Chopping Centers?

Commercial property owners can minimize the disruptions and financial headaches of costly land seizures.

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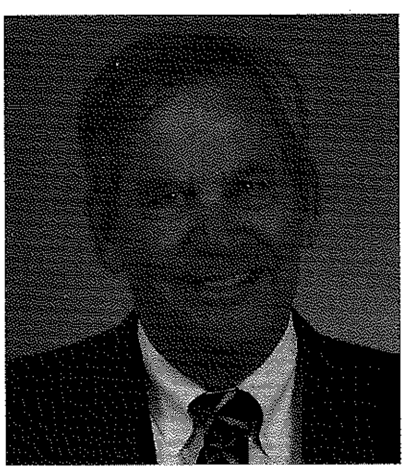
As eminent domain and condemnation proceedings become an increasingly prominent developmental tool, more private businesses are being forced to deal with the legal, financial and logistical ramifications of such actions. With a renewed emphasis on infrastructure improvements, such as transportation and utilities upgrades, this is a trend that is likely to continue. For shopping center developers, owners and managers, the wide range of short- and long-term complications, and financial and operational liabilities that frequently arise from the exercise of eminent domain can be particularly costly.

Although this power is limited to governmental entities and authorities, it is not unusual for a governmental body to work in conjunction with a privately owned company to seize property. A partial taking — where a portion of property is seized, often for planned roadway and transportation infrastructure expansions — is the specific type of eminent domain action most commonly faced by commercial center operators.

While eminent domain grants governmental authorities the right to acquire private property for public use, that power is not absolute. The government's ability to take some or all of a piece of property is constrained by clearly delineated conditions and legal limitations supported by well-established case law. However, while the legal framework is firm and objective, the details are often prone to subjective interpretation. That is why knowledgeable and experienced legal representation is critical. Private property owners have a right to fair compensation, but their window of opportunity to get that compensation can be limited, and the extent of the financial and operational damage brought about by the partial taking may not always be immediately apparent. The very real danger is that property owners often settle for far less payment than they rightfully deserve. Needless to say, a significant financial setback — while never desirable — is likely to be a particularly damaging blow during a period of economic uncertainty and slow recovery in the retail marketplace.

It is vital that commercial center operators understand how eminent domain and partial taking works, appreciate all potential implications of such an action for their business and bottom line, realize their rights and responsibilities, and know how best to proceed when they find themselves in such circumstances.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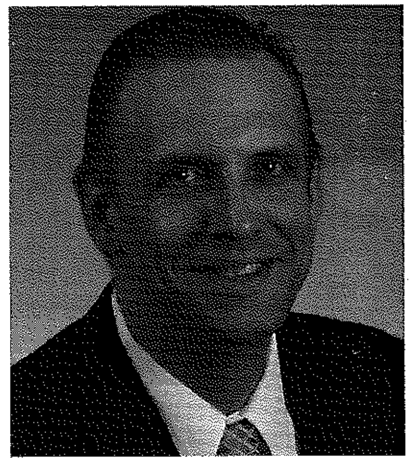
Impact

One of the challenges that any private property owner must face in the event of condemnation is assessing the full impact a land seizure might have on the value of the property as a whole. The seizure of even a small piece of property can have a disproportionately dramatic impact on the visibility, utility, operational integrity and, ultimately, the value of the property. For commercial center operators, who rely so heavily on accessibility and the coordination of multiple tenants and multiple uses, the short- and long-term impacts of such a disruption can be both damaging and extremely difficult to calculate. An in-depth understanding of the logistical factors at play and the potential financial liabilities that may arise as a result of the action is a necessary prerequisite to achieving a fair settlement.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Road-widening projects and improvements, including adding roundabouts, intersections or traffic circles, are common reasons for a partial taking claim, as are utilities upgrades such as sewer or electric/power-line improvements. A major consideration in evaluating the potential financial impact of a seizure is the anticipated business interruption due to construction or site disruption. Construction can be a major inconvenience for shoppers, compelling them to choose a more opportune destination. There are a host of additional complications and cascading financial liabilities that might not be immediately evident. Consider the example of a municipality that wishes to make a minor roadway expansion. While the partial taking in this instance may only require seizure of a 6-foot strip of property along the flank of a shopping center, this relatively small (in terms of square footage) plot of land can have a significant effect. The partial taking may decrease the number of parking spaces, interfere with existing signage, and hinder the flow of vehicular and pedestrian

Shopping center value is all about income and rental appeal, and the amount of the diminution in value can only be determined by extrapolating potential income loss over many years.

traffic into and through the space.

Malls and other large commercial venues are particularly vulnerable around the perimeter of the property, where all-important retail considerations like visibility, easy entrance/exit and aesthetics are most evident. A significant, and somewhat unexpected, concern is that of retail signage. Because signs are positioned to deliver maximum visual appeal, they are often located as close to the road as possible, which makes them common victims of eminent domain. Further complicating the issue is the need for commercial center operators to adhere to current guidelines and standards regarding signage. An elevated sign that is not in compliance with the latest regulations cannot simply be moved; a sign that is much lower to the ground must replace it. As a result, any fair valuation of a partial taking should make reasonable assumptions about how these changes might influence traffic and, ultimately, income.

Other commonly overlooked retail obstacles that may result from a partial taking include:

- Aesthetics. Even if a seizure involves "just" green space, landscaping and visual appeal are an important factor in the retail equation. For shopping centers, the allure of the property has a direct impact on the value of the property. Any condemnation that compromises the aesthetics of the property should be accounted for.

- Grade differential. A change in grade or elevation might interfere with access and make it impossible to continue to use the property in the same fashion.

- Tenants. The impact of structural, functional and aesthetic changes to a shopping center can have an enormous impact on individual tenants. In the event that a retail tenant perceives the value or desirability of the property to have decreased, it is not uncommon for them to ask for rent relief or to demand that they be released from their lease obligations. This can be especially tough to plan for, as problems may crop up months or even years down the road.

- Parking. Fewer parking spaces can obviously pose a problem, but a less