

To: Attorney General Jackley
Re: South Dakota Eminent Domain Memorandum
Date: 1/17/2023

Overview

Eminent domain is a constitutional device in South Dakota in addition to the Takings Clause in the U.S. Constitution. S.D. Const. Art. 6, § 13; U.S. Const. Amend. 5; *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 S.D. 24., 712 N.W.2d 22. It grants the State the authority to take or damage private property for public purposes, but requires just compensation. S.D. Const. Art. 6, § 13. The amount of compensation is determined by a jury. *Id.*

The Legislature has the authority to determine when eminent domain may occur. *Id.* It has extended this power to a variety of public and private actors (see below). The purposes for which these entities have been given eminent domain power typically involve the establishment or expansion of roads, bridges, utilities, and water services for public use. (see below). However, some entities, such as municipalities, have been granted general eminent domain power to achieve their purposes generally. SDCL 9-41A-51.

Most eminent domain proceedings are procedurally governed by the condemnation process in SDCL Ch. 21-35, which allows for municipalities to seize buildings. Eminent domain proceedings require the seizing entity to file a Petition that lists the interested parties, the property, and its intended purpose. *Id.* Procedural devices such as interpleader and summons of defendants are permitted. *Id.* The second most utilized process is SDCL 31-19, which is similar but requires the DOT's Transportation Commission to pass a resolution as an intermediary step.

There is a form of eminent domain called "inverse condemnation," where a property owner, claiming that interference with his property amounts to the exercise of eminent domain, initiates the lawsuit. *Hamen v. Hamlin County*, 2021 S.D. 7., 955 N.W.2d 336.

South Dakota Constitution

Art. 6 § 13. Private property not taken without just compensation--Benefit to owner--Fee in highways

Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article (Art. 6 § 6 requires trial by jury).

No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

Art. 17, § 4. Corporations subject to eminent domain--Police power

The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; and the exercise of the

police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.

Art., § 18. Compensation for private property taken for public use--Assessment of damages

Municipal and other corporations and individuals invested with the privilege of taking private property for public use **shall make just compensation for property taken, injured or destroyed**, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. **The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals** made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

South Dakota Statutes

- **SDCL Ch. 21-35 – Eminent Domain Condemnation (seizing a building).**
 - Plaintiff must file a Petition in circuit court (21-35-2).
 - Interpleader, summons, and mediation are permitted (21-35-7, 21-35-9, 21-35-11.1).
 - The sole issue the jury decides is the amount of compensation (21-35-15).
- **SDCL Ch. 31-19 – Eminent Domain and highways and utilities**
 - DOT may acquire or damage land for utilities and highways (31-19-1, 31-19-1.1).
 - Transportation Commission must pass a resolution (31-19-3)
 - A Petition is required in circuit court (31-19-3)
 - Defendants are allowed a hearing to demand a showing of necessity (31-19-10.1)
 - Compensation comes from the State Highway Fund (31-19-19, 31-19-20).
 - Attorney General Opinion required if possession is taken in advance of final judgment (31-19-36).
- **SDCL Ch. 46-8 – Eminent Domain and water rights**
 - Applies to acquiring water or expanding structures for conveying water (46-8-1).
 - Has “Least possible injury” standard, restricts proximity to homes and buildings, and requires a court Order for entering private property (46-8-1.1, 46-8-2, 46-8-2.1).
 - Provides that acquired water routes are easements and requires that property owners get reasonable access to their land (46-8-8, 46-8-10).
- **SDCL Ch. 49 - Eminent Domain and Public Utilities and Carriers**
 - Railroads may exercise eminent domain for right of way if granted permission from the Governor and the purpose is a public use. The procedure governing this process is SDCL Ch. 1-26. The Governor or commission may appoint an impartial hearing examiner. (49-16A-75).
 - Utility providers generating electric, gas, or liquid may exercise eminent domain to build facilities. Facilities may be built when PUC issues a permit. 21-35 governs the proceedings. (49-41B-4 to 4.4). AG may commence proceedings against the Utility where he believes SDCL Ch. 21-47 (foreclosure) procedure has not been followed. (49-41B-4.5).

- SDCL 49-2-12 – Common Carriers (mail carriers) may use eminent domain to gain right-of-way access. 21-35 governs procedurally.
- **Other Legislative Grants of Eminent Domain**
 - SDCL Ch. 5-15 - The **South Dakota Capitol Complex Restoration and Beautification** Commission may acquire property to expand and improve the Capitol.
 - SDCL Ch. 13-24 - **School Boards** may by resolution use eminent domain to acquire school land. (13-24-2, 13-51-9)
 - **Municipalities and Counties**
 - SDCL 11-7-22 - allows for municipal eminent domain for housing development, and SDCL 11-8-50 for urban renewal. 21-35 governs procedurally.
 - SDCL 9-41A-51- Granted to carry out purposes of Municipal Government.
 - County eminent domain to donate property to the U.S., maintain infrastructure, build, repair, or extend buildings, or other public uses (SDCL 7-18-9, 7-25A-7)
 - SDCL Ch. 34A-5 - **Sanitary Boards** may exercise under SDCL Ch. 31-19 procedure (34A-5-31).
 - SDCL 45-5-1 - **Department of Transportation** may conduct 31-19 eminent domain proceedings to grant the owner of a mine access to their mine.
 - SDCL Ch. 46A - **Board of Water and Natural Resources** to carry out its duties (46A-2-2, 46A-2-17).
 - SDCL 47-21-67 - **Rural Electric Co-operatives** for establishing electric transmission lines or systems.
 - SDCL Ch. 50-6A - **Regional Airport Authorities** to acquire property using 21-35 procedure. (50-6A-19)
 - SDCL 1-16J - **South Dakota Ellsworth Development Authority** may use 21-35 to acquire lands for developing Ellsworth Airforce Base.

South Dakota Case Law

Damages must include present and prospective damages, but not those which are speculative, remote, or sentimental. *Lawrence County v. Miller*, 2010 S.D. 60, 786 N.W.2d 360.

The “use by the public” standard requires use or right of use on the part of the public or some limited portion of it. *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131.

Damages in an eminent domain case are a property's “fair market value”, which is the highest price the property can be reasonably sold by a willing seller to a willing buyer and considering the property’s most profitable use. *Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55.

Const. art. 6, § 13 relates to eminent domain, not to taxation. *Wheelon v. South Dakota Land Settlement Board*, 1921, 43 S.D. 551, 181 N.W. 359

Eminent Domain is not intended to apply to damages based on negligence. *Vesely v. Charles Mix County*, 1939, 66 S.D. 570, 287 N.W. 51.

An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor. *Hamen v. Hamlin County*, 2021 S.D. 7, 955 N.W.2d 336.