

VIEW FROM THE TOP

OFFERS THAT CAN'T BE REFUSED — OR CAN THEY?

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A new baseball stadium on the South Capitol Street corridor, an intriguing plan to revitalize the Anacostia Waterfront, an exciting new mixed use development at Skyland, and a new Convention Center hotel at Mount Vernon Square are all exciting new projects for which the DC Government, or one of its quasi-public entities, have plans to purchase substantial parcels of real estate. Assuming the availability of funds, those purchases should be relatively simple for the City when it approaches owners who are eager to sell. For those who are not, the process becomes more complex.

For the reluctant sellers, the City has threatened to employ its power of eminent domain, a process that allows the government to "take" private property for a "public purpose" at a "just" compensation. The end result has seldom been in doubt. Statutes are written broadly enough to accord the government the shock and awe power it needs to acquire titles to private properties. Nonetheless, reluctant property owners who are also smart can use the rules of eminent domain to maximize the compensation that they receive for the taking of their properties.

Eminent domain, also referred to as condemnation, allows the Mayor to acquire the totality of all interests in private property for purposes such as public buildings, infrastructure and rights-of-way. The Mayor may also "condemn" private adjacent properties that are in excess of that needed for the public purpose, when such is necessary to preserve the view, appearance, light, and air..." and to prevent adjacent private properties from being used in ways that diminish the public benefit that is derived from the taking of the primary property.

Expect the City to engage appraisers to determine the fair market value of each property it wishes to acquire. A purchase offer, negotiation and a sale should follow. When parties are unable to agree, expect the Mayor to order the District's Attorney General to initiate condemnation proceedings by filing a Declaration of Taking in the D.C. Superior Court. Once filed, together with the "estimated compensation," title to the named property vests in the District of Columbia. Simultaneously, the right to the just compensation paid by the District into the Court's Registry vests in the owners of the named property and any other persons with an interest therein (i.e. lien or easement holders, tenants, etc.).

Are challenges available to the City's right to take your property? You bet – but to date, they have usually amounted to slowing the taking of the property more than stopping it. Challenges are often based on allegations of failure by the government to follow the proper condemnation procedures, or that the government is not actually taking the property for a prohibited private enterprise rather than for a "public" use.

Judicial challenges have recently been trending away from a wholesale endorsement of the use of eminent domain to take private property solely for "economic development." Instead, some courts have begun to require the taken property to actually be taken for a closely defined public purpose rather than to provide a site for a private development. Challenged governments have defended their economic development takings by pointing to more productive purposes for which the property should (and can) be used, such as for increases in jobs and tax revenues which, they say, amount to public purposes.

Nonetheless, courts in at least five states – most recently Michigan – have either struck down or substantially limited "economic development" condemnations that directly benefit private parties. District of Columbia Courts have not, in the light of these cases, yet considered what constitutes a "public use" sufficient to justify a condemnation. However, the U.S. Supreme Court has agreed to hear a Connecticut case in which a group of property owners have challenged the right of the City of New London to condemn their property to make room for a hotel-office-retail complex. Because the appeal is based on an alleged

violation of the U.S. Constitution, a Supreme Court decision favoring the Connecticut land owners would also curtail the District's otherwise broad power to condemn.

For now, the primary wrangling is likely to be in determining the fair market value of the property. A "special jury" of five "capable and disinterested persons" will be appointed to consider evidence relating to improvements, comparable values, rents and leases, environmental issues, zoning, business losses, taxes, insurance, etc., after which it will make an appraisal report to the court. Interested parties who are unhappy with the jury's determination of value may ask the court to set it aside for errors, irregularities or for insufficient evidence. Final compensation will be ascertained and awarded by a judgment. The court may also fix the time that the parties in possession must surrender the property, an event which could occur at any time after a Declaration of Taking is filed.

The power of eminent domain also extends to partial takings. In such cases, it is generally recognized that a property owner can recover damages not only for the parcel that is taken, but also for any proven injuries to the remaining property.

Administrative hurdles remain after the government obtains title to the property. Applicable zoning approvals must be obtained, environmental impacts must be assessed, any historic issues must be resolved, vaults must be closed, utilities must be terminated, new traffic patterns must be approved and, where necessary, the D.C. Council must close streets and/or alleys to facilitate the project.

The most significant challenge the City may face in developing each of these properties – particularly the Anacostia Waterfront and the new baseball stadium – is the pushback that is nearly certain to come from some citizens and those who represent them. The City needs to be very meticulous in substantiating the ways that these new developments will benefit and not injure the community. Perhaps of most significance are the reasons the public will be better served by producing these new developments rather than by channeling the public energies and finances toward more educational and social programs. The City's economic development team needs to be just as adept in resolving these political issues as it has been in assembling and managing the administrative elements of these projects. The contest for all parties will most likely be won in the preparation.

(This commentary is intended only as an aid for understanding general eminent domain issues. Legal counsel should be contacted for specific advice concerning specific cases.)