

An Overview of the Power of Eminent Domain

By Dennis A. Estis and John J. Reilly

There are times when sewerage authorities need to acquire additional land for their operations and cannot convince the owners of that property to sell to the authority at a fair price. Sewerage and utility authorities in New Jersey, like other governmental entities, have the power of eminent domain to take private property in condemnation proceedings if it is for a public purpose.

Eminent domain is the inherent power of the sovereign to take private property. It is limited by the Federal and New Jersey State Constitutions, in that the taking must be for a “public use” and “just compensation” must be paid. The taking is for a public use or purpose when it is reasonably necessary to further a statutory purpose of that authority. Just compensation is the amount of money that will make the property owner whole given the condition of the property in question in order to put the owner in the same position monetarily as if there had not been a taking, but a sale between a willing buyer and a willing seller.

Just compensation is the fair market value of the real property. If an authority acquires only a portion of the property, just compensation is either the difference between the fair market value of the property before and after the taking or the value of the part taken and damages, if any, to the remainder of the property, *i.e.* the part not taken. Generally, just compensation is determined as of the date of the filing of the condemnation complaint. Prior to filing a condemnation action, the authority is required to conduct “bona fide negotiations” with the record owner. At a minimum, this includes making an offer in writing in the full amount of the authority’s approved appraisal and providing a copy of the appraisal report to the owner. Courts strictly construe the requirement of bona fide negotiations

against the condemnor. The condemnation action will be dismissed if the authority fails to conduct bona fide negotiations.

If the bona fide negotiations breakdown, the authority would need to commence a condemnation action by filing a complaint in the Superior Court of New Jersey, Law Division, in the county where the property is located. The court will then enter an order that the owner must show cause why a final judgment should not be entered holding that the authority had properly exercised its power of eminent domain and appointing three condemnation commissioners to determine just compensation. At the time that the order to show cause is heard, the owner will have the opportunity to challenge the taking.

If there is no objection to the taking or the court rejects any challenge made to the taking, the court then will appoint three condemnation commissioners (very often two attorneys and one realtor from that county) to hold a hearing to determine just compensation. The authority is required to present its case to prove the valuation, while the owner can choose to put on a case or not. The owner is required to “appear” at the hearing if it should decide to appeal from the commissioners’ award and request an actual trial. Either party can demand a jury

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Hanover Township SA Gives Tour



Germain Garcias discuss the CCTV inspection system that Township of Hanover SA uses as part of its asset management program.



Township of Hanover SA Executive Director Mike Wynne takes township officials and members of the public on a tour of his facility. This is an annual event.

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trial. At the trial, the award by the commissioners is a nullity and their conclusion is not admissible. The issue of just compensation can be settled at any time and most cases settle prior to trial.

The authority may also file and record a declaration of taking (which is the authority's "deed" for the property taken) and deposit into court the full amount of its offer. Upon doing so, title to and the right to immediate possession of the property vests in the authority. The owner can then apply to withdraw the funds from court while still contesting that the amount of just compensation is greater than the amount deposited into court. A statutory provision applicable to sewerage authorities (but not to utility authorities) also requires that when depositing into court the amount of

the offer, the sewerage authority must also establish and maintain a trust fund with a bank or trust company in an amount at least equal to the amount deposited into court in order to secure the payment of the just compensation ultimately determined. If the just compensation is less than the amount of money deposited into court plus that deposited in the bank's trust fund, the authority then keeps the difference. In the event that the taking displaces an occupant from a home or business, the authority will also have to provide relocation assistance and benefits prior to being able to obtain physical possession of the property. Just compensation assumes that the property is environmentally remediated. If the property is environmentally contaminated, the court may keep on deposit the amount of the estimated cleanup costs (called a Suydam

escrow). The escrow amount remains on deposit pending determination of the owner's liability in a separate environmental cost recovery action, or however the issue is otherwise resolved.

The foregoing is not intended to be and does not constitute legal advice. When an authority exercises its power of eminent domain, it is very important that it engage legal and appraisal professionals who are experienced in condemnation in order to assure that its eminent domain power is properly exercised and that it obtains the property necessary for its public project in a timely manner.

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