

Eminent Domain: What Cities and Towns Need to Know, and Do, to Get It Right

Perrin Love

Clyde Snow Sessions & Swenson

Utah League of Cities and Towns Convention

September 12, 2007

Historical Condemnation Authority

- “Eminent Domain” is the power of the sovereign to take private property for “public use” without the owner’s consent
- It is a power that has existed at least since the days of the Roman Republic
- The term “eminent domain” dates from the Middle Ages
- The power of eminent domain was well established in England and in the American colonies by the time of the American Revolution and was used by the colonies to build roads, for example

Constitutional Law

Federal Constitution, Amendment V

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, nor in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; **private property shall not be taken for public use, without just compensation.**

Utah Constitution, Article I, Section 22

Private property shall not be taken **or damaged** for public use without just compensation.

The Utah Constitutional Takings Clause Has Been Construed Narrowly

- Board of Education v. Croft, 373 P.2d 697 (1962)
- Damages to land, by the construction of a public or industrial improvement, though no part is taken as provided for under section 78-34-10(3) **is limited to injuries that would be actionable at common law, or where there has been some physical disturbance or a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property** in excess of that sustained by the public generally.
- Twenty Second Corp. of Church of Jesus Christ of Latter-day Saints v. Oregon Short Line RR, 103 P. 243, 246 (Utah 1909) (to bring the case within the damage clause of the Constitution, **there must be some physical interference with the property itself or with some easement which constitution appurtenant thereto**).

- Coleman v. Utah State Land Bd., 795 P.2d 622, 626 (Utah 1990) (noting that the types of injuries that would be compensable as “damage” under the clause include drying up of wells and springs, destroying lateral supports preventing surface water from running off adjacent lands, running surface waters onto adjacent lands or depositing of cinders and other foreign material on neighboring lands by the permanent operation of the business or improvement established on the adjoining lands).
- Rocky Mtn. Thrift Stores, Inc. V. Salt Lake City Corp., 784 P.2d 459, 465 (Utah 1989) (dismissing damage allegations resulting from “a temporary one-time occurrence and **not a permanent, continuous, or inevitably recurring interference with property rights usually associated with and requisite in a compensable taking**”).

Substantive Conditions Precedent Utah Code Ann. § 78-34-4

Before property can be taken, it must appear that:

- the use is authorized by law (i.e., a public use)
- the taking is necessary to such use
- construction and use of property will commence within a reasonable time
- is already appropriated to a public use, the new public use is more necessary

Condemnation Authority for Cities and Towns Utah Code Ann. § 10-8-2

(1) (b) A municipality may

(i) furnish all necessary local public services with the municipality;

(ii) purchase, hire, construct, own, maintain and operate, or lease public utilities located and operating within and operated by the municipality; and

(iii) subject to Subsection (1)(c), acquire by eminent domain, or otherwise, property located **inside or outside the corporate limits of the municipality**, and necessary for any of the purposes stated in Subsections (i)(b)(1) and (ii), subject to restrictions imposed by Title 78, Chapter 34, Eminent Domain, and general law for protection of other communities.

- (c) Each municipality that intends to acquire property by eminent domain under Subsection (1)(b) shall, upon the first contact with the owner of the property sought to be acquired, deliver to the owner a copy of the booklet or other materials provided by the Office of the Property Right Ombudsman

- (d) Subsection (1)(b) may not be construed to diminish any other authority a municipality may claim to have under the law to acquire by eminent domain property located **inside or outside the municipality**.

Public Use

Utah Code Ann. § 78-34-1

- As a Constitutional Principle, Public Use is Generally Defined Broadly
- Variouslly defined as general welfare, public good, public benefit, public utility or necessity
- The definition becomes important in Kelo
- Public Use Defines Authority to Condemn
- Authority generally determined by the proposed public use
- The nature of the use, not the governmental status of the condemnor, determines authority to exercise power of eminent domain.

- Numerous Utah Supreme Court decisions have affirmed authority of private entities and persons to condemn property for public use.
- Postal Tel. Cable Co. of Utah v. Oregon S.L.R. Co., 65 P. 735 (Utah 1901) (private telegraph corporation had power to condemn telegraph line)
- Porcupine Reservoir Co. v. Lloyd W. Keller Corp., 392 P.2d 620 (Utah 1964) (private corporation had authority to condemn lands for reservoir)
- Watkins v. Somonds, 354 P.2d 852 (Utah 1960) (private individual had authority to condemn an irrigation easement)
- Jacobsen v. Memmott, 354 P.2d 569 (Utah 1960) (private individual had authority to condemn roadways to mining deposits)

Uses for Which Right May be Exercised (excerpt)

Utah Code Ann. § 78-24-1

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

- (1) All public uses authorized by the Government of the United States.
- (2) Public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.
- (3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town; the raising of the banks of streams, removing obstructions there from, and widening, deepening or straightening their channels; bicycle paths and sidewalks adjacent to paved roads; roads, streets and alleys for public vehicular use, excluding trails, paths, or other ways for walking, hiking, bicycling, equestrian use, or other recreational uses; **and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.**

Public Necessity

There Must Be a Current Project or Use

- Approved, defined plans for acquisition and use of property
- Authorization, usually in the form of a resolution
- A time frame for use in the reasonably near future
- Appropriated money to acquire and use the property
- Cannot landbank or speculate
- Cannot devalue property or cloud marketability

Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977)

Condemning Authorities Have Great Discretion To Determine “Necessity”

- It has long been held, and recently reiterated, by the United States Supreme Court, that it is for the condemning authority to determine the nature and extent of the property required for the public purpose and it is “not for the court to oversee the choice of boundary line nor to sit in review on the size of a particular project area.”

Kelo v. New London, Conn., - - U.S. - -, 125 S. Ct. 2655 (2005), quoting Berman v. Parker, 348 U.S. 26, 35 (1954)

- Necessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question; it merely requires the land be reasonably suitable and useful for the improvement.
- . . . particular questions as to the route, location, or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice, or arbitrariness . . .

Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684 (Utah 1979)

A Property Owner's Due Process Rights Are Very Narrow

The hallmarks of due process are notice and an opportunity to be heard, but not all proceedings demand the same level of process . . . **In eminent domain proceedings, courts have been reluctant to read into any protections from the Federal Due Process Clause beyond those already provided by the Just Compensation Clause** of the Fifth Amendment. This reluctance is predicated, at least in part, on a concern over “imposi[ing] new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. In this vein, the United States Supreme Court has stated in dicta that “unlike the Due Process clause . . . the Just Compensation Clause has never been held to require pretaking process or compensation, **and many federal courts have held that sovereign vested with the power of eminent domain may exercise that power consistent with the constitution without providing prior notice, hearing, or compensation, so long as there exists an adequate mechanism for obtaining compensation.**

Utah County v. Ivie, 2006 UT33, ¶ 22 (May 26, 2006) (quotations and citations omitted)

Condemnor's Duty to Locate It's Project With the Greatest Public
Good and Least Private Injury
Utah Code Ann. § 78-34-5

Right of Entry for Survey and Location

- where land is required for public use, the condemnor may enter upon the land for survey and map, without trespassing
- the use must be located in the manner which will be most compatible with the greatest public good and the least private injury

Procedural Prerequisites

Utah Code Ann. § 78-34-4.5 (as amended by SB 117)

1. Duty to Negotiate with the Property Owner to Acquire the Property

- Condemning authority must engage in reasonable negotiations
- Appraise the value of the property and property interests
- Generally by an MAI appraiser
- Generally need to make a final offer with a date certain

2. Disclosures to Property Owner

- Existence of the Ombudsman's office
- Property Owner has a right to mediation or arbitration

- Arbitration is not binding, unless the parties agree otherwise
- Provide a written statement that representations are binding only if in writing

3. Public Hearing and Final Resolution of Condemnation (effective May 1, 2006)

- Governing body of a political and subdivision must take a final vote authorizing condemnation
- Governing body must give property owners notice of each public meeting where final vote is expected to occur, and allow a property owner an opportunity to be heard on the proposed taking

Contents of a Complaint

Utah Code Ann. § 78-34-6

1. Name All Those Who Hold an Interest in the Property
 - Include lienholders, leaseholders, and easement holders
 - They all have property interests that must be compensated if taken
 - This becomes very important in determining the amount of just compensation
2. Or: Name the Property (federal Law) Fed. R. Civ. P. 71A
3. Identify the Property
 - General Description of the Property
 - Legal Description of Property or Property Interest to Be Condemned

- Attach a map if condemning a right of way 78-34-6

4. Allege the Elements of a Condemnation Claim

- Statutory authority to condemn
- Governmental or Corporate Authority to Proceed
- Attach resolution, if applicable
- Public Use of Project
- Necessity of Property for Public Use
- Budgetary appropriation or feasibility
- Compliance with Statutory Pre-Condemnation Procedures

Occupancy of Property Before Trial

Utah Code Ann. § 78-34-9

1. Timing for Filing

- Motion may be filed at any time after filing the complaint
- If filed with the complaint, property owner cannot be forced to reply before the time to answer the complaint – generally 20 or 30 days

2. Evidence

- Court may take evidence by affidavit or otherwise and “grant or refuse the motion according to the equity of the case” (Federal law uses preliminary injunction standards)

3. Challenges to Public Use or Necessity Tried on Motion for Occupancy

- condemnor need prima facie showing of right to condemn, or public use or necessity

Utah State Rd. Comm'n v. Friberg, 687 P.2d 821 (Utah 1984)

- But if the court gives parties full and fair opportunity to present evidence as to authority or necessity, those issues cannot be relitigated at trial.

Cornish Town v. Koller, 817 P.2d 305 (Utah 1991) (affirming finding of necessity in the absence of bad faith, fraud, or abuse of discretion)

4. Condemning Authority Tenders Appraised Value into Court

- If final award exceeds appraised value, the property owner is entitled to 8% interest on the difference from the date of occupancy forward. Utah Code Ann. § 78-34-9(5)
- If property owner withdraws amount from court, owner waives all defenses except for more money 78-34-9(6)(b)
- Property owner has no right to challenge adequacy of the appraised value at this stage of the litigation

5. Motion for Occupancy Not Subject to Arbitration Utah Code Ann. § 78-34-21(2)

The Condemnor Has Broad Discretion in Moving for Immediate Occupancy

We conclude that the condemnor need only **present prima facie evidence of the elements of subsection 78-34-9(2)(a)(i) to (iii)**. This relatively light burden of production stems from **appropriate deference to legislative action**. See *g. kay, Inc.*, 2003 UT 40, ¶ 11 (noting the wide discretion usually given government in exercise of its eminent domain power). **It is because of this deference that the practice of granting orders of immediate occupancy has been considered routine**. In essence, where there is no “fraud, bad faith, or abuse of discretion, and the condemnor has presented prima facie evidence both of its authority to condemn and of the elements found in subsections 78-34-9(2)(a)(i) to (iii), the condemnor’s decision to seek immediate occupancy should be respected by the courts.

. . . Ultimately, the courts' liberality in granting orders of immediate occupancy merely recognized that, by filing a motion for immediate occupancy, the condemnor assumes the risk that the court may ultimately find against it and require it to incur substantial expense in restoring the property. Although that risk is almost always small, it still serves to deter governmental entities from needlessly seeking immediate occupancy.

Utah County v. Ivie, 2006 UT33, ¶¶ 23, 24 (May 26, 2006) (other quotations and citations omitted)

In footnote 3 to this paragraph, the Supreme Court added that

Significantly, we have only reversed one order of immediate occupancy for a reason other than lack of authority to condemn . . .

Miscellaneous Procedural Issues

1. Right to Jury Trial Limited

- Jury determines amount of just compensation only. All other issues determined by the court.

2. Burden of Proof

- Condemnor has burden to establish elements of the taking
- Property Owner had burden to prove right to greater just compensation. This burden is reflected in the fact that the property owner is the named defendant, but the effective plaintiff at trial.

3. Owner Testimony As to Value

- Owner may offer foundation testimony necessary for appraisal
- Owner may offer an opinion as to value
- Jury may be instructed as to bias

Measurement of Just Compensation and Damages

Utah Code Ann. § 78-34-10

1. Just Compensation Is Based on Property's Highest and Best Use, Not Current Use
2. Compensation for Improvements May Not Be Based on a Different Highest and Best Use than the Underlying Raw Ground
3. Raw Ground suitable for subdividing and development may not be valued as if it were already subdivided





Mitigation of Taking or Severance Damages

Utah Code Annotated § 78-34-11

- Just Compensation and Damages Are Fixed as of the Date of Summons
- Property Owner May Not Increase Damages By Improving Property After That Date
- After the Summons, Property Owner has a Duty to Mitigate Damages
- State v. Fox, 515 P.2d 450 (Utah 1973) (landowner entitled to his cost to restore property to its condition before the taking, if the cost is less than the depreciation in fair market value caused by the taking);
- State v. Ward, 189 P.2d 113 (Utah 1948).
- After the Summons, Condemnor Has Authority to Mitigate damages through additional construction measures or Amend Its Complaint to reduce the size of the taking

- Bingham & Garfield Railway Co. v. North Utah Mining Co., 162 P. 65 (Utah 1916) (“where the owner claims special damages because he is deprived of a crossing or passageway,” the condemnor may, in mitigation of damages, agree to construct and maintain proper crossings, or may agree that he will preserve and keep in repair the irrigating ditches, or may agree to limit the area sought to be condemned and fix its limits within those first proposed”)
- Cornish Town v. Koller, 817 P.2d 305 (Utah 1991) (affirming amendments to a complaint on the eve of trial, to reduce a taking from fee to an easement to mitigate severance damages.)