

# The Private Cost of Public Projects

By: Aaron Kenter



*Issues to Consider when defending landowners in eminent domain cases.*

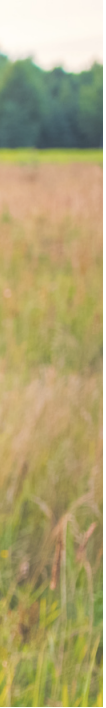
With the entrance of Intel onto the scene in Central Ohio, the region is set to experience one of the largest economic developments Ohio has seen in many years. In a recent article on the subject,<sup>i</sup> Columbus Business First reported on numerous infrastructure expansion projects planned in and around the proposed Intel site. This is sure to be only the beginning as officials responsible for transportation infrastructure and utility service in the affected counties, townships, and municipalities work rapidly to plan the infrastructure improvements necessary to accommodate the Intel development.

While the Intel and associated developments are a boon for our region, we should expect that the planned infrastructure expansion will require the taking of private property for public use. "Eminent Domain" is the legal term that refers to the power of the state to take private property and convert it to a public use. "[T]he state's great power to seize private property predates modern constitutional principles. Understood as the offspring of political necessity, eminent domain is, like the taxation and police powers, an inseparable incident of sovereignty."<sup>ii</sup>

The act of exercising the power of eminent domain is commonly referred to as "Appropriation" or "Condemnation." Examples of a

governmental entity's exercise of this power is in taking privately-owned land for the building of public road projects, flood control projects, schools, airports, and many other types of public projects. Further, both Federal and Ohio law delegate the power of eminent domain to private entities in certain circumstances where their projects are deemed to serve the public's interest. Examples include certain types of pipelines, power lines, and railroads. The entity taking land by eminent domain, whether the government or a private company, is referred to as the "Condemning Authority" or the "Appropriating Agency."

Losing private property for the public benefit is a difficult and painful burden imposed upon some private property owners for the benefit of the community. Those facing this burden need and deserve competent legal counsel to ensure that their rights are protected. Indeed, while the circumstances giving rise to an Appropriating Agency's use of eminent domain rarely present the landowner with the opportunity to successfully challenge the infrastructure project itself, property owners nevertheless possess many important rights when facing eminent domain. Eminent domain imposes a far greater burden on those property owners who fail to avail themselves of these rights than it does on those who take action to protect their interests.



The power of eminent domain is broad and far reaching, but it is not absolute. An Appropriating Agency's ability to take property by eminent domain is limited by the Fifth Amendment to the U.S. Constitution and Article 1, Section 19 of the Ohio Constitution. When taking private property by eminent domain, an Appropriating Agency may take "no more than that necessary to promote the public use."<sup>iii</sup> In other words, an Appropriating Agency may only take those property rights that are necessary for the public use its project is meant to fulfill. Where an Appropriating Agency seeks to appropriate property rights that exceed that which is necessary for its project, a property owner may challenge the appropriation as excessive. Indeed, this important right was recently upheld by the Ohio Supreme Court in *Ohio Power Co. v. Burns*, Slip Opinion No. 2022-Ohio-4713 (affirming an appellate court's reversal of a trial court which failed to perform the proper review of an appropriation challenged by the property owner as excessive.)

Further, the Fifth Amendment requires that when a condemning authority exercises eminent domain power, it must pay just compensation to the landowner. The Ohio Constitution further extends the rights of the property owner by providing that just compensation shall be assessed by a jury. "Just Compensation" is a term of art that refers to the sum of money that the Appropriating Agency must pay to the property owner as payment for the taking of the property.

However, most appropriations do not involve the taking of an entire property. Most appropriations are partial takings where the Appropriating Agency takes a portion of the property for its project and leaves the remainder to the property owner. A common misconception in partial takings is that just compensation is limited to the value of the property taken. Instead, just compensation must include both the fair market value of the property taken and any damages to the residue.<sup>iv</sup>

Damages to the residue are any decrease in the fair market value caused by the appropriation.<sup>v</sup> Every element that a buyer who is fully aware and informed of all circumstances involving the value and use of the property would consider before making a purchase must be considered in determining fair market value.<sup>vi</sup> Therefore, property owners must carefully analyze the appropriation affecting their property to determine what effect it may have on the value of their remaining property.

Economic growth and development require infrastructure expansion which, in turn, often requires the taking of private property. Although eminent domain is a tremendous power that imposes a substantial injury on property owners affected by it, that injury can be mitigated by understanding and applying the rights our law provides.

<sup>i</sup> "Intel's Central Ohio project spurs multitude of planning efforts, infrastructure projects. Here's what is underway." John Bush, Columbus Business First, November 14, 2022 (last accessed 12/5/22 at: <https://www.bizjournals.com/columbus/news/2022/11/14/intel-central-ohio-planning-infrastructure-efforts.html>).

<sup>ii</sup> *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 39.

<sup>iii</sup> *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 69.

<sup>iv</sup> Ohio Revised Code 163.14(B); Ohio Jury Instr. §609.09(2).

<sup>v</sup> *Id.*

<sup>vi</sup> *Masheter v. Kebe*, 49 Ohio St.2d 148, 151, 359 N.E.2d 74 (1976); Ohio Jury Instr. §609.05.

*Aaron Kenter represents landowners across Ohio in eminent domain cases against the Ohio Department of Transportation, Public Utilities, Municipalities, and Pipeline Companies. Additionally, Aaron represents landowners in negotiating oil and gas leases and solar power leases.*

Aaron Kenter, Esq.  
Goldman Braunstein Stahler Kenter LLP  
[kenter@gbsklaw.com](mailto:kenter@gbsklaw.com)

