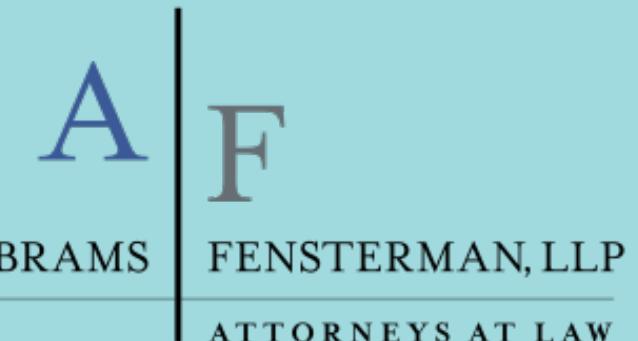


# EMINENT DOMAIN

New York State Law & Procedure

Prepared for the Town Board of the Town of North Castle



Long Island • Brooklyn • White Plains • Rochester • Albany

# Overview of Eminent Domain Law

## What is Eminent Domain?

- Eminent domain is the power of the government to take private property for public use without consent of the owner.
- This power is granted by state law and is regulated by the Fifth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment.
- The Fourteenth Amendment requires that when eminent domain is used certain procedural due process safeguards such as notice and an opportunity to be heard be provided.
- In New York State, the laws regarding eminent domain are outlined in Article 2, Section 7 of the New York State Constitution and in the Eminent Domain Procedure Law (EDPL).
- The EDPL sets forth the procedures that must be followed when the government exercises its power of eminent domain.

“nor shall private property be taken for public use, without just compensation”

➤ US Constitution, Fifth Amendment

“Private property shall not be taken for public use without just compensation”

➤ NY Constitution, Article 1, § 7

# Municipal Authority to Condemn Property

The power of eminent domain, inherent in the State is delegated to municipalities by the New York Constitution and permits condemnation of land within the boundaries of the municipality. NY Constitution, Article IX, § 1.

The Town Board may acquire property in the name of the Town for public use, such as Town facilities and public improvements, such as the construction of dams, culverts or drains, to prevent damage to property resulting from floods and erosion. Town Law § 64(2).

“A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.”  
NY General Municipal Law § 74.

# What may be acquired through eminent domain?

Any interest in property can be condemned in New York State. This includes real property, leaseholds, personal property, leases, easements and waterways. *See Kaufman's Carousel v. City of Syracuse Industrial Development Agency*, 301 A.D.2d 292 (4<sup>th</sup> Dep't 2002); EDPL § 103(F).

# Public Use Requirement

**The condemnor must demonstrate that the taken property will be used for a public purpose.**

# Appraisal & Inspection of Property

## Right to Access to Condemnee's property:

- Upon reasonable notice, the owner must let the condemnor's appraiser inspect the property and provide any other pertinent information required for the appraisal. EDPL § 302.
- Failure of the owner to allow access to the property will suspend the condemnor's obligation to make an offer for acquisition until access is provided. EDPL § 302.
- The condemnor "has the right to enter the property for the purpose of making surveys, test pits and borings, or other investigations, and also for temporary occupancy during construction." EDPL § 404.
- Condemnor is liable for any damages caused during entry or appraisal, but damages may not duplicate any payments of just compensation for the condemned property. EDPL § 404.

# Negotiation

## Duty to Negotiate

- The condemnor should “make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement.” EDPL § 301. However, courts will not require proof that the parties negotiated in good faith. *Matter of In re Vil. of Saranac Lake*, 93 A.D.3d 971, 974 (3d Dep’t 2012).
- Under New York General Municipal Law, “A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.” NY General Municipal Law § 74.

# The Offer

- The condemnor must make a written offer to acquire the property at no less than 100% of the appraised value prior to acquiring the property. EDPL § 303.
- Wherever practicable, the offer should include “an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.” EDPL § 303.
- If the offer is not accepted in 90 days, it is deemed rejected. EDPL § 304(B).
- The landowner may reject the offer as payment in full and accept the offer as an advance partial payment. EDPL § 304(A)(3). The condemnee then has 3 years to bring a claim for additional compensation. If no claim is made, then the original acceptance is deemed acceptance in full. § EDPL 503.

# Eminent Domain Procedure

## Notice of Public Hearing

**With limited exceptions addressed below, prior to acquisition, the condemnor must conduct a public hearing prior to acquisition. EDPL § 201.**

### **Notice to Public**

- Notice of the hearing must be provided at least 10 but no more than 30 days prior to the hearing by publication for least 5 consecutive days in an official daily newspaper. EDPL § 202.

### **Notice to Property owner**

- The condemnor shall serve notice on the property owner or its counsel at least 10 but no more than 30 days prior to the hearing, by personal service or certified mail, return receipt requested. The notice must also state that if the owner wishes challenge condemnation of its property via judicial review, it may do so only on the basis of issues, facts, and objections raised at such hearing. EDPL § 202 .

# Conducting the Public Hearing

- At the public hearing, the condemnor outlines the public use to be served by the proposed public project, reviews the impact on the environment and residents, and presents any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. EDPL § 203.
- Any person in attendance is given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. EDPL § 203.

# Determination & Findings

## Public Notice

Within 90 days after the public hearing, the condemnor must complete its determination and findings concerning the proposed public project. A summary must be published in at least two successive issues of a newspaper of general circulation. The summary must state:

- the public use, benefit or purpose to be served by the project;
- the location and the reasons for the selection of that location;
- the general effect of the proposed project on the environment and local residents; and
- any other factors the condemnor considers relevant. EDPL § 204.

## Notice to Owner

The condemnor must serve the property owner by personal service or certified mail:

- the published summary of the determination and findings;
- directions on how to obtain the complete determination and findings; and
- inform the owner that it has 30 days to seek judicial review of the determination and findings in the appellate division of the supreme court in the judicial department where the property to be condemned is located. EDPL § 204.

# Exemptions to Public Hearing Requirement

**A public hearing procedure is not necessary when:**

- Pursuant to another state, federal, or local law:
  - the condemnor obtains a license, permit, certificate of public convenience or necessity, or other similar approval to condemn the property, or
  - the condemnor conducts or offers to conduct prior to an acquisition one or more public hearings and provides notice to the public and owners of property. EDPL § 206 (A, C).
- The condemnor obtains a certificate of environmental compatibility and public need. EDPL § 206(B).
- “[W]hen in the opinion of the condemnor the acquisition is de minimis in nature so that the public interest will not be prejudiced by the construction of the project or because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement.” EDPL § 206(D).
- When property is acquired pursuant to the mental hygiene law. EDPL § 206(E).

# De minimis Acquisitions Under EDPL § 206(D)

- De minimis determination is made by the condemnor.
- To challenge a de minimis determination, the property owner must bring an article 78 action and the condemnor's decision "should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith.'" *Matter of Zutt v. State*, 99 A.D.3d 85, 97 (2d Dep't 2012).

## Examples

- Easement to allow the public to use an existing roadway to gain access to a small recreational area was de minimus where it did not interfere with current land use, and did not involve the removal of any structures, trees or bushes or otherwise require a structural change to the existing roads. *Matter of Eagle Cr. Land Resources, LLC v Woodstone Lake Dev., LLC*, 108 A.D.3d 71, 78 (3d Dep't 2013).
- Proposed taking for the purpose of building a sidewalk was not de minimis where town sought to acquire nearly 2,600 square feet of land, and significant public controversy existed over the location of the sidewalk. *Matter of Marshall v Town of Pittsford*, 105 A.D.2d 1140 (4th Dept 1984).
- Easement for sewer line was de minimus where it did not require removal of any structures or interfere with current land uses. That it might, at some point in the future, be developed for commercial purposes, does not cause the easement to "interfere with current land use." *Matter of Rockland County Sewer Dist. No. 1 v J. & J. Dodge, Inc.*, 213 A.D.2d 409, 411 (2d Dep't 1995).

# Special Proceeding to Condemn the Property

- The eminent domain proceeding to acquire the property is commenced by filing a petition in the Supreme Court where the property is located. The petition may be filed up to three years after publication of the determination and findings. EDPL § 401.
- The petition is a request to the court for an order to acquire the property and for permission to file an acquisition map. EDPL § 402(B).
- At the same time the petition is filed, a notice of pendency is filed against the property with the County Clerk. EDPL § 402(B)(1).
- Upon entry of the Supreme Court's order, the acquisition map is filed in the County Clerk's Office, and title is passed to the condemnor. EDPL § 402(B)(5).

# Just Compensation

- The Fifth Amendment requires that property owners receive just compensation when their property is taken.
- In New York, the measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the condemnee is so using the property all the time. *See Matter of City of New York (Franklin Record Ctr.)*, 59 N.Y.2d 57 (1983)
- The measure of damages in partial taking cases is the difference between the value of the whole before the taking and the taking. *See Diocese of Buffalo v. State of New York*, 24 N.Y.2d 320 (1969).
- Temporary loss of access generally provides damages for only the rental value of the temporary easement unless claimant can establish permanent damage resulting from the loss of access. *Matter of County of Nassau*, 148 A.D.2d 533, 534 (2d Dep’t 1989).
- In the case of a partial taking such as an easement, consequential damages may be awarded for loss of value to the property caused by the appropriation. *Murphy v. State of New York*, 14 A.D.3d 127, 132 (2d Dep’t 2004).
- Incidental expenses must be reimbursed to the condemned, including any recording fees or transfer taxes, sewer or water fees, and the pro rata portion of property taxes. EDPL § 702.

# Procedure for Determining Just Compensation

- Within 30 days after entry of the order granting the petition vesting title, the condemnor must serve a notice of acquisition upon the condemnee or publish the notice for at least ten successive days. The notice must include the date the order was entered, state that the acquisition map was filed with the County Clerk, and inform the condemnee that it must file a written claim for compensation with the condemnor and the clerk of court. EDPL §§ 502(B) & 503(B).
- The condemnee may file a claim for compensation in the Supreme Court where the property is located. The claim must identify the property affected by the acquisition, and a statement of the damages claimed. EDPL § 504.
- The court must view the acquired property unless the parties agree to waive this requirement by stipulation. EDPL § 510.
- The court will conduct a prehearing conference and trial, hearing testimony and weighing the evidence, including written appraisals submitted by the parties, and will determine the compensation due to the condemnee as a result of the acquisition. EDPL §§ 508, 509, 511 & 512.

## Special Procedure for Claims Under Twenty-Five Thousand Dollars

- When the total compensation demanded by the condemnee is twenty-five thousand dollars or less, a condemnee may file a claim for compensation with the clerk of court, describing the property and the amount of compensation demanded by the condemnee. EDPL § 601(A).
- After the claim is filed, the court must view the property, and then conduct an informal hearing where the parties present evidence concerning the value of the acquisition. EDPL §§ 601(B) & 602.
- Following the informal hearing, the court will determine the compensation due to the condemnee and file its decision with the clerk of court. The clerk will serve the condemnee and condemnor a copy of the court's judgment. EDPL § 603.

# Defenses to Eminent Domain

- The condemnor's determination and findings may be challenged by filing a petition in the Appellate Division where the acquired property is located. EDPL § 207.
- The appellate division's scope of review of the determinations and findings is limited to whether:
  1. The proceeding confirmed with the federal and state constitutions;
  2. The acquisition is within the condemnor's statutory jurisdiction or authority;
  3. The condemnor's determination and findings were made in accordance with procedures set forth in the EDPL and with Article 8 of the Environmental Conservation Law (SEQRA); and
  4. Whether a public use, benefit, or purpose will be served by the proposed acquisition. EDPL § 207(C).

# Timeline

January 22, 2025	Complete preparatory steps (appraisal, EAF, title report) and give notice of public hearing
February 26, 2025	Hold public hearing (condemnor must “outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels;” backup must include appraisal and EAF; persons in attendance must be given opportunity to be heard.)
March 12, 2025	Town Board makes SEQRA determination and issues condemnation findings; if Town Board decides to hold referendum, referendum must be held between June 10, 2025 and July 15, 2025
March 19, 2025	Publish synopsis of findings in two successive issues of official newspaper and serve synopsis on property owner.
April 2, 2025	Publication and service complete.
May 2, 2025	Last day to submit petition for referendum (unnecessary if Town Board schedules referendum on its own); last day to challenge determination in Appellate Division (30 days after publication is complete).
May 14, 2025	If no legal challenge to findings or referendum petition, file petition in Supreme Court to acquire property; offer owner 100% of appraised value.
August 12, 2025	Owner’s last day to accept offer.