

Mall Cases Highlight Process of Eminent Domain
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*Article originally published in the January 10, 2014, Keep it Legal Section
of the Northern Colorado Business Report*

Use of eminent domain is almost always contentious and can be very complex. A pair of high-profile local events in which this condemnation power has been used or threatened – in Longmont for the redevelopment of Twin Peaks Mall and in Fort Collins in the Foothills Mall redevelopment – suggests that a basic primer on eminent domain, how it is exercised and which entities have the power to utilize the process, may be useful to businesses and landowners.

Generally, the power of eminent domain is the power of federal or state government, or their respective delegates, to take private property for public use. In Colorado, the use of such power is governed by the U.S. Constitution, the Colorado Constitution and Colorado Revised Statutes. While the power is applied most commonly to take real property, it also can be applied to take personal property or even intangible property such as contract rights and copyrights.

Under the Fifth and 14th amendments to the U.S. Constitution, property owners are entitled to receive just compensation and due process for any property taken. Colorado's Bill of Rights, found at Article II in the Colorado Constitution, provides similar protections:

“Private property shall not be taken or damaged, for public use or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”

In other words, whether the exercise of the power of eminent domain is for public use is a matter for judicial determination, and the court is not bound by the claim of such public use by the condemning party.

Colorado statutes set forth a long list of government entities, corporations and persons authorized to use eminent domain. In addition to the United States and the state of Colorado, the list includes: state educational boards; cities, counties, and towns; 40 different kinds of single-purpose districts, special districts, authorities, boards, commissions and other governmental entities, such as school districts, power authorities, improvement districts, urban-renewal authorities, and regional transportation districts; and 19 different classes of individuals and corporations including pipeline and cemetery companies, mineral owners needing rail spurs and telephone, power, and gas companies.

When considering use of eminent domain, the condemning party must follow several steps to acquire a targeted property. First, the condemning party must provide notice of its intent to acquire such property to the owner(s), along with instructions regarding appraisal if the subject property is valued at \$5,000 or more. The notice must indicate that the condemning party has the right to use eminent domain if the parties cannot agree to terms of a voluntary transfer. After providing such notice, the condemning party then must negotiate with the owner or owners of the targeted property and make a good-faith offer to purchase it. Colorado statute and case law require, as a prerequisite to the exercise of the power of eminent domain, that the condemning party has been unable to agree on the compensation to be paid to the landowner or landowners after good-faith negotiations about such payment.

If negotiations between the parties fail, then the condemning party may file a petition seeking the condemnation in the district court of the county where all or a part of the subject property is located. In filing such a condemnation action, the condemning party must allege that it has the right to use eminent domain, that the property must be acquired for a proper public purpose, and that the parties have failed to agree on compensation for the subject property. Colorado statute also requires that the condemning party must serve the property owner or owners with a summons along with the petition. The condemning party also may, and often does, file a motion for immediate possession along with the petition, which would lead to a prompt court hearing on the ability of the condemning party to take possession of the targeted property. The affected landowner or landowners must raise any challenges to such condemnation during this immediate possession phase. If the court finds that the condemning party has not satisfied its burden, then property will remain in the possession of the landowner or landowners. If the condemning party satisfies the burden and the parties do not agree on the amount of money which must be deposited for eventual payment to the landowner or landowners, then the court must decide the amount of money to be deposited with the court, hearing evidence from both parties about the value of the property.

As we have seen from the case in Longmont between the Longmont Urban Renewal Authority and Dillard's at Twin Peaks Mall, this issue can be very contentious. However, once the deposit amount has been determined and has been paid by the condemning party, that party will be entitled to immediate possession of the subject property.

The final step in the process (absent a subsequent appeal) is the valuation trial. Unless the parties eventually agree on the amount of compensation to be paid to the landowner or landowners, a trial will be held to determine the final amount of compensation to be paid to the owner or owners by the condemning party. If the condemning party has not previously sought immediate possession, the decisions as to valuation, title transfer and possession all will be determined at the valuation trial.

The Fort Collins and Longmont cases are reflective of the spectrum of possibilities when it comes to using eminent domain. In Fort Collins, the parties reached an agreement about compensation and other details for the Sears property before a condemnation petition was filed. In Longmont, no such agreement materialized. The Urban Renewal Authority filed a condemnation petition and the parties have been involved in a hard-fought court battle for

months. The parties in Longmont are \$3 million apart regarding the value of the Dillard's property, and a final valuation trial is still to come this spring.

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