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Eminent Domain and the Infrastructure Investments and Jobs Act, H.R. 3684

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In November 2021, the United States Congress passed the Infrastructure Investments and Jobs Act, H.R. 3684 (the “Infrastructure Act”). The Infrastructure Act grants about \$1 Trillion Dollars to the government to invest in the Nation’s infrastructure over the next decade. Colorado will undoubtedly receive a portion of this funding, though it still remains unclear just how much.

This article provides a brief overview of eminent domain, the expected impacts from the Infrastructure Act, and how to legally navigate the eminent domain process.

Eminent Domain

If you are a frequent traveler on Interstate 25, then you have probably encountered construction related to its expansion. Much of this expansion could not have occurred but for eminent domain. Eminent domain is the right of various government agencies and entities—like the Colorado Department of Transportation (CDOT)—to take private property for public or private use in exchange for payment of just compensation.⁽¹⁾ You may also see this referred to as “condemnation” or a “government taking.”

(1) C.R.S. § 38-1-101(1)(a). In certain cases, eminent domain can also be used to take public property or land in the public domain, but this requires a specific statute authorizing such a taking. *Town of Parker v. Colorado Div. of Parks & Outdoor Recreation*, 860 P.2d 584 (Colo. App. 1993). In the interest of brevity, this Article only discusses eminent domain as applied to private property.



CP2 FIRM VOLUNTEER DAY



The CP2 team volunteered time at a Precious Child in Broomfield, Colorado organizing holiday gifts and clothing for children in need.

In Colorado, eminent domain is governed by Article II of the Colorado Constitution and Colo. Rev. Stat. § 38-1-101, *et seq.* Various government agencies and entities may exercise eminent domain, but this authority must be conferred expressly by statute, or clearly implied from the rights, powers, and duties conferred by the General Assembly.⁽²⁾ For example, the legislature has granted CDOT the right to condemn property for state highway purposes, including adjacent lands, but CDOT’s power to condemn property does not extend further.

The Infrastructure Act

Eminent domain has traditionally been used to facilitate transportation, supply water, and construct public buildings, which is the purpose of the Infrastructure Act. It specifically provides that, “[a]mong other provisions, this bill provides new funding for infrastructure projects, including for roads, bridges, and major projects; passenger and freight rail; highway and pedestrian safety; public transit; broadband; ports and waterways; airports...” and specifically important to Colorado, “...Western Water Infrastructure.”⁽⁴⁾

Most Colorado municipalities publish a Capital Improvement Plan (CIP) which is generally a comprehensive plan informing the public, and guiding the municipality as to how the community will grow over a period of time.⁽⁵⁾ A CIP can be an important method to deduce what areas of a community may be impacted in the coming years, and give the public awareness as to any potential for eminent domain cases. CIPs are—as the name suggests—plans, and often budgetary or other concerns may hinder or broaden the municipality’s projections.

Legal Procedure

It can be difficult to stop a condemning authority from taking your property. There are defenses you can raise—like demonstrating that the taking is not for a public purpose—but, ultimately, it will be easier to instead prepare yourself for the legal process.

A condemning authority will first send the landowner notice of its intent to acquire some or all of the landowner’s property.⁽⁶⁾ Once the landowner receives a notice of intent to acquire, it is prudent to hire an

appraiser, and specifically an experienced eminent domain appraiser who can provide a report that follows the statutory requirements, to determine the value of the property subject to the taking. This will prepare the landowner to negotiate with the condemning authority. Good faith negotiations are a prerequisite to a condemnation proceeding.⁽⁷⁾

If the negotiations do not prove fruitful, the condemning authority will then file a “Petition in Condemnation” in court.⁽⁸⁾ The condemning authority must demonstrate in the Petition, among other statements, that it has the authority to take the subject property and the purpose for the taking.⁽⁹⁾ No earlier than thirty days after service upon the landowner-defendant, the court will set a hearing. At the hearing, depending on the issues raised by either party, the court will typically determine whether the condemning authority has the requisite authority to take the subject property, and if so, the court will grant possession of the condemned property to such authority. Subsequently, the court will set a valuation trial to determine what amount the condemning authority must pay to the landowner for taking the subject property.⁽¹¹⁾

Conclusion

The Infrastructure Act will give Colorado additional funding to expand its infrastructure, which will inevitably lead to Colorado government and government agencies exercising its right of eminent domain. It is a finicky legal principle to navigate, leaving broad guidelines for the condemning authority to leverage and little room for the landowner to wiggle out of its power. The best outcome for the landowner is to obtain the highest value for the taken property.

(2) *Potashnik v. Pub. Serv. Co.*, 247 P.2d 137, 138 (1952).
(3) See C.R.S. § 43-1-208; see also *Dep’t. of Transp. V. Stapleton*, 97 P.3d 938, 943 (Colo. 2004).
(4) H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act, H.R.3684, 117th Cong. (2021), <http://www.congress.gov/>.
(5) As an example, the City of Fort Collins’ CIP can be found here: <https://www.fcgov.com/cityplan/files/city-plan.pdf?157727132>.
(6) C.R.S. § 38-1-121(1).
(7) C.R.S. § 38-1-121.
(8) C.R.S. § 38-1-102(1).
(9) *Id.*
(10) C.R.S. § 38-1-104.
(11) COLO. CONST. art. II, § 15.



Considerations in Buying or Selling a Business

By Chris Schmidt



As interest rates continue to rise, economic growth will begin to slow in the coming years. With a slowing economy, healthy companies with high cash reserves may want to take advantage and look for opportunities to expand. One option for growth that could be considered is the acquisition of a competing or complementary business. As a company starts planning for its next acquisition there are several items that a potential buyer or seller should consider, one of which is the structure in which the transaction will occur. In determining the appropriate transaction structure there are many considerations that should be discussed. One of the main items to consider is whether the transaction will be structured as an asset purchase or a stock purchase. Each type of transaction has its advantages and disadvantages and as a party to a transaction one should understand the risks associated with each type of transaction. This article addresses the following factors to consider with these types of transactions: (1) risks associated with successor liability and continuing business; (2) third-party consents;

(3) shareholder approval; and (4) general tax considerations.

When acquiring an existing business, the potential purchaser should consider the possible risks involved with the company's liabilities and continuing the business. With the exception of certain statutory and common law liability claims, a purchaser in an asset purchase agreement can minimize its exposure associated with successor liabilities by deciding which liabilities it is willing to include as part of the transaction. Essentially, a purchaser would not be accountable for any liabilities that are unknown to it. Note, however, that there are certain liabilities and business risks associated with product liability and personal injury that will be assumed by a purchaser of certain types of assets regardless of the type of transaction chosen.

On the other hand, in a stock purchase, the purchaser does not have the option to pick and choose which assets and liabilities it will acquire in the transaction. The purchaser acquires the company stock and all of the liabilities associated with the continuing entity. Carefully drafted indemnification provisions and obtaining insurance may help to mitigate some of these risks. Additionally, spending extra time in due diligence review to identify any potential risks is well worth the effort.

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A well-planned transaction should allow ample time to obtain any third-party consents that may be required as part of a transaction. Third-party consents are generally required by other parties who are doing business with the acquired entity. An asset purchase will likely require more third-party consents than a stock purchase. This is because the seller will want to remove its liability for any contracts or other agreements related to the purchased assets and the business. These third-party contracts and agreements will need to be identified on a schedule and they should be reviewed during the due diligence phase of the transaction. Additionally, representations and warranties from the seller as well as indemnifications can be used to minimize the risk involved in missing a required third-party consent. A stock purchase will likely require fewer third-party consents unless there is a change in control of the acquired entity, in which case there may be several consents and approvals needed. A purchaser will want to require that all material contracts and agreements are provided during the due diligence process so that it may assess whether any third-party consents are required.

Shareholder approvals is another area that may or may not be necessary depending on the structure of the transaction, the organizational documents, and the governing statutes. In an asset purchase, unless the organizational documents provided otherwise, shareholder approval will likely only be required if the transaction involves selling substantially all of the entity's assets. However, a transaction structured as a stock purchase will likely require that the shareholders approve the transfer. Documents that should be reviewed include the Articles of Incorporation/Organization, Bylaws/Operating Agreement, and any shareholder or buy-sell agreements in place. These documents should be requested and reviewed as part of the due diligence process.

Lastly, and not least important, are the tax considerations for the different structure types discussed

in this article. In general, a purchaser will prefer to purchase the assets so that it can obtain a step-up in the basis of those assets and then it will be able to depreciate or amortize the cost over the asset's respectful lives. On the other hand, a seller will prefer to sell the stock so that it can recognize capital gain and that such gains will be subject to a more favorable tax rate. Because a purchaser prefers to purchase the assets rather than the stock, they may be willing to pay an inflated purchase price. Depending on whether the acquired corporation is a C corporation or an S corporation there are several different structures that should be investigated to accommodate both parties general tax concerns.

As you can see there are many considerations the parties to a transaction will need to discuss and work through before a transaction is put onto paper. We can work with you and your advisors in choosing the appropriate structures that will work for you.

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