Points of Practice

Infrastructure and EMINENT DOMAIN

BY JEREMY YOUNG

What's Coming and What Businesses Should Do About It

The last several presidential administrations have attempted to get legislation passed to address the country's crumbling infrastructure, all to no avail. With the election of President Biden and Democratic majorities in the U.S. House and Senate last November, however, it appears that the time for action on infrastructure has finally come.

There is broad consensus on both sides of the aisle that increased funding is required to fund traditional infrastructure improvements, such as roads, bridges, public transit, railroads, water storage, ports, airports, inland waterways, broadband infrastructure and drinking and waste water systems. Beyond that, however, sharp disagreements abound.

In addition to having different opinions on how much to spend on infrastructure and how to pay for it, the politicians do not even agree on a definition of the term "infrastructure," with Republicans sticking to the categories listed above, and Democrats including

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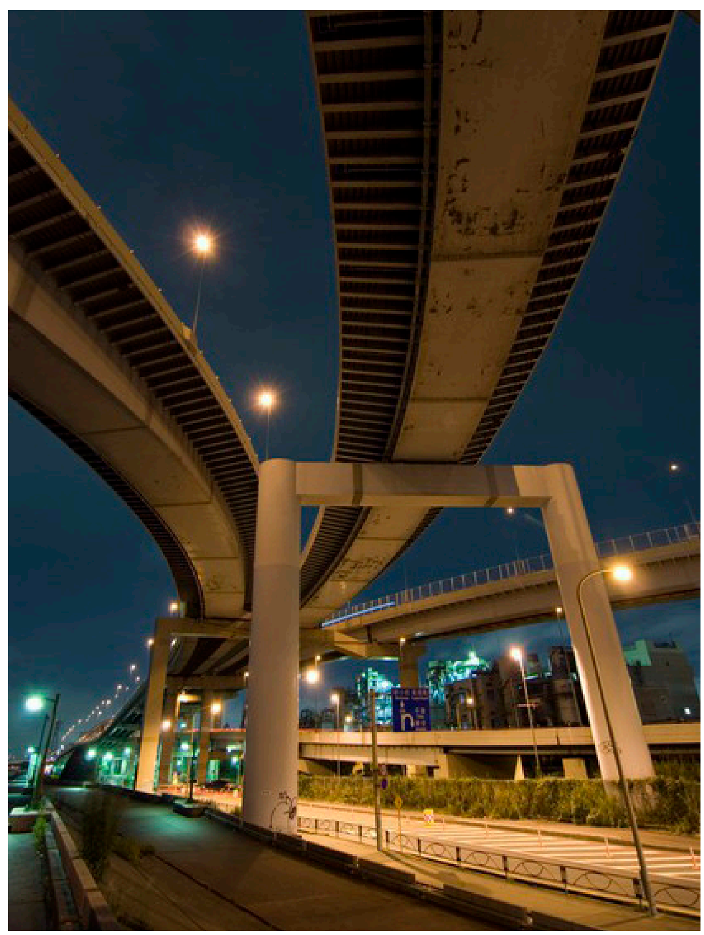
“human infrastructure,” such as child care, research and development, and job training. The parties have proposed competing infrastructure packages, with Democrats advocating President Biden's expansive American Jobs Plan, and Republicans proposing the narrower Republican Roadmap.

These plans follow on the heels of a number of COVID-19 packages that included funds that relate to infrastructure. The CARES Act, passed last year, provides $25B in funding to support the transit industry's response to the pandemic. Similarly, the Coronavirus Response and Relief Supplemental Appropriations Act, signed into law by President Trump earlier this year, set aside $14B to support the transit industry. And the American Rescue Plan Act, passed after President Biden took office, included $30.5B to support the transit industry, $1.675B of which was allocated to capital investments.

This article will not attempt to summarize the entirety of the $2.3T American Jobs Plan, but will instead focus on the categories of spending that implicate the use of eminent domain. First, the AJP provides $621B for transportation infrastructure and resilience, including $115B to modernize bridges, highways and roads; $85B to modernize and expand public transit systems; $80B for Amtrak (part of which would be used to improve existing corridors and connect new city pairs, including Cleveland, Columbus and Cincinnati); $25B for airports; $20B to reconnect neighborhoods cut off by historic transportation investments; $17B for inland waterways, coastal ports, land ports of entry and ferries; and $25B for “ambitious projects that have tangible benefits to the regional or national economy but are too large or complex for existing funding programs.”



Beyond transportation, the AJP sets aside $111B to upgrade and modernize drinking and waste water systems; $100B for high-speed broadband; $100B for power grid modernization and resiliency; $100B to upgrade and build new public schools; and $12B for community colleges, including facilities.

The $568B Republican Roadmap, by contrast, proposes $454B for Transportation Infrastructure, including $299B for roads and bridges, $61B for public transit, $44B for airports, $20B for rail, $17B for ports and inland waterways, and $13B for safety programs. Additionally, the Roadmap provides $65B for Broadband Infrastructure, $49B for water infrastructure, $35B for drinking and waste water systems, and $14B for water storage.

While it is tempting to compare the monies the two plans would allocate, such comparisons are of limited value, since the AJP proposes new money, while the Roadmap generally adjusts already programmed funds up slightly.

As of this writing, the Biden Administration and Republican members of Congress are attempting to negotiate bipartisan infrastructure legislation, but the chances of reaching compromise on a global package appear slim. Nevertheless, there is a possibility that those portions of AJP both parties can agree upon may be passed in bipartisan manner. However, Democrats are expected to attempt to pass the remainder of the AJP (or some version of it) through budget reconciliation, which the U.S. Senate Parliamentarian has authorized, notwithstanding that procedure's typical limitation to once per year and its recent use to pass American Rescue Plan Act. The budget reconciliation process would bypass the filibuster and permit passage with only 51 votes in the Senate. Democrats are eager to move quickly, with House Speaker Nancy Pelosi announcing that she wants to pass a package by July 4.

Regardless of what form the infrastructure package ultimately takes or the manner in which it is passed, it is a safe bet that increases in infrastructure spending are imminent, as is an increase in eminent domain activity.

Once a bill passes, money will start to flow and projects will start to move. This will likely lead to a significant increase in construction activity, and a significant uptick in the use of eminent domain to acquire the necessary property rights. Most businesses are not ready for the onslaught.

For the most part, businesses do not devote a lot of resources to eminent domain. The business folks are too busy running the company to worry about it. In-house legal departments do not pay much attention to it either. The lawyers are busy too, and eminent domain is often treated as "found money," rather than a traditional "cost" to the business. After all, the business will recover something no matter how things turn out, since the condemning authority is legally required to provide some measure of compensation, which is a pleasant break from the business having to actually pay money out to claimants. And while some businesses may use outside real estate counsel on a regular basis, eminent domain is real estate litigation, a niche practice area requiring a specialized skill set, and most real estate lawyers are not equipped for it.

The result? Rather than considering a challenge to the taking or seeking to maximize its monetary recovery (which would require the business to pay for an appraisal), the business tries to push the condemning authority for a little more than is initially offered and focuses on how the changes to the property can be "worked around" from an operational standpoint. Matters fall through the cracks, and money—often significant money—is left on the table!

It is time to change how businesses think about eminent domain. Large brick-and-mortar retailers, the businesses likely to be most impacted, should audit how eminent domain matters are handled. Who receives notices from condemnors? What happens once notice is received? If the response is not consistent, systematize it and train personnel to follow the protocol. If that seems daunting, qualified eminent domain counsel should be consulted. Smaller businesses should designate a point person and formulate a response plan. And all businesses should consider lining up qualified eminent domain counsel ahead of time.

In many states, including Ohio, a condemnor can file an eminent domain lawsuit shortly after sending written notice communicating its intent to acquire the property. A business may find it difficult to complete an appropriate search for counsel by the time its answer is due, and a failure to take timely—and informed—action risks losing valuable rights.

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