *Kohl v. United States*. This case presented a landowner's challenge to the power of the United States to condemn land in Cincinnati, Ohio for use as a custom house and post office building. Justice William Strong called the authority of the federal government to appropriate property for public uses "essential to its independent existence and perpetuity." *Kohl v. United States*, 91 U.S. 367, 371 (1875).



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