

The Infrastructure Investment and Jobs Act Will Increase Eminent Domain Activity—Get Ready

By Jeremy S. Young

After much debate, President Joe Biden signed into law the \$1.2 trillion bipartisan Infrastructure Investment and Jobs Act last November. The Act provides for \$550 billion in new [federal spending in infrastructure](#).

The Problem of Unprepared Businesses

The Act will undoubtedly lead to a significant increase in eminent domain activity to acquire the property rights necessary to implement new infrastructure projects. Many businesses are not ready.

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, and in-house legal departments pay little attention to it either. After all, it's fairly rare from a historical perspective for a typical business to be impacted by eminent domain.

Eminent domain is often treated as “found money,” rather than a traditional “cost” to the business. This is because the business will recover something no matter how things turn out, since the condemning authority is legally required to provide some measure of compensation. That can be a pleasant break from the business having to actually pay money out to claimants. And while some businesses may use real estate counsel regularly, 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 legal challenge to the taking or seeking to maximize its monetary recovery, 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.” Matters fall through the cracks, and money—often significant money—is left on the table!

The Solution

It is time to change how businesses think about eminent domain. Real estate is one of the most valuable assets many businesses own, and the exercise of eminent domain to take all or part of that real estate will have a very real impact on the business in the long run.

A property owner should never blindly rely on the condemnor's appraisal, which tends to understate the amount of just compensation due. For a taking of any significant magnitude, especially one involving loss of parking or an impairment of access, the business should obtain its own appraisal. Only then will it have a full picture of the property's value, both before and after the project.

Additionally, most condemnors will not seriously entertain a counter from a property owner unless it is supported by an appraisal. Although a typical appraisal will cost a mere \$5,000 to \$10,000, it can often lead to an exponential increase in compensation. Nevertheless, many businesses balk at the cost. That mentality has to be overcome if a business is going to successfully navigate an eminent domain taking.

Large brick-and-mortar retailers—the businesses likely to be most impacted by an across-the-board increase in infrastructure spending—should also 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 pleading is due in court, and a failure to take timely—and informed—action risks losing valuable rights.

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