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CONDEMNATION LAW

WHEN THE GOVERNMENT TAKES YOUR PROPERTY

YOUR RIGHTS AS A PROPERTY OWNER IN CONDEMNATION

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FORMAT OF THIS BROCHURE

This brochure contains both the background of the firm along with an informative guide through the condemnation process in a question and answer format.

Feel free to contact us with any questions, for further information, or if you want to discuss your specific situation.

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BACKGROUND OF THE FIRM

Founded in 1976, Forchelli Deegan Terrana LLP is one of Long Island's largest and most distinguished law firms.

The Firm represents a broad range of clients, including national, regional and local businesses, public, private and family-owned companies, major real estate developers, property owners and operators, contractors, banks, municipalities, educational institutions, not-for-profits, foundations, and individuals. Personal attention and quality representation that is both practical and cost-effective are hallmarks of the Firm.

In October 2022, the entire staff and attorneys from Koeppel Martone & Leistman, L.L.C. joined the firm, establishing FDT at the Preeminent Real Estate Tax Law Firm in New York State. With over 70 attorneys, the Firm provides legal services in nearly 20 different practice areas, with the talent, skill and experience necessary to meet the legal needs of virtually any client. These attorneys are supported by a dedicated team of paralegals, law clerks, administrative and support staff, and cutting-edge office and communications technology.

Headquartered in Uniondale, NY, in one of Long Island's premier office buildings, the Firm is conveniently located for clients in Nassau and Suffolk Counties, as well as those in New York City.

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A REVIEW OF COMMONLY ASKED QUESTIONS IN THE CONDEMNATION PROCESS

I

WHAT IS CONDEMNATION?

Condemnation is the taking of private property by the government (or government agencies) for public purposes. These purposes include construction of roads, road widening (or improvement), parks, schools, environmental preservation, job creation, housing and municipal parking lots. Many commercial property owners, especially those with property along major thoroughfares, will, at some point, be confronted with a condemnation. For example, the New York State Department of Transportation has recently conducted major road improvements and widenings along Smithtown Bypass (Route 347), Jericho Turnpike (Route 25), Main Street/Northern Boulevard/Port Jefferson-Riverhead (Route 25A) and the service roads along the Long Island Expressway. Several towns and counties have likewise undertaken major road widening and drainage projects which have and will affect property owners along the right of way.

Once a government decides to take property, it is very difficult, costly and usually futile to try to prevent it.[1] The Eminent Domain Procedure Law ("EDPL") requires that public hearings be held by the condemning authority to review the proposed taking and the public purpose underlying the taking. Almost invariably, these hearings will result in a finding that a "public necessity" exists for the taking and then authorizing the condemnation to proceed.

The EDPL provides for a specific judicial review process of this finding of public necessity. However, unless the taking is plainly not for a public purpose and thus improper – an extremely difficult showing to make – a court will not intervene. Usually, the most that can be accomplished is to delay the taking on the ground of some procedural irregularity such as improper notice or inadequate environmental studies. See EDPL §§202 and 203.

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[1] There is a general misconception that a condemnation can be "stopped". Taken at face value, this is an overstatement. Many condemnations can, at great expense, be "slowed down" or "delayed", but, as a practical matter, not stopped permanently. It is extremely difficult, except in extraordinary circumstances, to prove that a taking is not for a "public purpose". See, generally, EDPL Art. 2. Conceivably, the mere delaying of the condemnation could result in the condemnor abandoning the project, but this is really an administrative and/or political decision, more than a legal one.

Essentially, the property owner's remedy is to receive just compensation guaranteed by the Fifth Amendment of the Constitution for the taking of private property.

The discussion which follows is based on New York State statutes and practice. However, every state has a procedural law for condemnation proceedings (e.g. NJSA Title 20).

The practice will vary from state to state, but there will be many similarities. For example, most states require an "advance payment" upon taking of the property (see e.g. NJSA 20:3-18; Calif. Code of Civ. Pro. §1255.010, PA. St. 26 P.S. §1-407). Every state has a procedure for the filing of a claim and a method – whether it's before a panel of commissioners or the court – to determine just compensation (compare Penn. Statute 26 P.S. §1-502 to New York's EDPL Article 5).

The concept of "what is compensable" also varies from state to state, but there are certain bedrock constitutional standards of just compensation that apply to every state.

II

WHAT CAN THE GOVERNMENT TAKE?

The answer to this question is simple: anything and everything provided that it pays just compensation. Except if limited by the enabling statute (and this limitation will usually only be applied to subordinate government agencies or subdivisions), the power to take is, as a practical matter, virtually unlimited. The government can take real property, personal property, trade fixtures, leasehold interests, contractual rights, franchises, and entire businesses.

A taking can be "partial"; for example, when the government takes some frontage to widen a road; or it can be "total" when the government takes the entire property. It can be permanent (i.e. the government owns it forever) or temporary (i.e. taking a portion of real estate to provide for construction, at the end of which the property is returned).

III

THE GOVERNING STATUTE

In the State of New York, the condemnation procedure is governed by the Eminent Domain Procedure Law (EDPL) which applies to all condemnations, including those undertaken by the State, municipalities, and state and local agencies.

IV

WHO CAN CLAIM DAMAGES?

Any person with an interest in the property taken has a potential claim. This includes, of course, the fee owner of the property. But it also can include lessees and mortgagees, as well as owners of fixtures and equipment affected by the taking (see Sections XVI, XVII and XXVII below).

V

WHEN THE GOVERNMENT TAKES YOUR PROPERTY WHAT ARE YOU ENTITLED TO?

When the government takes your property, the Constitution of the United States (and every state Constitution) requires that you must be paid "just compensation" for the property it has taken, as well as compensation for damages to the part it has not taken (if the taking is partial) (see Section VI below).

VI

WHAT IS "JUST COMPENSATION"?

The standard of just compensation for the taking of property (as well as determining the indirect damages -- see below) is valuation at the "highest and best use" of the property. Thus, even if property is being under-utilized, the claimant is entitled to the value as if it was being used to its full reasonable potential. This does not mean, however, that the potential highest and best use can be speculative or hypothetical. It must be realistic based on the zoning (or potential rezoning -- see below) or the character and history of development of the surrounding area.

Often, this can result in a zoning issue. For example, undeveloped residentially zoned property in a valuable commercial zone may still be valued at its commercial value provided the claimant can show a high probability of rezoning. The burden, however, is on the claimant to prove this probability and proof must be clear and convincing of the probability that such zoning change or approvals would have been granted.

VII

WHAT ABOUT DAMAGES TO PROPERTY THAT THE GOVERNMENT HAS NOT TAKEN?

The damages can be both "direct" and "indirect". Direct damages are the value of the property physically taken. Indirect damages, which are also known as "severance" or "consequential" damages, are the loss in value to the remaining property by reason of the taking of a portion of the property (e.g. loss of frontage or access) or by reason of the use to which the condemned parcel is being put by the government (e.g., a landfill or an incinerator).[2]

VIII

AM I ENTITLED TO DAMAGES TO MY BUSINESS?

Except in the rarest of circumstances, the claimant cannot collect for the loss of business value, or going concern value, or loss of profits. Damages are strictly limited to the value lost in the real estate, fixtures and equipment [3]. Leases which speak in terms of the tenant retaining a claim for "business" or "going concern" value have no valuation significance in the process of determining just compensation.

IX

HOW DOES THE GOVERNMENT TAKE PROPERTY?

The method by which government actually takes title (i.e., vests title) to the property differs depending on whether the condemning authority is the State (or one of its agencies) or a local government. A specific distinction is made by the EDPL between State appropriations and appropriations made by local government such as county, town, city, or village. The different procedures applicable to a taking by the State in contrast to a taking by a local government are generally set forth in EDPL §402.

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[2] There is a technical difference between "severance" and "consequential" damages. Severance damages represent the loss in value (i.e., diminution) in the utility or potential of the remainder land by reason of the taking. Consequential damages are the damages caused to the remainder land resulting from the use of the land taken by the government. For example, if the government takes part of your property to erect an incinerator or toxic waste facility, the resulting damages are consequential.

[3] The legal philosophy underlying this concept is that you cannot recover "business" damages since the condemnor is not "taking" business -- just real estate -- and the government is obligated to pay only for what it takes -- not what the property owner may be losing (i.e., lost profits, etc.).

(A) The State

EDPL §402(A) provides that the State appropriates property by filing a map in the Office of the Clerk of the County in which the property is located and with the "condemning agency". The State takes property simply by the filing of a map. The EDPL imposes a number of pre-vesting procedures upon the State and, as a general practice, the State will contact the property owner well before the taking and will hold informational hearings. Nevertheless, as noted below, it is not until the actual notice of appropriation that the property owner is usually aware of the taking.

(B) Local Governments

In contrast to the State, local governments or condemning authorities follow a more traditional procedure. Public hearings must be held to establish the "public purpose" or necessity for the taking. At the public hearings, comments will be invited from the affected property owners as well as the general public. Usually, there is little question that the purpose of the taking is in the public interest and a finding of public purpose will be issued. This can be challenged, but is rarely successful. See EDPL Article 2. Counsel for the local government will then file a notice of pendency and make a formal application before the Supreme Court in the county in which the property is located. This application is very similar to a plenary action or, for that matter, a special proceeding requiring service upon the property owner with at least twenty days notice in addition to newspaper notice. In most circumstances, there is no opposition to the formal notice to vest title and the application is unopposed. Upon the Court's signing of the actual vesting order and its entry with the county clerk, title is deemed vested in the condemnor.

X

WHEN DO I MAKE THE CLAIM?

Different statutes of limitations will apply depending on whether the State or the local government takes title. For a State taking, the time in which to file a claim against the State is three years from the date of receipt of the Notice of Appropriation. This, however, is not simple as it appears since the State's failure to serve the Notice of Appropriation in accordance with the EDPL may not actually toll the statute of limitations. If notice has not been given appropriately, claims can be filed after the three year period subsequent to the vesting of title. See EDPL §502(A) and §503(A).

With respect to the vesting of title by local governments, the date in which a claim must be filed is set by the Supreme Court vesting order and may extend anywhere from six months to three years. EDPL §503(B). Failure to file within that period of time can be excused for a good cause shown. Obviously, it is not recommended that a claimant wait until the last moment to file a claim. It is almost always in the property owner's best interest to file a claim immediately so as to prevent any question of its timeliness. In fact, although in a State condemnation the claimant has three years to file, interest can be suspended if the claim is not filed within six (6) months after the Notice of Appropriation. See EDPL §514.

XI

WHAT IS A CLAIM?

A notice of claim is a simple instrument. In a condemnation by a local government, only a notice of appearance demanding additional compensation is required. The State form tends to be slightly more complex. However, its function is simply to put the State on notice that the property owner intends to seek additional compensation. See EDPL §503(B) and §504.

However, claims for fixtures must be specific -- detailing the actual fixtures for which damages are claimed. See EDPL §503(C).

XII

WILL I RECEIVE INTEREST?

The statute governing proceedings by local municipalities provides that interest on the award shall be at the rate of six (6%) percent per annum from the date of title vesting to the date the award is ready to be paid. General Municipal Law, § 3-a. The State currently pays interest at nine (9%) percent per annum (see CPLR §5004), but this interest rate may be reduced by the State depositing the advance payment with the Comptroller pursuant to EDPL §514. Under certain provisions of the EDPL, interest can be totally suspended or substantially reduced if the claimant fails to take the necessary steps to file its claim to process the award in a timely fashion. See EDPL §304 and §514.

XIII

WHEN DO I GET MONEY?
THE PRE-VESTING OFFER/ADVANCE PAYMENT

(A) Pre-Vesting Offer

The government is obligated under the applicable statutes to make a good faith effort to negotiate prior to the vesting of title. EDPL Art. 3. However, in rare circumstances will the property owner find the offer acceptable. In most cases, the government must therefore acquire title by condemnation procedure. Even with an acceptable offer, a government will often condemn the property rather than buy it because title acquired by condemnation is the purest title -- clearing any possible encumbrances.

(B) Advance Payment/Amount

Upon the taking or shortly before, the owner of property is entitled to an advance payment equal to one-hundred percent of the condemnor's "highest approved appraisal" of the property. All mortgages, judgments, liens and encumbrances must first be satisfied from this payment, with the balance, if any, payable to the property owner. EDPL §303.

A property owner can take the advance payment and still make a claim for further damages.

(C) Time

The advance payment is not discretionary and should be made immediately upon or immediately before vesting of title. However, as a practical matter, payment generally takes a number of months. Since the taking authority requires extensive documentation and tax clearances to confirm that there are no pre-existing liens, etc., it can often take six months or longer before the advance payment is released. See EDPL §403. Note that interest must be paid on the advance payment from date of vesting to date of payment, but keep in mind that failure to properly prosecute the claim could result in suspension of interest.

XIV

CAN THE GOVERNMENT INSPECT MY PROPERTY?

The appraisers, engineers and/or inspectors for the condemning authority have the right to inspect property (even before the formal taking) for purpose of gathering information upon which to base an appraisal. This inspection could even include environmental testing. The appraiser should be given access to the premises and, in fact, has a right to access the premises. Otherwise, the property owner may waive or delay its right to an advance payment. See EDPL §§302 and 404.

A record should be kept on which appraisers, engineers and/or inspectors visit the premises, the date of their visit and the time spent by them in the premises. They should contact you in advance to arrange a time that is mutually convenient and not appear without notifying you first.

Before the inspection can take place, the condemnor must give you notice, and may be required to post a bond to cover against any damages caused by the inspection. If this situation occurs, or you are uncertain, it is important that you contact your condemnation counsel immediately as this inspection could interfere significantly with the use of your property. Counsel will assure that an appropriate bond or restrictions are placed on such inspection.

XV

WHAT ABOUT MORTGAGES AND LIENS?

(A) Payment

Virtually every mortgage will provide that the mortgagee (i.e., the bank or lending institution) is entitled to the entire condemnation award to be applied against the mortgage. However, in partial takings (i.e., where the government takes less than the whole property), the mortgagee, upon request, will often waive this right or will agree to share the award with certain conditions. Of course, even where the mortgagee takes the entire award, it reduces the mortgage so the fee owner realizes a benefit.

(B) Mortgage Interest

It is a peculiar and little known concept that unless there is a specific provision in the mortgage to the contrary, upon a taking, as a matter of law, the interest rate on the mortgage security is deemed changed to the rate paid by the condemning authority. For example, if the mortgage rate is 11% and the State takes the property, the rate to which the bank is entitled on the mortgage after vesting is 9%. If there is a prepayment penalty, the condemnor may be liable for such penalty.[4] See EDPL §702.

[4] Interest on a mortgage is actually somewhat more complicated. The interest rate on the mortgage (i.e., the security) is reduced, but the bank may still, at its option, choose to sue on the mortgage note -- thereby preserving its higher interest rate.

(C) Partial Take/Mortgage

Where only a part of the property is acquired, and there is a mortgage in existence which covers that part of the property not acquired or where there is a blanket mortgage covering property not a part of the condemned premises, payments should be continued under the terms of the mortgage so as to avoid a default in the mortgage as to that part of the property not condemned.

XVI

HOW DO LEASES AFFECT THE AWARD?

Leases will typically contain provisions governing the rights of the landlord and tenant in the event of condemnation. For example, most leases contain provisions giving the landlord or tenant the option to cancel the lease in the event of a taking, especially if the take is substantial as defined by the lease.[5]

XVII

WHAT ARE FIXTURES?
CAN I RECOVER FOR DAMAGES TO MY FIXTURES?

(A) What is Considered A Fixture?

A fixture is an article in the nature of personal property which has been so annexed to the realty that it is regarded as part of the real property. For valuation purposes, a fixture is compensable. It does not need to be permanent or affixed in a manner as their removal would cause damage. In New York, the standard used by courts is extremely broad. A fixture is compensable if (i) it is intended to be used in conjunction with the property; (ii) it is affixed in a permanent manner to the property; (iii) the property would, in some way, be damaged if the fixture was removed; and most importantly (iv) even if the fixture is removable and it meets one of the above three criteria, it becomes compensable.

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[5] There is no general concept of "fairness" in the allocation. The literal terms of the lease will govern.

(B) Can I Recover for Damages to My Fixtures?

The owner of the fixtures has a potential claim for damages. However, these claims are complicated and require solid evidentiary support and must be detailed in the claim. See EDPL §503(C). A fixture claim requires advance planning at the time of title vesting.

Claimant should make certain that photographs have been taken of any fixtures before moving out and that the fixture appraiser has completed their inventory and appraisal. A detailed inventory should be taken of what is removed. Any item which has been removed may not be claimed for as a fixture. However, the costs of removal and reinstallation may be claimed. Before moving, a claimant should have a copy of the fixture appraisal for reference purposes. The fixture claim will be affected by the removal claim and vice versa. A claim for an item as a fixture will bar payment for its removal and/or re-installation.

XVIII

WHAT ABOUT RENT, INSURANCE, REAL ESTATE TAXES AND WATER/ UTILITIES?

(A) Rent

(i) Back Rents. The owner of the building should collect rents up to but not including the date of title vesting. The condemning authority or its agents will not attempt to collect any of the rents due prior to title vesting date. If the owner does not collect back rent themselves, it will not be adjusted or collected by the condemnor.

(ii) Rents after Vesting. If any rent is collected by the owner for a period subsequent to the passing of title, the condemnor will demand a rebate of those rents. If unpaid, such rents will be a lien against the award to be made and will have to be paid or adjusted prior to the payment of the award. The property owner should make rent adjustments to the condemning authority as soon after title vesting as possible. Disputes can better be resolved while tenants are still available.

(iii) Continued Occupancy. An owner or tenant can often occupy any of the space in the building after vesting, either as a commercial or residential tenant. The condemning authority will demand a rent to be paid for use and occupancy. The amount of this rent may be negotiated, and will not affect the determination of just compensation. If unpaid, such rent will be deducted upon payment of the award. Disagreements on the amount of the appropriate use and occupancy rental, are resolved by a judicial hearing or may be an issue in the trial itself. No written agreement as to rent should be entered until counsel has reviewed it. See EDPL §305.

(iv) Services/Utilities. Tenants should assume that the rental arrangement with the State, unless otherwise agreed, will be on a net basis (i.e., tenant is responsible for insurance, maintenance, etc.). It is highly unlikely that the condemning authority will provide services or repairs to the premises or make arrangements for same after the taking. If the owner chooses to remain in occupancy, it is his or her responsibility.

(B) Insurance

Even where the taking is total, liability insurance should be continued for a reasonable period after the title vesting date as protection against pre-existing physical defects or claims. If the owner of the property continues to occupy all or any portion of the premises, insurance should be continued on personal property. The owner should consult its insurance broker as to continuing protection for itself as a tenant with respect to fire and liability insurance.

(C) Taxes

(i) Payment to Vesting. As a general rule, the owner is required to pay only the apportioned amount of the real estate taxes for that part of the tax year prior to vesting of title. However, if the owner is in title as of the tax status date, it is, as far as the assessor is concerned, still the owner and will be liable for the tax for the entire year although the condemning authority may vest title at some point in that tax year. Note, however, that this excess payment can be adjusted later – see (iii) below.

(ii) Apportionment. Prior to the next tax status date, application should be made to the assessor for an apportioned bill to remove the property taken by the condemnor and adjust the tax bill accordingly. All real estate taxes should be paid promptly to avoid any interest and penalties.

(iii) Condemnor/State Refund of Apportioned Taxes. If the tax has already been paid for a period beyond title vesting, the condemnor, upon proper application, will pay an apportioned amount of the taxes.

(iv) Where the taking is partial, the above explanation applies, but there will be a further apportionment.

(D) Water

If water taxes are paid by a frontage charge, the owner is liable for an apportioned water tax for the year in which title vested. If there is a water meter, a reading should be requested as soon after the date of title vesting as is possible to include up to the date

of title vesting. If water frontage charges have already been paid, application should be made by the owner to the local tax collector for a refund.

XIX

WHAT IF MY PROPERTY HAS ENVIRONMENTAL PROBLEMS?

The question of the effect of an environmental condition on the valuation of the property for condemnation or just compensation purposes is still an open issue. As of the date of this brochure, no New York appellate court has rendered a definitive determination on how costs of remediation fit into the valuation of property where there is an environmental condition. The position of the government is that these costs must be deducted from the gross market value to determine the net market value of the property and the position of the claimant/property owner is that it would be improper to impose costs of remediation as a deduction, especially where the property taken has been operating without interference with this condition. Trial courts which have addressed the issue have largely found that either the costs of remediation may not properly be deducted from the award, or that the amount of costs of remediation which can be deducted are limited by various circumstances. This is still a developing area of condemnation law and you, as property owner, should feel free to contact us to discuss this problem if the situation applies.

XX

WHAT IF MY PROPERTY HAS BUILDING VIOLATIONS?

If there are building department or health department violations which have been placed on the property and not officially removed, the cost of clearing up such violations could become a deduction from the market value as of taking date. The property owner, so as to effectively deal with any attempt by the condemning authority to take such a deduction, should:

(i) Maintain a copy of the notice of violation(s).

(ii) Detail what work was done (if any) to remove the violations or any part of them, even though not officially removed.

(iii) Preserve all documents showing that the work was done to remove any violations, including contracts and cancelled checks.

If violations have not been removed, an estimate should be obtained from a contractor or an engineer on the cost of the removal of these violations. This could become an important issue in the valuation trial or settlement.

XXI

DO I HAVE A CONDEMNATION CLAIM IF GOVERNMENT REGULATIONS "DESTROY" MY PROPERTY?

The answer to this question is a qualified "yes", but it is extremely difficult to prove.

In recent years, much attention has been focused on these so-called regulatory or "de facto" takings. These are situations where the regulatory authorities place such onerous restrictions on the use of the property that the property owner claims that the government has "de facto" (as opposed to formal or "de jure") taken the property, entitling the property owner to just compensation. Traditionally, the remedy for a de facto taking was known as an "inverse condemnation".

A recent spate of cases from the Supreme Court of the United States, in conjunction with a number of lower state and federal court cases, gave rise to the sense that a major change in the standards of de facto condemnation was being implemented by the courts. See, e.g., First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987), Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Dolan v. City of Tigard, 512 U.S. 374 (1994).

The Supreme Court of the United States seemed to be moving toward a concept of requiring compensation (or at least recognizing a de facto condemnation requiring payment of compensation) whenever local regulations resulted in substantial market depreciation in the value of the property.

The New York courts are generally not receptive to de facto condemnation claims requiring a very powerful showing that the property has been destroyed by government action. Gazza v. New York State Dep't of Envtl. Cons., 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997).

However, in certain circumstances, New York's statutory scheme does provide some relief to recover for a "de facto" condemnation where the government's application

of the environmental rules and regulations deprive a property owner of substantial value. See, ECL 24-0705(7) which provides:

> "In the event that the court finds the action reviewed constitutes a taking without just compensation, and the land so regulated merits protection under this article, the court may, at the election of the commissioner, either (i) set aside the order or (ii) require the commissioner to proceed under the condemnation law to acquire the wetlands or such less than fee rights therein as have been taken."

The statute requires a two-step analysis. It must first be determined whether the administrative denial of the permit is rational and supported by substantial evidence. Once this is established, it must be determined whether the denial of the permit constitutes an unconstitutional taking of petitioner's property. See, Spears v. Berle, 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979).

A precautionary note. The law on the question of "de facto takings" is changing very rapidly. Decisions frequently come down refining and re-defining the legal standards. The above review should therefore be viewed as only the broadest outline of this area and any property owner who believes that they are the victim of a de facto condemnation must consult with their counsel to be assured that they are evaluating their situation under the most recent standards.

XXII

WHAT ARE THE INCOME TAX IMPLICATIONS?

A condemnation is a taxable event at the time of vesting. Section 1033 of the Internal Revenue Code deals with "involuntary conversions" and affects re-investing of proceeds of the condemnation proceeding so as to accomplish a deferral of any capital gains.

THERE ARE STRICT TIME LIMITATIONS UNDER THESE SECTIONS! IMMEDIATE TAX ADVICE SHOULD BE SOUGHT WITH RESPECT TO THESE MATTERS AND AS TO ANY OTHER PROBLEMS WHICH MAY AFFECT AN OWNER AS A RESULT OF THE CONDEMNATION -- WE EMPHASIZE -- AT THE TIME OF TAKING. DO NOT WAIT UNTIL THE AWARD IS ACTUALLY RECEIVED, WHICH MAY BE YEARS THEREAFTER.

XXIII

WHAT HAPPENS AT TRIAL?

A condemnation trial is essentially a trial involving different opinions of expert witnesses. An appraisal must be filed and will be exchanged with the condemning authority which will have its own appraiser and appraisal report. Cases involving partial takings require expert engineering testimony and reports to identify the severance or consequential damages. Where the valuation question of "highest and best use" is dependent on the likelihood of a zoning change, an expert land planner and report will also be required.

All of these reports must strictly conform to specific rules and requirements and filed and exchanged within a specified time in advance of trial. See EDPL §508.

The trial of a claim involving the State is held in the Court of Claims and a trial of a taking by a local government is held in the Supreme Court in the County in which the property is located.

XXIV

CAN I RECOVER THE COSTS OF LITIGATION?

Where the condemnation award is "substantially in excess of the amount of the condemnor's proof", the court, "in its discretion", may award as additional compensation the actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred. EDPL §701 and §702. An application for such fees can only be made at the end of the case. In settlement negotiations, the right to reimbursement is often an important issue for negotiation.

XXV

CAN I GET RELOCATION EXPENSES?

The property owner (including tenants) – be it residential or commercial property – may be entitled to certain reimbursement and assistance to accomplish relocation. For a State taking, the relocation expenses can include:

(A) Moving Expenses

(i) Professional Move – is based on the Agency obtaining two moving estimates. This is accomplished by doing an inventory of the claimant's personal property which

will be moved. Estimates must be obtained, and then confirm the amount of funds approved for the actual move. The State approves the lower of the two estimates that are obtained. The claimant will be provided with a copy of both estimates. The claimant may use any mover they want, but the State will not pay more than the lowest of the two estimates.

(ii) A Self Move – is based on the lowest of the two professional estimates with an additional deduction of 10%. However, the State will compensate in some cases for a foreman that is taken away from his normal duties to perform as an overseer of the move.

(B) Storage

For necessary storage, the Department will reimburse the fees up to twelve (12) months. This must be approved in advance.

(C) Tangible Loss of Personal Property

Actual direct losses of tangible personal property as a result of moving or discontinuing a business but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property.

(D) Re-establishment Expenses up to $10,000

These are actual reasonable expenses necessary to reestablish a business at its new site. This is a "spend" to "get" benefit. Actual paid bills must be submitted. The expenditure is to make the business "whole" again. The business is to be placed back in a functional operational condition as prior to the move.

(E) "Buy Back" or Salvage Value

If for any reason the relocatee wishes to take a trade fixture with them to the new location, they may purchase the item back from the Department for its salvage value. This is the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense.

(F) In Lieu of Moving Expenses

Any displaced business eligible for moving payment may elect to accept a fixed payment in an amount to be determined according to criteria established by the Department in lieu of moving expenses. Such payment will be determined by the last

two Federal Income Tax Returns. Such payment shall not be less than $1,000 nor more than $20,000.

(G) Searching Fees

The State will pay up to $1,000 for searching fees. Again, this benefit is a "spend" to "get". The claimant must document the dates, time, addresses and real estate agents that were seen and contacted for the search. However, the State will not pay real estate brokerage or reimburse for the security deposit required at the new site.

Please bear in mind that the extent of compensable relocation expenses varies depending on who is taking the property – e.g. State or Federal or federally subsidized. It can also vary on the Agency of government which does the taking.

XXVI

CAN I STAY ON AS A TENANT?

It is typical in most condemnations that the property owner (if they are an occupant or lessee) will continue in possession of the property even after the State (or any other governmental entity) formally takes title to the property. In these circumstances, the property owner's status is converted to that of a tenant. In such circumstances, whoever is occupying the property now becomes the tenant of the state and is responsible for a reasonable use and occupancy charge. The State will initially set this charge, but the amount of the charge can be challenged. It is not unusual for the property owner and/or prior tenant to stay on as the State's tenant for months and in some cases even years.

Keep in mind that to the extent that a rental is not paid for this period of time between the formal vesting date and the date of the award, the State can claim a deduction from the total award equivalent to the accumulated use and occupancy charges due. Therefore, it is always good practice to challenge the use and occupancy charge early on so that it does not become a major deduction either from the ultimate award (if after trial) or a significant factor in the overall settlement.

XXVII

IF THE PROPERTY IS UNDER A CONTRACT OF SALE AT THE TIME OF VESTING, WHO IS ENTITLED TO THE AWARD?

Where a property (or a portion of the property) is condemned when it is under contract, there are a number of different possible scenarios. Assuming that the contract does not specifically address the situation of condemnation – in which case the contract totally controls – the result would be governed by the General Obligations Law (GOL) which provides that where a property is under contract and the entire property or a substantial portion of the property is taken and performance of the contract becomes impossible, the contract is deemed cancelled and the purchaser is entitled to the return of the down payment and the seller is entitled to make the condemnation claim. Alternatively, to the extent that the seller recovers in condemnation, the purchaser would have a claim or lien against the award to the extent of the down payment.

A more complicated situation arises where the taking is partial. For example, where only a small piece of land is taken for a road widening while the property is in contract. Here, again, assuming the contract does not specifically address it, the GOL applies and provides for a proportionate reduction in the purchase price to reflect a reduction in the amount of property which now can no longer be conveyed at closing. Of course, this is simply stated, but hard to apply since the taking of a small portion of a property can have a disproportionate effect on the remainder property and the purchaser may not be willing to pay an amount reduced by a mathematical proportion of the taking to a whole. Therefore, it is always good practice in a contract where there is a possibility of condemnation occurring between contract date and closing to provide for a specific arrangement in the event of a taking so that any disputes can be avoided.

XXVIII

IF I AM NOTIFIED OR BECOME AWARE OF A CONDEMNATION, WHAT SHOULD I DO?

Every taking, whether it is by the State, County, City, Town, Community Development Agency, etc. is normally preceded by a substantial volume of paperwork or notice from the condemning authority. You or your client will receive in the mail or be served by hand with various notices of the impending take or the proposed project. The property owner may even be visited by a representative of the condemning authority.

DO NOT IGNORE THESE NOTICES! AS SOON AS YOU BECOME AWARE OF A CONDEMNATION, YOU SHOULD CONTACT CONDEMNATION COUNSEL.

It is important that counsel get involved early in the process since claim filing and time requirements can be quite strict. Failure to timely file your claim in the proper form could result in the loss of your right to additional compensation. Under no circumstances should any documents be signed by the property owner without first conferring with counsel.

UNDER NO CIRCUMSTANCES should you wait for the actual construction to begin before seeking counsel. By the time construction begins on any government project, it is usually long after the property has been legally taken and frequently far too late to preserve your rights to just compensation.

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