

THE SPIRIT OF

EMINENT DOMAIN

A historical accounting of honest and fair negotiations

BY MAZIE LEFTWICH, PSY.D.



Individual property ownership rights are engraved into the bedrock of U.S. history. Colonists enjoyed widespread land ownership, and their emerging free market economy was based primarily on private contracts. Yet the government's power of eminent domain—the taking of private property for the greater public good—is no less a cornerstone of our country's formation.

Finding a balance between the public interest and the protection of private property rights requires a cautious and deliberate process. When done equitably, the greater good of society is served.

The Beginnings of Eminent Domain

The United States can trace its history of utilizing eminent domain all the way back to England and the Magna Carta, when a rebellious group of Feudal Barons forced upon the unpopular King John of England a document to limit the King's powers by law and protect the Baron's rights. The Magna Carta was first chartered in 1215 and was reissued with alternations in 1216, 1217 and 1225. It eventually served as the foundation for the English system of common law.

The Magna Carta was a safeguard against arbitrary government. Article 39 of the Magna Carta reads, "no free man shall be ... disseised [deprived] of his freehold ... except by the lawful judgment of his peers, or by the law of the land." But no compensation was awarded to owners whose property was taken by the King (government) for public use.

As English Law and the political system matured and a parliament developed, the government obtained ownership of private property through existing legal channels, including parliamentary legislation. This principle was followed in England for several centuries and later adopted

by the developing American colonies. Interestingly, there was never a specific set of documents written for the Colonies, but simply an assumption by the King and all parties that the Colonies were an extension of England.

Eminent Domain and the Colonists

During the early days of American history, uncompensated takings of private property by colonial governments generally involved unimproved land. Each colony had its own unique style, but all had governors appointed by the King who reported back to him. Colonial governments often appropriated private land to build roads and bridges to develop America's frontiers. Making personal sacrifices for the common good, including forfeiting personal property was considered an essential duty of every colonist.

But much like today, there was disagreement surrounding eminent domain. While many disagreed that personal property interests should always be sacrificed for the greater good of society, not everyone agreed with the takings. Many colonists expressed distress over colonial governments that were abusing their power of eminent domain. New York, for example, regularly failed to recognize title to real estate in its colony that was held by residents of Vermont. Other colonies also discriminated in favor of their own residents, and against persons whose patriotism was questionable during the American Revolution. During the Revolution, the power of eminent domain was used at times to seize the land of colonists who were loyal to Great Britain, as well as to obtain various goods and housing for the colonial army.

Birth of a Nation

As delegates to the Constitutional Convention of 1787 were returning to their colonies to have the new Constitution ratified, the issue of basic rights became a major concern

throughout the colonies. George Mason, who is considered the Father of the Constitution, had made a motion to have a preface to the Constitution declaring such rights, but it had been rejected at the Convention. So George Mason then refused to sign the Constitution and ratification took place without it having a Bill of Rights. However, after the adoption of the American Constitution in 1788, there was fear, particularly by the anti-Federalists led by Thomas Jefferson,

“
...the spirit of eminent domain has been to protect the landowner's rights.”

that the federal government would be too powerful. Thus in 1791, Jefferson pushed for the adoption of the Bill of Rights, supported by Madison, for the first ten amendments to the federal Constitution. Interestingly, once again the Magna Carta played an important role in that it had the origins of many of the rights and liberties contained in our Bill of Rights.

It was in this context that the Eminent Domain Clause of the Fifth Amendment was drafted. It states, "No person shall be ...deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use without just compensation."

Making a Commitment to Landowners

The Interstate Natural Gas Association of America (INGAA) created a standardized approach to land acquisition for the pipeline industry. However, every right of way professional, no matter the industry, should strive to adhere to these principles. The INGAA Commitment to Landowners includes the following:

- 1. Respect and Trust:** Positive, lasting relationships are built on mutual respect and trust. We will strive to understand issues from the Landowners' perspective and help them understand ours.
- 2. Accurate and Timely Information:** Providing natural gas transportation and storage services to the nation may create concerns. We will provide Landowners with information regarding the importance of energy infrastructure, the reason and need for the proposed project, and the processes in place governing easement acquisition, certification, construction, operation and maintenance of our facilities, and the particulars of individual projects.
- 3. Negotiate in Good Faith:** We will listen and strive to understand, and negotiate in good faith. We will make every attempt to reach agreement with Landowners in an honest, fair and reasonable fashion.
- 4. Respect the Regulatory Compact:** Final approval for a project is not a certainty and our interactions with Landowners will reflect that understanding. Prior to a Federal Energy Regulatory Commission decision, actions taken to negotiate easements or options are at the company's risk as there is no guarantee the project will be approved. We will communicate clearly that federal eminent domain cannot be exercised unless a Certificate is granted by the Federal Energy Regulatory Commission and will distinguish clearly when, and if, eminent domain is exercised pursuant to state law.
- 5. Responding to Issues:** We will respond to Landowner concerns in a timely fashion. To enhance direct communications and timely responses, we will provide Landowners with a single point of contact within the company to answer any question or concern and to provide general or project-specific information.
- 6. Outreach:** We will engage with and promote awareness on the part of affected stakeholders early in the planning process. In broadening our outreach, we will develop relationships with, and introduce our industry to, those who might not have otherwise known about its benefits to the community and our dedication to safely providing these services.
- 7. Industry Ambassadors:** Each company employee and representative is an ambassador for the industry. We will ensure our employees and representatives interact with stakeholders in accordance with these commitments.
- 8. Ongoing Commitment to Training:** We believe in continuous improvement in all aspects of our business. With the demand for natural gas increasing and many new people entering the industry, we will train our representatives to interact positively and productively with Landowners and other stakeholders.

The Fifth Amendment provides a range of protections for citizens. It also requires the Federal Government to pay a fair price—just compensation—when they purchase all or part of a parcel of private property for the general public's use. If a government entity determines that public interest requires the use of privately-owned land, they can use eminent domain to justify the purchase of that land, even if the landowner doesn't want to sell it. Important to note, the Fifth Amendment, as originally written, was only a restriction against the Federal Government. It did not apply to the States.

While there were some limits on the powers of the States before 1865, it was not until the Civil War that the federal Constitution limited the powers of the state (and thus local) governments against their own citizens through the passage of the Thirteenth, Fourteenth and Fifteenth Amendments. The Fourteenth Amendment imposed restrictions on States through the broadly worded Equal Protection, Due Process, and Privileges and Immunities Clauses. The Due Process Clause prohibits state and local government officials from depriving persons of life, liberty, or property without legislative authorization. This clause has also been used by the federal judiciary to make most of the Bill of Rights applicable to the States, as well as to recognize substantive and procedural requirements that State Laws must satisfy.

The Case for Eminent Domain Today

While most landowners can agree that eminent domain is necessary, no one wants it applied to them. Even though it has been used to acquire private property for national parks, transportation, water supply projects, and electrical and energy infrastructure—all things that benefit private landowners—there's still a "not in my backyard" mentality. Highways, pipelines, cell towers and airports are all vital to our modern society.

However, these types of projects can't be constructed without using some private lands. Without eminent domain, a single property owner could stand in the way of a project that could potentially benefit hundreds of thousands or even millions of people.

From the days of the Magna Carta, the spirit of eminent domain has been to protect the landowner's rights. The framers of the Constitution treated private property as the cornerstone of a free society. As such, eminent domain is intrinsic to the principles on which our nation was founded. Eminent domain is about individual rights, so understanding the landowner's perspective is imperative. Taking away private property for public use should not be done lightly. Owners must receive just compensation. The entire spectrum of projects, with all their many stages, processes and procedures, must be handled in a fair manner. And property owners must be given an adequate opportunity to be heard and have their questions and concerns addressed.

Negotiating with Honesty and Integrity

Right of way agents are compelled to negotiate in good faith and approach negotiations with the intent of developing rapport and trust with the landowner by being responsive to all their concerns, always being honest and timely with responses and working with the utmost integrity. When initiating a right of way easement or land purchase, remember that the land you are seeking is not for sale. The landowner is not predisposed to work with you. Your goal is to enter into a voluntary, fair and reasonable agreement with each landowner whose property is crossed or purchased.

Just compensation is determined by the fair market value of the property as determined by sales of comparable properties and other valuation measures in the area at the time of the right of way negotiations. The landowner may have much more than just a financial investment in their property. Emotional,



The Eminent Domain Clause of the U.S. Constitution's Fifth Amendment states, "No person shall be ...deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use without just compensation."

familial and cultural factors often come into play when negotiating compensation, further complicating a delicate situation. When negotiating on behalf of a private entity, additional concessions can often be made in the spirit of cooperation. From replacing a fence to building new access roads, such items added can smooth the transition. However, in public entities negotiations, where such additional items cannot simply be added, a right of way agent must be extremely clever in problem solving with the landowner, such as moving a driveway entrance a few feet. Remember, the landowners will be neighbors to your project for many years to come, so establishing and maintaining positive long-term relationships is in everyone's best interest.

In Summary

Public use versus private property rights has been a divisive issue going back for centuries throughout many countries. Unfortunately, in the United States there have been a handful of highly publicized instances in which an organization abused its eminent domain powers. Any organization that uses eminent domain as a threat is operating well outside the law and this damages the reputation of our entire industry. Yet for every negative story, there are many success stories in which

landowners and public/private entities reach equitable and mutually beneficial arrangements regarding fair market value. Eminent domain is a very powerful law. It is necessary to build the infrastructure of America. Without it, many of our nation's beloved natural parks wouldn't exist. The goal is to initiate eminent domain procedures judiciously, and only as a last resort.

If you keep the landowner's perspective in mind when negotiating—and are honest and fair in your negotiations—you can walk away from the transaction knowing you are operating with the same spirit as our Founding Fathers. ✪



Dr. Mazie Leftwich is a nationally recognized speaker, workshop leader and trainer and has been an IRWA Certified Instructor for 25 years. She spearheaded training and professional development programs for Contract

Land Staff, LLC, and provided training for energy companies, non-profits and colleges, including the University of Houston. Mazie developed CLS's Project Land Management Program® and now serves as a Consultant for the firm.