

# Public Use vs. Necessity | The Two Pillars of Eminent Domain

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When we talk about [eminent domain](#) (ED) proceedings in the United States, it is important to split ED protocols into two main pillars; public use and necessity. While these two terms often go hand in hand – i.e. ED takings must be necessary and for public use – speaking to them as separate ‘pillars’ during discussions on ED can offer plenty of advantages as you move through the whole process.

## Public Use Case Scenarios

Under the Ohio constitutional provision, all eminent domain takings must be primarily in the public interest as opposed to the private.

We as litigators also understand that in cases where a public project will benefit private interests, that the project will not be somehow deprived of its public-facing characteristics. In Ohio, there is also a presumption in favor of public use projects when the specific exercise of power has been authorized by Ohio’s General Assembly.

Given my study of our revised statutes and legal codes over the course of my law career, **I want to go over a few relevant legal authorities on the issue of private vs. public use that I think are important.**

First, [Revised Code 163.021\(A\)](#) requires that any land or infrastructure set for taking (via eminent domain) be transformed for public use. The 2006 [Norwood v. Horney](#) case further addressed this public-use issue, saying, “It is axiomatic that the federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual...even when just compensation for the taking is provided.”

Similarly, per the [Kelo v. City of London](#) case from 2005, the appropriation of property for economic development purposes (i.e. to revitalize the city’s economy through the creation of jobs and increased tax revenue) was interpreted by the U.S. Supreme Court as satisfying the ‘public use’ requirement prescribed by the constitution.

## A Bit of History

Before we go on to look at necessity requirements for eminent domain proceedings, it is interesting to note that when the 2005 decision between [Kelo and the City of London](#) went public, there was a huge backlash seen in the general population.

Understand, this was a case where a city government was exercising their power of eminent domain for the sole purpose of economic development. Sensing some of their private property freedoms were at risk, many took to major media outlets to express their distaste for these proposed changes. I even

recall one cartoon depicting a steamroller that read, “Rest assured, your property will be used for projects vital to the public interest. Especially the public interested in a new mini-mall.”

It therefore wouldn't be until the [Norwood v. Horney](#) case a year later that Ohio would roll back their stance on the issue. In this case Ohio's Supreme Court interpreted Ohio's constitution more narrowly than the federal constitution, to indicate that a taking must retain more than simply an economic benefit to be considered for 'public use'.

### **Necessity Case Scenarios**

Working in tandem with the public use requirement is the necessity requirement, which comes up in ED proceedings when proposed 'takings' are not limited strictly to what is physically or absolutely necessary. This can be an issue where the taking of any property rights is unjustified, or where the property rights the government proposes to take are more than it needs.

**Under the two necessity cases that follow, takings which are 'reasonably convenient and useful to the public' are considered to satisfy the Ohio standard for necessity:**

1. ***City of Dayton v. Keys, 21 Ohio Misc., 105, 112, 252 N.E.2d 655, 659 (Ohio Com.Pl. 1969):*** “Necessity means that which is indispensable or requisite especially toward the attainment of some end...In statutory eminent domain cases it cannot be limited to an absolute physical necessity. It means reasonably convenient or useful to the public...”
2. ***Henry v. Columbus Depot Co., 135 Ohio St. 311, 20 N.E.2d 921, par. 1 Syllabus (1939):*** “When private property is appropriated for a public or quasi-public use, unless express authority is given by statute, no greater estate or interest may be taken than is necessary for such public use. In such case, where an easement is sufficient, only an easement may be taken.”

Ohio law thus provides that if a property is 'taken' for a particular purpose that requires only an [easement interest in the property](#), then that is the singular, necessary interest the taking authority has the right to appropriate. **It could not therefore take full fee ownership of the property because of a lack of necessity for that level (or interest) of property ownership.**