

Right-of-Way Acquisition Process

A Practical Guidance® Practice Note by
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This practice note discusses key steps in the right-of-way acquisition process for a public project. It covers pre-acquisition activities, filing of a condemnation action, securing possession, procedures after all parties have been served, discovery, just compensation, and trial considerations. This practice note is written from the condemning authority's perspective, but it discusses issues that are vital to property and business owner counsel as well. This note offers guidance to help counsel recognize and anticipate how individual aspects of the right-of-way acquisition process can have ramifications on the ability to timely construct a public project. Be sure to consult local counsel as needed for information on specific local laws, regulations, customs, or practices relating to the eminent domain process, as this is a highly jurisdiction-specific area.

For guidance on planning and zoning, see [Planning and Zoning](#). For guidance on eminent domain, see [Eminent Domain Takings](#). For guidance on commercial purchases and sales, see [Purchasing and Selling Commercial Real Estate](#)

[Resource Kit](#). For guidance on title and survey review, see [Title Insurance](#) and [ALTA Survey Review](#).

Pre-acquisition Activities

The focus of pre-acquisition activities is to:

- Attempt to acquire the necessary property interests without the need for eminent domain –and–
- Gather information necessary to avoid problems that may come up later in the eminent domain action

Early Engagement

While an attorney is not usually engaged early in the project lifecycle, there are benefits to bringing in a condemnation attorney as soon as possible. An early introduction to a project allows you to review project plans and the scope of proposed acquisitions. Agency staff and engineers often will not be cognizant of parcel boundaries and the subsequent valuation impacts when designing a public project. By reviewing the project plans, you may be able to advise the agency on ways to either eliminate individual acquisitions or limit the scope of rights being acquired. For example, instead of acquiring a strip of property in fee, it may be advantageous to acquire only a permanent easement; similarly, the scope and terms of a temporary construction or access easement may significantly impact the remaining use of the property and in turn the amount of damages. Carefully crafting the property rights being acquired helps avoid the need for eminent domain, or minimizes the eventual award of compensation.

If you are engaged early in the process, you can ensure that consulting firms are able to help identify all tenants

on a property, including business name, any dbas, and business owner information. Acquiring this information in advance helps with clearing any title encumbrances, naming defendants in the eminent domain complaint, and serving occupants with the motion for possession.

Preliminary Property Involvement

Once specific property is identified as necessary for a project, a notice of intent to appraise provides the property owner with notice that the agency will be conducting an appraisal and allows the property owner an opportunity to accompany the appraiser. Generally, you will not be part of this process, but if you are involved (even at a high level), you can direct the agency or right-of-way agents to begin collecting necessary information at this on-site visit.

The appraisal that is prepared will serve as the basis for the agency's formal written offer, in an amount no less than the appraised value, to purchase the property at issue. Depending on the sophistication of the agency in dealing with eminent domain, you may want to review the appraisal to ensure it satisfies all statutory requirements. For agencies with extensive eminent domain experience and well-qualified right-of-way agents, this may not be necessary; however, errors in the appraisal could lead to a potential challenge to the agency's right to take the property, thereby delaying the construction of the public project. At this time, the agency will also inform the property owner that they are entitled to up to a \$5,000 reimbursement if they wish to obtain their own appraisal of the property. Again, depending on the experience of the agency, you may need to oversee that the formal written offer contains all of the required components, such as the appraisal reimbursement information.

When there are very small-scale acquisitions, the costs to the agency to prepare its own appraisal, reimburse a separate appraisal, and engage legal counsel can often well exceed the fair market value of the small acquisitions. In this case, it is often best to see if the acquisition can be avoided altogether by adjusting the project alignment or by engaging in early acquisition negotiations that aim to acquire the property before counsel is actively engaged. This is an example of why advising your agency clients to involve you early on in the process is beneficial in saving them both time and money.

After the formal offer, the agency must engage in good faith negotiations and allow a reasonable time following the offer before commencing legal proceedings. Failure to do so may give opposing counsel grounds to dispute the agency's right to take or challenge a subsequent motion for possession.

To comply with the above procedures, the agency should consider retaining an outside acquisition agent and/or relocation consultant familiar with public acquisition and eminent domain procedures. The assistance of such consultants generally aides in negotiations with the property owners, assures compliance with proper procedures so as to avoid potential problems if eminent domain is later sought, and often results in a settlement without litigation. Moreover, because these consultants are not attorneys, the property owners are less inclined to bring in counsel early, thus, maximizing the possibility of an amicable resolution.

Resolution of Necessity

Adopting a Resolution of Necessity (RON) by the agency's board or council is the formal approval to proceed with an eminent domain lawsuit. While most agencies require the adoption of a RON prior to commencing eminent domain proceedings, not all entities with the power of eminent domain require such a resolution. Depending on the condemning entity, a RON may not be required under the law.

Prior to the adoption of a RON, the agency should ensure environmental review (i.e., California Environmental Quality Act or National Environmental Policy Act) for the public project is complete. (Details on the environmental requirements are beyond the scope of this practice note.)

Additionally, written notice of the RON hearing must be sent to the property owner with sufficient time to allow the property owner to respond to the notice before the hearing. Depending on the jurisdiction, there may be certain rules on where to mail the notice. The notice must be sent to the property owner listed on the county's last equalized tax assessment roll. However, if the agency is aware of a different address for a property owner (or if it is known that there are multiple owners), mailing notices of the hearing to those additional addresses can help head off arguments from property owners about insufficient notice. It also ensures that the RON can be heard at the desired meeting.

At the meeting, counsel for the agency may discuss with the board or council during closed session to inform them of the purpose of the RON and why negotiations were not successful. It is helpful for you to remind the board members that the purpose of the RON hearing is not to discuss compensation to the property owners, but rather to make a determination that:

- The public interest and necessity require the project
- The project is planned or located in the manner that will be most compatible with the greatest public good and least private injury

- The property sought to be acquired is necessary for the project –and–
- The precondemnation offer has been made to the owner of record

Compensation will be determined later through the eminent domain litigation.

Staff or counsel will then give a presentation on the RON during the public meeting and the board will vote to adopt the RON. The RON, identifying the property interests to be acquired, becomes a key exhibit to the eminent domain complaint.

Filing of Condemnation Action

Initiating the eminent domain action requires identifying all potential defendants, addressing title encumbrances, and filing and serving the complaint and other initial pleadings.

Title Review

In preparing the complaint, you should review a title report to determine any interest holders in the property that need to be named as defendants. Depending on the type of acquisition (full or partial), some interest holders may not need to be named as interested parties. For example, if the agency only acquires an easement on a portion of the property, you may not need to name other easement holders where the easements are not in conflict.

You should work with the title company to ensure all interest holders are addressed or accounted for. Sometimes there may be a very old interest on the property and the interest holder is either deceased or is a company that has dissolved or merged. In order to identify a successor in interest or an individual with authority, you may need to conduct independent research to identify the current status of an interest holder and an address for service of process. It is a good practice to run the status of an interest holder by the title company if you intend to add or amend a party to the matter. If an interest holder cannot be located after diligent efforts, you may need to prepare and submit an application to serve the party via publication. Applications for service by publication and the publication process itself can take two months or more. Then, waiting the required amount of time for the defendant to appear and likely taking a default also draws out this process. If the party served via publication is a fee owner, a motion for possession generally cannot be granted until service is complete. Early title review and investigation identifies any

un-locatable defendants and allows you to factor in and inform the client about potential delays.

It is also crucial that you work with the outside consultants or that you conduct investigations to identify any tenants on the property. Depending on the acquisition, you may need to name tenants in the complaint, and they will likely not be listed on a title report. If you were engaged early in the process, it makes collecting information on tenants much easier and avoids delays.

Beyond the purposes of the initial title review, you should order a litigation guarantee from a title company because it transfers liability to the issuer for errors of omitted information regarding title to real property. Further, you should request an updated litigation guarantee from the title company after the lis pendens has been recorded. This will allow you to ensure that (1) the recorded lis pendens is appearing on title and (2) that no new interests have appeared on title since your preliminary review. Should there be new interests, you should file a DOE amendment to name the newly identified interest holder in the complaint.

Deposit

The preliminary appraisal serves as the basis for the amount of just compensation that should be placed on deposit with the state treasurer or superior court (depending on jurisdiction). The date of deposit generally establishes the date of value for the eminent domain action.

You should work with the agency to ensure a deposit check in the correct amount is timely issued to the state treasurer or court. The treasurer or court should provide you with a receipt that will then be used in the initial pleadings, such as the motion for possession.

Pleadings

Once the defendants have been identified, you will prepare the complaint and other supporting pleadings. After the complaint is filed and receives a judicial assignment, the other initial pleadings should be filed. These generally include a notice of deposit, summary basis of appraisal, a notice of pendency of action, and sometimes a notice of motion for prejudgment possession. The pendency of action, or lis pendens, also needs to be recorded and it serves to limit any subsequent interest holders from making a claim in the action, as they are placed on record notice of the pending eminent domain action. Working with your agency client to obtain the preliminary appraisal, written offer, and other supporting documents, like the legal descriptions and plat maps, earlier in the process allows

you to prepare the initial pleadings so that you can file them immediately after you receive a judicial assignment. When possession of the property is needed promptly for construction, preparing the motion for possession in advance can save your client time.

Once you have court-conformed copies of the complaint and other initial pleadings, you will prepare a service package and coordinate with the process server. Serving the complaint and the initial pleadings as one package minimizes costs for your client. The information discovered in your independent title research can often be useful in identifying agents for service of process and appropriate service addresses.

Securing Possession

Obtaining prejudgment possession of the property can be crucial to maintaining a project construction schedule. Advanced planning ensures that the motion is adequately noticed and is likely to be granted, provided the substantive requirements are met.

Notice and Timing

Adequate notice of the motion for possession and hearing must be given to the property owner and all occupants. When scheduling a motion for possession hearing, it is important that you contemplate how many owners or occupants need to be served and if any of them will be difficult to locate. This is another example of how advanced planning and investigation can minimize delays and problems. While it is often important to obtain possession as soon as possible for construction schedules, if inadequate notice is provided, owners and occupants may have grounds to challenge the motion for possession.

In some states, such as California, one key consideration in determining timing is whether or not the property is occupied. For unoccupied property (i.e., vacant land), the required notice periods are much shorter (60 days versus 90 days).

The Motion

In order to secure possession of property for a public project while the eminent domain action is still pending, you will be required to file a motion for prejudgment possession, a declaration(s) in support that demonstrates the agency's need for prejudgment possession, and a proposed order. The required standards vary by jurisdiction, but generally the court may grant the motion if the court finds that:

- The agency is entitled to take the property by eminent domain

- The plaintiff has made a proper deposit of the agency's appraised value of the property with either the court or the state treasurer –and–
- If an opposition was filed, that:
 - There is an overriding need for the public agency to possess the property prior to final judgment –and–
 - The hardship the agency would suffer if possession is denied would outweigh any hardship the defendant would suffer by granting possession

If the motion is granted, you will need to obtain the signed order and prepare, file, and serve a notice of ruling of the order. Only after the order is served on the last owner or occupant does the final countdown towards possession begin (California orders become effective 30 days after service for occupied property and 10 days for unoccupied property).

Procedures after All Parties Have Been Served

The summons requires an answer to the complaint to be filed by a defendant within 30 days of service. In order to facilitate negotiations, you may find it beneficial to grant a defendant an additional 30 to 45 days to respond to the complaint. However, if the timing of possession is crucial, be careful to distinguish that an extension of time to respond to the complaint is not an extension of the time to challenge the motion for prejudgment possession.

A party may alternatively file a disclaimer, disclaiming any interest in the property. Often times you can prepare the disclaimer on behalf of a defendant and then file the signed document to expedite the resolution of that defendant's interest. This frequently occurs when there is an old deed of trust on the property that had been previously been paid off, but never removed from title. Working with the financial institution to file the disclaimer helps to clear title of that interest.

If a party fails to timely file either an answer or a disclaimer, you will then seek entry of default of the party.

An answer may raise challenges to the right to take as well as set forth the various items of compensation to which the party claims entitlement. Typical claims raised in the answer can include the following:

- Fair market value of real estate and fixtures and equipment
- Severance damages, in the event of a partial acquisition
- Challenges to the agency's right to take

- Contamination and required remediation, and their impact on fair market value of the property
- Apportionment, including both fixtures and equipment and claims for leasehold bonus value
- Compensability of items claimed to be improvements pertaining to realty (fixtures and equipment)
- Loss of business goodwill, including increased operating costs
- Precondemnation damages
- Inventory or crop losses

Discovery

In eminent domain matters, discovery consists of both regular discovery requests and expert discovery.

Regular Discovery

When propounding discovery, you should consider the claims asserted by defendants in the answer and craft your requests based on those claims. For example, if there is a business on the property and the defendant claims loss of business goodwill, you need to seek out information about the business, its operations, its financials, the impacts it has experienced, whether it needs to relocate or not, and so forth. Likewise, if a property owner asserts damages based on the project interfering with their development plans, you should inquire into the status of the development plans, efforts to seek entitlements or permits, whether other similar properties in the area are developing, and so on.

Expert Discovery

The exchange of expert appraisals is typically set at 90 days before trial and generally occurs prior to mediation. When selecting experts for trial, it is important not only to consider the technical ability of the appraiser, but also their ability to testify effectively. Valuation issues are convoluted and often difficult for juries to grasp. The appraiser must not only appear credible and trustworthy to a jury, but be able to synthesize and convey the necessary information in an understandable way.

Following the exchange of appraisals, but before mediation, depositions of the parties' respective expert witnesses are taken to investigate the basis of their opinions.

Just Compensation

In eminent domain law, there is a constitutional mandate for the payment of just compensation. This is generally understood to be the fair market value of the property being acquired, based on its highest and best use in

the reasonably near future. Further, while a judge may decide issues of law, the determination of the amount of compensation falls with the jury. Outside of the payment for the property interests acquired, there are other compensable rights and valuation issues.

Severance Damages

When there is a partial taking (meaning only a part of the property is condemned), the remainder property may be eligible for severance damages. Severance damages may be awarded if the partial taking and subsequent public project diminish the value of the portion not taken. They are measured by the diminution in the market value of the remaining portion. Any compensation for such damage will be offset by any benefit to the remainder. While benefits can be used to offset severance damages, in many jurisdictions they cannot be used to offset the compensation owed for the taking itself.

Business Goodwill

While not a constitutional component of eminent domain just compensation, statutorily provided grounds exist in some jurisdictions to compensate a business owner impacted by an agency's acquisitions. Goodwill is an intangible aspect of a business and is often considered to be the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage. In order to be compensated for a loss of business goodwill, a business owner will generally need to establish that there was business goodwill in the before condition (before the project and condemnation) and that there was a loss of goodwill in the after condition.

Common Valuation Problems

Every acquisition is unique, and a variety of valuation issues can arise. Additional issues to be cognizant of, beyond those mentioned above, include:

- Furniture, fixtures, and equipment
- Inventory and personal property
- Leaseholds
- Temporary takings –and–
- Date of value

When an acquisition presents a unique scenario, you need to be prepared to advise your client of the valuation issues and to hire additional experts to opine on such issues, if warranted.

Trial Considerations

After the expert exchange and prior to trial, there are various mechanisms that you should evaluate to determine the potential for settlement, or at least to limit the number of issues to be dealt with at trial.

In some jurisdictions, there are mechanisms for the court to hear motions on evidentiary or legal issues affecting the determination of value. In California, Cal. Civ. Proc. Code § 1260.040 allows, at least 60 days before trial, an opportunity to receive an early ruling on key disputes that may in turn make a settlement more likely. Such rulings could knock out a non-compensable damage claim or resolve other appraisal issues. An early ruling can encourage the parties to settle, or at least eliminate some issues/disputes from trial.

Prior to trial, you may want to consider if mediation could resolve the dispute for your client. Mediation generally takes place approximately 30 to 45 days prior to the scheduled trial date, which allows time for the expert reports to be exchanged and depositions to be conducted. Mediation is generally very effective at resulting in settlements, with approximately 90% of filed eminent domain cases settling through the mediation process.

Selecting a mediator with eminent domain experience, or other valuation experience, may help in resolving the matter, as you will not need to spend as much time educating the mediator on aspects of eminent domain law.

If mediation fails to result in a settlement, many jurisdictions require the parties to file and serve statutory final settlement offers and demands prior to trial. These final offers not only serve as a possible further avenue of settlement, but they serve as the basis for the court's determination of entitlement to litigation expenses in the event the matter proceeds to trial. If, after trial, the court finds the agency's offer was unreasonable and the owner's demand was reasonable in light of the verdict and evidence, then the court has discretion to compel the agency to reimburse the owner's litigation expenses, including attorney's and expert fees.

At the very eve, or beginning, of trial (depending on the court's local rules), you can use a motion in limine to exclude testimony that you believe to be improper or prejudicial. This can be used, similar to legal issues motions, to exclude mention of non-compensable damages, or to challenge an appraiser's qualifications. All of these mechanisms are key lead-ups to trial that may actually result in a settlement.

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Brad Kuhn, Chair of Nossaman's Eminent Domain & Valuation Group, guides private and public sector clients through complex real estate development and infrastructure projects – particularly with eminent domain/inverse condemnation, land use/zoning, construction, environmental, and other property and business disputes. Selected to lead some of the largest projects in the nation, Brad has counseled on developments valued at more than \$25 billion.

An accomplished real estate and business litigation attorney, Brad focuses on the transportation, energy/gas, water, land use development, and telecommunications sectors. His work has been profiled in numerous publications, including multiple cover features in *Right of Way Magazine*. He is a sought-after speaker and the author of several treatises, including works on ground lease practices, condemnation, and real estate valuation.

Both *Chambers & Partners and Best Lawyers in America*® recommend Brad for land use, zoning, and infrastructure matters, commending his "practical, business-minded advice" and his "high level of decorum in dealing with the other sides." He has earned the CRE® designation by the Counselors of Real Estate®, distinguishing him as a leading advisor in complex real property matters.

Brad serves as general counsel and sits on the Advisory Board for Mobility 21, and has served as general counsel to the International Right of Way Association (IRWA), where he was elected as President of the Inland Empire Chapter and named as the organization's "Professional of the Year."

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Jillian Friess Leivas focuses her practice on eminent domain laws and regulations. Having served as a summer associate at Nossaman, she has experience preparing pleadings and motions and has also assisted with client meetings and preparing depositions for trial. In addition, Jillian advises clients on environmental and land use matters involving the California Environmental Quality Act (CEQA) and federal appraisal requirements.

While in law school, Jillian served as the Editor-in-Chief of the *Chapman Law Review* and was an active member of Chapman's Alternative Dispute Resolution, Mock Trial, and Moot Court Competition teams.

Jillian regularly comments on news involving eminent domain issues on Nossaman's *California Eminent Domain Report* blog.

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