



FREQUENTLY ASKED QUESTIONS

What is the legal definition of “eminent domain” and “land condemnation”? Can I stop the government from taking my property? If the government wants my property, what steps do I take? Emmett Boney Haywood, a qualified North Carolina eminent domain/land condemnation attorney, answers these and other important questions below.

1. WHAT IS EMINENT DOMAIN?

Eminent domain is the government’s inherent right to take private property for a public use, subject to the payment of just compensation for the taking. The government’s power of eminent domain is limited by the 5th Amendment of the U.S. Constitution, which states that private property cannot be taken for public use without payment of just compensation. The North Carolina Constitution has been interpreted by the court to provide similar protections to private property owners.

2. WHAT IS LAND CONDEMNATION?

Land condemnation is the act of exercising the right of eminent domain to take private real property for public use. A land condemnation action is generally begun by the filing of a complaint or petition in the county in which the property is located. Property owners can defend themselves, or they can have an attorney represent them in the land condemnation action. With some land condemnation claims, a settlement is reached before a condemnation action is initiated. This is known as a “pre-condemnation settlement.” See question #4 below for more information on pre-condemnation planning.

3. WHO CAN TAKE MY PROPERTY?

Federal, state and local governments all have the power to condemn private property for public purposes. This power has been delegated to government agencies including the North Carolina Department of Transportation. This power has also been delegated to “quasi-public” entities such as public utility companies, but these “private condemners” are subject to somewhat different procedures and restrictions. Under federal and North Carolina law, all entities possessing the power of eminent domain are subject to the constitutional requirements that 1) a taking must be for a public use; and 2) the property owner must receive just compensation.

4. WHAT SHOULD I DO BEFORE MY PROPERTY IS TAKEN?

If it appears that your property will be affected by a governmental taking, then you need to be proactive. You need to act before the process begins. In general, when considering pre-condemnation actions, it is wise to seek the advice of an attorney experienced in property law and eminent domain issues. As a property owner, you should try to avoid taking positions, especially written positions, which may be used against you in the land condemnation proceeding. Other actions to consider are:

- Do not apply for building permits, zoning changes, variances, tax valuation reduction and the like without first speaking with an attorney.
- Do not give the government a copy of your income statements, appraisal reports or other personal and property information without speaking with a lawyer.



- Use your best efforts to maintain the appearance and condition of your property.
- Inquire about what relocation benefits you may be entitled to receive.
- Be careful what you say to government representatives as they often record what you say and may try to use your statements against you.
- Avoid entering into listing agreements or sales contracts.
- Timing is important. Ask the following questions: Is the proposed project funded? If so, will the government acquire my property? Am I eligible for an “advance acquisition”?

Information that you will want to obtain from the government includes but is not limited to the appraisal report, copies of public hearing maps, highway plans and cross sections.

Here is a list of some of the questions you should know the answers to:

- What is the purpose of the project?
- Why is my property being taken?
- How much of my land is being taken?
- What is the impact of the project on the property?
- How will the project affect my remaining property?
- Will my property’s access, visibility, land use or grade be altered by the project?
- Could the plans be changed to reduce the negative impact to my property?
- Are there any easements being taken? How will these easements affect my remaining property?
- What are drainage easements, slope easements and temporary construction easements?
- If the taking is by a local government, will I have to pay an assessment for the public project?
- If I have to move, what relocation benefits will I receive?
- What experts, if any, should I hire? Do I need to hire a real estate appraiser, engineer, land planner or other experts?
- Is the government’s offer fair?

A well-trained lawyer who is knowledgeable in North Carolina land law, eminent domain and land condemnation matters can help you answer these and other important questions.



5. CAN I PREVENT THE GOVERNMENT FROM TAKING MY PROPERTY?

As a general rule, the government can take your property if the property is taken for a “public use” and the proper studies and procedures are followed. It is important to examine your individual circumstances to see if the government’s taking is legally proper.

6. HOW IS MY PROPERTY VALUED IF THEY TAKE MY ENTIRE PROPERTY?

In North Carolina, the measure of compensation for the taking of your entire property is the fair market value of the property on the date of the taking. In general, the date of valuation is the date that the land condemnation petition or complaint is filed.

7. HOW IS MY PROPERTY VALUED IF THEY TAKE ONLY A PORTION OF MY PROPERTY?

If only part of your property is taken, a “partial taking” has occurred. The measure of compensation for a partial taking depends on who is taking the property. In North Carolina, there are two separate statutes that deal with eminent domain – Chapter 136 and Chapter 40A of the NC General Statutes. Some towns and cities have been granted the right to select which statute they use, so it is important to know which statutory authority is being utilized.

If the NC Department of Transportation is taking the property, pursuant to Chapter 136 of the NC General Statutes, the measure of compensation is based on the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking. The remainder is the land that is left over after the taking has occurred. Damages to the remainder can sometimes be offset by benefits to the remainder.

In other land condemnation cases generally involving local governments, the measure of compensation, under Chapter 40A of the NC General Statutes, is based on the “greater of” either (1) the fair market value of the land taken OR (2) the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking. See Chapter 40A, NC General Statutes.

8. HOW WILL AN APPRAISER VALUE MY PROPERTY?

The appraiser must value your property at its highest and best use or uses, which is not necessarily its present use. In NC eminent domain cases involving partial takings, often the most important element of compensation is the damages caused by the project to the remaining property. It is important to carefully review the impact the taking will have on your remaining property. You should not be rushed into accepting a quick settlement without first consulting with an experienced eminent domain attorney to fully understand the total impact of the taking.

There are three common appraisal approaches used by appraisers in valuing property in land condemnation cases: the market approach, the cost approach and the income approach. A lawyer qualified to handle NC eminent domain cases understands each of these approaches and can help to evaluate the credibility of appraisals used to value your property.



9. HOW IS MY PROPERTY VALUED IN A PARTIAL TAKING?

In North Carolina, when a partial taking occurs, the property is valued twice. First, the property is valued in its “before” condition; that is, immediately before the land condemnation occurred. The appraiser considers the property’s highest and best use in the before condition and then values the property for that use. The appraiser assumes that there is a market for the property and that any hypothetical buyer has no knowledge of the condemnation action.

Next, a fictional button is pushed and the project is imagined to be complete – your land has been taken, and the appraiser must value the property a second time, in its “after” condition. The appraiser considers the property’s highest and best use in the after condition and then values the remainder for that use.

An appraiser will calculate the mathematical difference between the before value and the after value to determine the amount of damages for the taking, or just compensation owed the property owner.

10. DO I HAVE TO ACCEPT THE GOVERNMENT’S FIRST OFFER?

No. It is important to understand the basis of the offer and the full impact of the taking on your remaining property before settling your case.

11. WHAT HAPPENS IF I CANNOT AGREE ON THE AMOUNT OF COMPENSATION?

If you and the condemning authority are unable to reach an agreement on just compensation for the taking, then the condemning authority will file a lawsuit in the NC Superior Court in the county where the property is located. We cannot overstate the value of retaining at this time the services of a qualified NC eminent domain/land condemnation attorney who knows how to uphold your property rights.

12. WHAT HAPPENS AFTER A LAWSUIT IS FILED?

After the condemning authority files the lawsuit and a summons is issued, the lawsuit documents are served on all parties with an ownership interest in the property – owner, mortgage holder, etc. After the lawsuit has been served, the named defendants have a set time frame for answering the lawsuit. This time frame is set forth in the North Carolina General Statutes. The remaining life cycle of a land condemnation case may include the hiring of experts, discovery, court hearings, mediation and a trial by 12 jurors to determine the issue of just compensation.

13. WHAT IS MEDIATION, AND WHY DO I HAVE TO MEDIATE MY CASE?

Mediation is an effort by both sides of an eminent domain dispute to attempt to resolve the issue. A mediator is selected who has no interest in the case or the outcome of the dispute but who will work with the parties to affect an amicable resolution. In Raleigh and throughout North Carolina, the Administrative Office of the Courts has determined that in order to manage and reduce the number of civil law cases on the trial calendars, virtually all cases (including land condemnation cases) filed in NC Superior Court must go through mediation. Mediation is now a mandatory step in the life cycle of a land condemnation case.



EMMETT BONEY HAYWOOD
ATTORNEY AT LAW

14. DO I HAVE TO PAY INCOME TAXES ON A CONDEMNATION AWARD?

It depends. Proceeds from a land condemnation may be treated differently from those of a voluntary sale for income tax purposes. In some cases, proceeds from a condemnation award can be reinvested to defer your tax obligation until a later date. However, the reinvestment must meet specific requirements in order to be eligible for deferred tax treatment. It is important that you seek tax-planning advice from a knowledgeable accountant or tax attorney with a law firm that is intimately familiar with eminent domain and tax issues.