

Eminent Domain: An Overview

Issue Memorandum

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Introduction

In the United States, the term "eminent domain" refers to the power of the government to take private property for public use.¹ Eminent domain is an intrinsic, inalienable attribute of sovereignty that requires no constitutional recognition—it is inevitable that the government must, at times, take control of property for the public good.² The Fifth Amendment to the United States Constitution, as well as state constitutions, do place certain requirements on the exercise of eminent domain, however, most notably the payment of just compensation for any property acquired through the use of eminent domain.

In the context of separation of powers, eminent domain is an inherently legislative power.³ The capacity to exercise eminent domain rests solely with the federal and state legislatures, and that power must be delegated by the legislature for any entity to exercise it.⁴ Subject to constitutional limitations, it is for the legislature to determine how and by whom the power of eminent domain may be exercised.⁵

To provide context for discussions surrounding eminent domain in South Dakota, this memorandum summarizes the legal framework of eminent domain, reviews the interpretation and use of eminent domain in South Dakota, and provides background on how eminent domain is regulated in other jurisdictions.

Legal Framework

To better understand eminent domain, it is necessary to begin with the four discrete legal elements required for the proper exercise of eminent domain. These four elements can be found in the Takings Clause of the Fifth Amendment, which is the foundation for all eminent domain jurisprudence in the United States: ". . . nor shall (1) private property be (2) taken for (3) public use, without (4) just compensation."⁶

The first element of eminent domain is "private property." Most often, the private property acquired through eminent domain is *real property*, *i.e.*, parcels of land and any associated structures permanently attached to the land owned by another person.⁷ As the government does not need to take property from itself, the "person" owning the property is typically a private citizen or non-governmental legal entity. In addition to real property, "private property" may also include *tangible personal property*, such as a vehicle or equipment, and *intangible personal property*, such as an easement or contract right.⁸ Eminent domain actions over these types of property are less common, however.

¹ *Eminent Domain*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/eminent_domain.

² *The Fifth Amendment's "Takings" Clause*, FindLaw, <https://constitution.findlaw.com/amendment5/annotation12.html>; Matthew P. Caylor, *Eminent Domain and Economic Development: The Protection of Property Four Ways*, 36 *Ariz. J. Int'l & Comp. L.* 165 (2019).

³ *Eminent Domain: A Legal Introduction*, Issue Memorandum 1999-16, South Dakota Legislative Research Council.

⁴ *The Fifth Amendment's "Takings" Clause*, *supra* note 2; Caylor, *supra* note 2.

⁵ *Eminent Domain: A Legal Introduction*, *supra* note 3.

⁶ U.S. Const. amend. V.

⁷ Jean Folger, *What Is Real Property? Definitions and Types of Properties*, Investopedia, <https://www.investopedia.com/terms/r/real-property.asp>.

⁸ *Eminent Domain*, *supra* note 1.

The second element of eminent domain is "taken," or a "taking," which is the legal term of art used when property is acquired by the government for public use.⁹ A taking may be *physical*, in which the government literally seizes the property from its original owner, or *constructive*, in which the government restricts the owner's rights to such an extent that the government's action is equivalent to a physical taking (also known as a *regulatory taking*).¹⁰ A taking may be a *complete taking* of the property in its entirety, a *partial taking* of only a portion of the property, or a *temporary taking* of the property for only a specific period of time.¹¹

The third element of eminent domain is "public use." What constitutes "public use" differs between jurisdictions and is the subject of frequent litigation. However, at its core, the element of "public use" requires the government to prove that its taking of private property is necessary for the accomplishment of some public benefit. The most commonly recognized public uses are those that confer a direct benefit to the public, such as the building of roads, bridges, dams, or government buildings. The U.S. Supreme Court employs a broad definition of public use and consistently defers to the right of states to make their own determinations of what constitutes public use. In 2005, in the landmark decision *Kelo v. City of New London*, the U.S. Supreme Court upheld the use of eminent domain to seize private property on behalf of a private developer for the purpose of economic development.¹² The Court found that the taking constituted public use due to the general benefits the community would enjoy as a result of the economic development.¹³ The Court also concluded that the Fifth Amendment does not require "literal" public use, but the broader and more natural interpretation of public use as "public purpose."¹⁴ The *Kelo* decision significantly broadened the government's eminent domain power. In response, many states, South Dakota included, enacted laws to restrict the government's use of eminent domain for private economic benefit. See below for further information regarding these laws.

The fourth and final element of eminent domain is the payment of "just compensation." Just compensation must constitute "a full and perfect equivalent of the property taken" and is typically determined by appraising the property's fair market value, *i.e.*, the amount the property would sell for in a competitive market, assuming both buyer and seller are willing and knowledgeable participants.¹⁵ Many factors are considered in determining fair market value, such as the size, condition, and location of the property, its current and potential use, and recent sales of comparable properties in the area. No sentimental or other subjective value held by the owner is considered in calculating just compensation.¹⁶

To summarize the legal framework of eminent domain: pursuant to the Fifth Amendment Takings Clause, the government may only exercise its eminent domain power to take the private property of another if it is for public use and the original owner is paid just compensation in exchange for that private property.

"Public Use" in South Dakota

Eminent domain in South Dakota begins with the South Dakota Constitution, which states "[p]rivate property shall not be taken for public use, or damaged, without just compensation."¹⁷ Again, the four legal elements of eminent

⁹ *Takings*, Cornell Law School Legal Information Institute, <https://www.law.cornell.edu/wex/takings>.

¹⁰ *Id.*

¹¹ Robert Rafii, *Eminent Domain Overview*, FindLaw, <https://www.findlaw.com/realestate/land-use-laws/eminent-domain-overview.html>.

¹² *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312 (1893).

¹⁶ *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

¹⁷ S.D. Const. Art. VI, § 13.



domain are clear. Because the public use requirement is the prevailing issue in most conflicts arising from eminent domain, the following discussion focuses on the interpretation of "public use" in South Dakota.

There is no law in South Dakota defining the term "public use;" therefore, it has been the task of the South Dakota judiciary to interpret what constitutes public use in the exercise of eminent domain. In 1913, the South Dakota Supreme Court adopted the "use by the public test," which requires that there be a "use or right of use [of the property] on the part of the public or some limited portion of it" in order for a taking to constitute public use.¹⁸ As stated by the Court, the controlling factor "is not the *necessity* of the use, not even the *fact* of use, but the *right* to use."¹⁹

Notably, this "use by the public" standard, which remains the law in South Dakota, is stricter and provides property owners more protection than the United States Constitution.²⁰ As discussed above, in *Kelo v. City of New London*, the U.S. Supreme Court held that a taking complies with the public use requirement as long as it embraces the broader and more natural interpretation of public use as "public purpose."²¹ Thus, if the exercise of eminent domain is rationally related to any conceivable public purpose, regardless of actual use by the public, the taking constitutes "public use." In the *Kelo* case, this meant that the taking of private property for transfer to a private entity, for the purpose of economic development and enhancing tax revenues, was found to be a constitutional exercise of eminent domain.

In 2006, in response to the *Kelo* decision, the South Dakota Legislature passed HB 1080 to restrict the use of eminent domain in certain circumstances.²² The bill was codified in two sections:

- SDCL 11-7-22.1 prohibits a county, municipality, or housing and redevelopment commission from acquiring private property through the use of eminent domain for transfer to any private person, governmental entity, or other public-private business entity, or primarily for the enhancement of tax revenue. The statute provides no loopholes or exceptions, broadly restricting the use of eminent domain for private development.²³
- SDCL 11-7-22.2 stipulates that within seven years, no county, municipality, or housing and redevelopment commission may sell or transfer its interest in property acquired through the use or threat of use of eminent domain to any private person, nongovernmental entity, or public-private business entity without first offering to sell the property back to the original owner at current fair market value. Known as a "right of first refusal," the statute further curtails an entity's ability to seize property from one person in order to give it to another private party.²⁴

As a result of this legislation, South Dakota was one of only four states to receive an "A" rating by the Institute for Justice in its 50-State Report Card on Eminent Domain Reform.²⁵ The report cites South Dakota as a leader in eminent domain reform with a statutory scheme that provides comprehensive protections to property owners against eminent domain abuse.

¹⁸ *Illinois Cent. R. Co. v. E. Sioux Falls Quarry Co.*, 33 S.D. 63, 144 N.W. 724 (1913).

¹⁹ *Id.*

²⁰ *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131.

²¹ *Id.*

²² The U.S. Supreme Court recognized that states have the power "to impose 'public use' requirements that are stricter than the federal baseline." See *Kelo*, *supra* note 12.

²³ *50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*, Institute for Justice, https://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf.

²⁴ *Id.*

²⁵ Florida, North Dakota, and Virginia also received an "A" rating. Michigan and New Mexico received an "A-" rating. *Eminent Domain*, Institute for Justice, <https://ij.org/issues/private-property/eminent-domain/>.



Eminent Domain in Other Jurisdictions

Following the *Kelo* decision, forty-six other states also passed legislation, issued state supreme court decisions, or amended their state constitutions to limit the exercise of eminent domain in certain circumstances.²⁶ Most of these limitations are comparable to the legislation enacted in South Dakota, *i.e.*, specifically declaring that economic development or the enhancement of tax revenues does not constitute a public use.²⁷ Where a greater difference between states lies is in the legal process used to exercise eminent domain, known as condemnation.²⁸ Below are some key policies utilized in other states before, during, and after the condemnation process.

Pre-Suit Procedures

South Dakota is one of several states without a robust set of requirements a condemnor must meet before filing a condemnation action. These pre-suit procedures provide property owners greater legal protection, and often facilitate the transfer of property without the commencement of a condemnation action.²⁹ Pre-suit procedures come in a variety of forms across jurisdictions, but several common themes are apparent, including initial contact and notice, and negotiation and offer requirements.

Contact with the property owner is a prerequisite to filing a condemnation suit in many states.³⁰ This initial contact serves to notify the property owner that his or her property is under threat of condemnation, and provides the property owner time to hire a qualified attorney or otherwise defend against the impending action.³¹ The timeline for this initial contact and notice differs, ranging from twenty days to ninety days prior to suit, depending on the jurisdiction.³²

More than simply requiring the condemnor to notify the property owner of a pending suit, many states also require that some form of negotiation occur between the condemnor and the property owner before an action is filed. To prevent mere "lowball" offers, states typically mandate that these negotiations be done in good faith, requiring the condemnor to make reasonable and diligent efforts to negotiate and actually buy the property from the owner.³³ In Florida, for example, before an eminent domain proceeding can commence, the condemnor must provide the property owner with a written offer, a copy of the appraisal upon which the offer is based, if requested, and must attempt to reach an agreement regarding the amount of compensation to be paid for the property.³⁴ Laws requiring a pause for negotiation often result in more reasonable offers, as the condemnor is incentivized to settle with the property owner quickly in order to move forward with the project and avoid litigation.³⁵

²⁶ *Id.*

²⁷ Stephen F. Broadus IV, *Ten Years After: Kelo v. City of New London and the Not So Probably Consequences*, 34 Miss. C. L. Rev. 323 (2015).

²⁸ "Eminent domain" refers to the right of the government to seize private property for public use; "condemnation" is the legal process used to exercise that right and obtain physical possession and legal title of the property.

²⁹ Caitlyn Ashley, et al., *Law and Policy Resource Guide: A Survey of Eminent Domain Law in Texas and the Nation*, EENRS Program Reports & Publications (2017).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*; *Landowner Rights Under Eminent Domain Laws*, North Dakota Attorney General, <https://attorneygeneral.nd.gov/consumer-resources/landowner-rights-under-eminent-domain-laws/>.

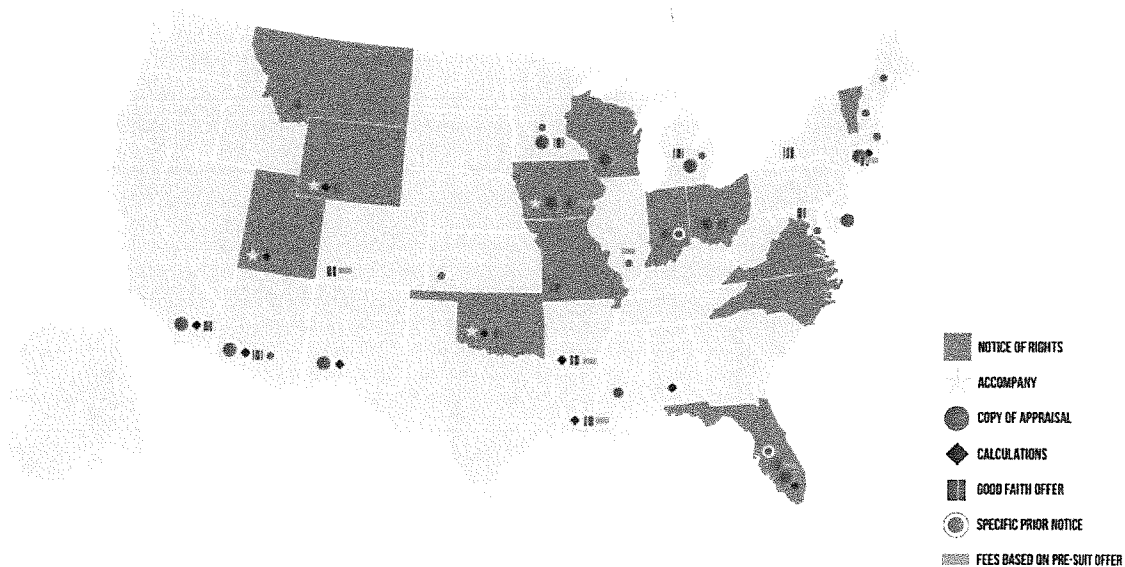
³⁴ Ashley, *supra* note 29 (citing Fla. Stat. § 73.015).

³⁵ *Id.*



Beyond negotiation, twenty-four states further require that an actual offer be provided to a property owner prior to filing a condemnation suit.³⁶ Many states use the amount of this pre-suit offer to determine whether to award attorneys' fees to the property owner if the condemnation action does proceed to trial.³⁷ If the condemnor's offer is lower than the amount ultimately awarded by the factfinder, attorneys' fees are typically awarded based on a percentage above the condemnor's original offer.³⁸ This procedure helps to enforce other pre-suit requirements and incentivizes the condemnor to make a fair offer at the outset.³⁹ The award of attorney's fees also ensures that a property owner is made whole at the conclusion of the condemnation action; had the condemnor made a fair and acceptable offer at the beginning of the process, the property owner would never have incurred attorney expenses to begin with.⁴⁰

Figure 1 – Pre-suit Property Owner Protections by State.⁴¹



Property Valuation and Other Expenses

How a state values property, and whether additional expenses are awarded to a property owner, are additional variations seen in the condemnation process. Just compensation, *i.e.*, fair market value, remains the baseline for reimbursement in an eminent domain action; however, many states have enacted policies that go further than just compensation.

In Florida, for example, property owners are guaranteed "full compensation" rather than "just compensation" for property acquired through eminent domain. "Full compensation" takes into consideration all factors and circumstances surrounding a taking in order to make the property owner whole again, *i.e.*, to place the property

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Not indicated in Figure 1, SDCL § 21-35-23 awards a property owner reasonable attorney fees and compensation for two expert witnesses if the amount of compensation awarded to the property owner in a condemnation action is twenty percent greater than the condemnor's final offer and the award exceeds seven hundred dollars.



owner in the same financial position as the individual would have been in had no taking occurred.⁴² This means that in addition to fair market value, a condemnor is responsible for payment of items such as moving costs, severance damages, attorneys' fees, and expert witness costs.⁴³ Policies such as this serve to put a property owner on equal footing with the condemning authority.

Expense reimbursement provisions exist in many other states as well. In California, a condemnor is required to pay the first \$5,000 of an appraisal conducted by a property owner.⁴⁴ In Pennsylvania, displaced property owners are entitled to receive up to \$31,000 for costs associated with terminating a mortgage, purchasing a replacement home, and increased mortgage expenses; renters are eligible to receive up to \$7,200 for increased rental expenses.⁴⁵ Reimbursement for moving expenses is included in this calculation as well.⁴⁶ In Oklahoma and South Carolina, property owners are also eligible for reimbursement of mortgage prepayment penalties.⁴⁷

To ensure land taken through eminent domain is properly valued, some states provide specific rates for certain types of property.⁴⁸ In Missouri, if a property owner's home or land within three hundred feet of the property owner's residence is condemned, it is considered a "homestead" taking, and the property owner is awarded 125% of the property's fair market value.⁴⁹ If the property being taken has been owned by the same family for more than fifty years, and the property's current use would not be feasible following condemnation, the property is considered to have "heritage value," and the property owner is awarded 150% of the property's fair market value.⁵⁰ If the property being taken is agricultural, the property owner is awarded 150% of the property's fair market value.⁵¹ California, Kansas, Nebraska, and Wyoming also specify that property owners must be compensated for growing crops that have not been harvested on the property to be taken.⁵²

Other Variations in Condemnation

Given the diversity in condemnation procedures across jurisdictions, there are several additional policies worth highlighting here that do not fit into the categories discussed above.

- In Delaware, a condemnor is required to prove by clear and convincing evidence that the taking satisfies the definition of public use, a higher burden of proof than the preponderance of the evidence standard typically imposed in a civil case.⁵³ Colorado and Idaho also impose this greater evidentiary standard when the taking is done in the context of urban renewal, and Michigan in the context of eliminating blight.⁵⁴
- In Maryland, if land is condemned for a gas pipeline, the pipeline must transmit gas to local consumers and offer to contract with those consumers.⁵⁵

⁴² Fla. Const. Art X, § 6; *Eminent Domain*, Paplas | Griffith, <https://www.eminentdomain-fl.com/eminentdomain>.

⁴³ *Id.*

⁴⁴ Cal.C.C.P. § 1263.025.

⁴⁵ Ashley, *supra* note 29 (citing 26 Pa. Stat. & Cons. Stat. Ann. §§ 711, 902–04).

⁴⁶ *Id.*

⁴⁷ *Id.* (citing S.C. Code Ann. § 28-2-110, Okla. Stat. Ann. tit. 27, § 10).

⁴⁸ *Id.*

⁴⁹ *Id.* (citing Mo. Rev. Stat. §§ 523.001, 523.039, 523.061).

⁵⁰ *Id.* (citing Mo. Rev. Stat. §§ 523.001, 523.039).

⁵¹ Mo. Rev. Stat. § 523.039.

⁵² Ashley, *supra* note 29.

⁵³ Del. Code tit. 29 § 9501A

⁵⁴ Broadus, *supra* note 27.

⁵⁵ *Id.* (citing Md. Code Ann., Pub. Util. §§ 5-403, 5-404).



- In Montana, a balancing test is used to determine the best location for a project requiring condemnation of the land, which allows the owner to be involved in the planning of the project to mitigate harm to the land.⁵⁶
- In North Dakota, the property owner has the right to request a list of at least ten neighboring property owners to whom offers are being made for the same project, and any map in the condemnor's possession showing the property being affected by the project.⁵⁷

Conclusion

Eminent domain is the power of the government to take private property for public use. The power of eminent domain belongs exclusively to the legislative branch, and only entities to whom the power has been delegated may exercise it, and only in the mode and manner prescribed by the Legislature. South Dakota provides property owners protection from eminent domain abuse by utilizing a narrow definition of "public use" and prohibiting the use of eminent domain for transferring property to a private entity or for tax revenue enhancement. Policies that may provide further protections include requiring good faith negotiations by the condemnor and other pre-suit procedures, establishing property valuation methods for certain types of land, and awarding additional fees and expenses to a property owner at the conclusion of an eminent domain action.

The Legislative Research Council provides nonpartisan legislative services to the South Dakota Legislature, including research, legal, fiscal, and information technology services. This issue memorandum is intended to provide background information on the subject. For more information, please contact Melanie Dumdej, Assistant Chief for Legal.

⁵⁶ *Id.*

⁵⁷ *Landowner Rights Under Eminent Domain Laws*, *supra* note 33.



Appendix

As an additional resource, the following table lists all entities authorized to exercise eminent domain in South Dakota, and the chapter of South Dakota Codified Law granting and describing the extent of that authority.

Entity	SDCL chapter
Bureau of Information and Telecommunications	SDCL chapter 1-13
Department of Corrections	SDCL chapter 1-15
South Dakota Health and Educational Facilities Authority	SDCL chapter 1-16A
South Dakota Ellsworth Development Authority	SDCL chapter 1-16J
A county or municipality, for the acquisition of a historic easement	SDCL chapter 1-19B
Department of Human Services	SDCL chapter 1-36A
South Dakota Building Authority	SDCL chapter 5-12
South Dakota Capitol Complex Restoration and Beautification Commission	SDCL chapter 5-15
A board of county commissioners	SDCL chapter 7-18 SDCL chapter 7-25 SDCL chapter 7-29 SDCL chapter 41-18
An improvement district	SDCL chapter 7-25A
A board of township supervisors	SDCL chapter 8-2
A governing board of a municipality	SDCL chapter 9-12 SDCL chapter 9-27 SDCL chapter 9-32 SDCL chapter 9-36 SDCL chapter 9-38 SDCL chapter 9-47 SDCL chapter 9-48 SDCL chapter 9-51 SDCL chapter 11-8 SDCL chapter 11-9
A municipal power agency	SDCL chapter 9-41A
A municipal housing and redevelopment commission	SDCL chapter 11-7
A political subdivision	SDCL chapter 11-14
A school district	SDCL chapter 13-24
Board of Regents	SDCL chapter 13-51 SDCL chapter 13-51A
Highway authorities of the state, counties, or municipalities	SDCL chapter 31-8
Department of Transportation	SDCL chapter 31-10 SDCL chapter 31-19 SDCL chapter 31-27 SDCL chapter 31-29 SDCL chapter 31-30



Entity	SDCL chapter
A highway authority charged with the construction, reconstruction, or repair of a public highway along a section line	SDCL chapter 31-18
An owner of an isolated tract of land containing at least ten acres not touched by a passable public highway, or smaller tract of land containing at least five acres used or intended to be used in good faith in whole or in part for residential purposes	SDCL chapter 31-22
A sanitary district board of trustees	SDCL chapter 34A-5
A municipality, for the installation and operation of a solid waste management system	SDCL chapter 34A-6
A regional recycling and waste management district	SDCL chapter 34A-16
Department of Game, Fish and Parks	SDCL chapter 41-2 SDCL chapter 41-4
The owner of a mine or a mining claim	SDCL chapter 45-5
Any person, for application of water to beneficial use or to enlarge an existing structure for conveyance of water for use	SDCL chapter 46-8
Board of Water and Natural Resources	SDCL chapter 46A-2
South Dakota Conservancy District	SDCL chapter 46A-2
A water development district board	SDCL chapter 46A-3D
An irrigation district board of directors	SDCL chapter 46A-5 SDCL chapter 46A-6
A water user district	SDCL chapter 46A-9
A drainage district board of trustees	SDCL chapter 46A-10A
A watershed district	SDCL chapter 46A-14
A water project district	SDCL chapter 46A-18
An electric cooperative	SDCL chapter 47-21
A cemetery association	SDCL chapter 47-29
A common carrier, to acquire right of way	SDCL chapter 49-2
A pipeline company owning a pipeline that is a common carrier, to acquire right of way	SDCL chapter 49-7
A railroad	SDCL chapter 49-16A
South Dakota Railroad Authority	SDCL chapter 49-16B
A regional railroad authority	SDCL chapter 49-17A
A corporation owning or operating lines of telegraph or telephone	SDCL chapter 49-30
A translator district	SDCL chapter 49-32A
A corporation organized for constructing, maintaining, and operating a street railway, or for generating, transmitting, or distributing electricity to be sold to or used by the public for heat, light, or power	SDCL chapter 49-33 SDCL chapter 49-34
A consumers power district	SDCL chapter 49-37
A regional airport authority	SDCL chapter 50-6A

