

Entrepreneur[®]

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CUTTING EDGE

LEGAL AID

Fighting Chance

When the government wants your land, prepare to fight for fair payment.

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IN THE U.S. CONSTITUTION, the right to property ranks right up there with life and liberty. The government may not deprive people of life, liberty or property without due process of law. However, the law also recognizes a legal concept called "eminent domain," which is the right of federal, state and local governments to take private property when it's needed for a public purpose. If a government agency decides to widen a road or build a fire station and needs the property your business is on, there's not much you can do to stop it. With a well-organized strategy and many hours of negotiation, however, you may be able to have the project altered enough to save your business. If not, the agency must pay you for the property. The key question, then, is how much?

The government's goal is to acquire the land for the lowest possible cost. That means paying an amount equal to an appraiser's estimate of the land value, which likely doesn't match the value of the location to your business. When you have a thriving business, it can be enormously expensive to move. You may not be able to find a suitable location



ILLUSTRATION: MIKE CRESSY

nearby, and moving across town could cost you your customer base plus lost income because of the disruption.

Fortunately for business owners, courts have been increasingly sympathetic in recent years to the plight of the landowner or business owner whose land is snatched by the government. "I think the courts are less willing to let the condemning authority trample the rights of the landowner," says Michael Nolan, an attorney with Pitney, Hardin, Kipp & Szuch in Morristown, New Jersey, who has represented various businesses in eminent domain cases. Only a fraction of eminent domain condemnation cases ever go to trial, but the trend in the courts makes it more likely that the agency in question will be open to reasonable arguments—and to making a reasonable offer.

DUELING APPRAISERS

If a government agency wants your land (or a portion of it), your first official notice is likely to be a letter stating the agency's interest in the property. This letter—or one soon to follow—typically includes the agency's initial proposal for compensation based on its own appraisal. In many cases, you and your attorney have an opportunity to negotiate with the agency, bringing in your own evidence of the value of the property and what it would cost you to relocate your business.

If you refuse the initial offer, the next step might be a hearing, in which a commissioner examines the evidence, hears arguments from both sides and proposes a compromise. If you still aren't happy with the offer, in some states you have the right to a

jury trial. Unfortunately, that's often just a battle of experts, with each side trying to convince the jury what the property is worth.

Augustus F. Wagner Jr., an attorney with Nutter, McClennen & Fish in Boston who has represented both businesses and government agencies in condemnation cases, contends that the most important thing a business can do is get organized and start negotiating long before receiving an official notice. Business owners are almost always aware of the government's plans for development soon enough to get involved in the early planning stages, he says, when arguments could have a significant impact in shaping the project. Maybe the agency doesn't really need your whole property, just half the parking lot. Maybe the road could be slightly rerouted so it doesn't go through your assembly plant. By sitting on your hands, you lose the opportunity to do anything more than argue about compensation.

If you lease property for your business, your rights depend entirely on the lease. In a standard lease, Nolan says, the landlord gets all the proceeds of an eminent domain condemnation—and you, as the business owner, are out in the cold. At the opposite extreme, one of Nolan's clients has a 99-year lease that entitles the tenant

to all proceeds if the property is taken. Be sure to address this issue when negotiating your lease. The longer the term of the lease, the better your chances of getting a clause that entitles your business to compensation in case of a condemnation.

TAKING ACTION

If you learn your property may be subject to condemnation, get involved immediately by taking these steps:

- ❖ Find a lawyer with experience in the area of government-condemned property. You have a great deal to lose, so don't scrimp on legal counsel. A good lawyer will make sure you don't accidentally waive your rights.

- ❖ Get your business records in order so you have proof of your normal income, market base, customers per hour, or anything else that might show how much you'd lose if you had to close your current location.

- ❖ If you have dreams about developing the site yourself, have your plans drawn up to show its "highest and best use." What looks to the government agency like a vacant lot might be the property you were on the verge of turning into an office park.

- ❖ Have an appraiser assess your property so you'll be prepared in case the agency makes a low-ball compensation offer. Make sure he or she is a

qualified appraiser who'll be respected by both sides, not just someone who will say what you want to hear.

- ❖ Get bids on relocation costs, such as moving furnishings, signs and equipment. Do you have grandfathered machinery that you'd have to replace to meet current regulations?

- ❖ Begin negotiating with the agency as soon as possible. Take documentation to show what this move would cost you and how you'd suggest the project could be altered so you wouldn't have to move.

- ❖ Find out if part of the property would be enough. In some states, the government must pay business interruption costs if they take part of the property but not if they take all of it—so it's in the government's interest to force you out completely. By putting a face on the business and making reasonable requests, you might be able to avoid this problem.

"Small businesses have to recognize that they're not going to get fair market value unless they fight for it," Nolan says. "Get in the ballgame and work it out."

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