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Condemnation and Tax Certiorari

Advance Payment Problems Arising From Condemnation

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New York is what is known as a "quick take" state. This means that title to property is transferred immediately when a condemnor exercises its power of eminent domain. The condemnor owes the condemnee just compensation once the property is taken. The measure of this just compensation is the fair market value of the property taken on the date of acquisition. Because the money is due on the title vesting date, interest accrues for any delay in payment. This is different from a "slow take" acquisition where a just compensation claim is resolved before title to property is transferred to a condemnor.

New York eminent domain proceedings are controlled by the Eminent Domain Procedure Law (EDPL). EDPL §303 provides:

The condemnor shall establish an amount which it believes to represent just compensation for the real property to be acquired. The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever practicable, the condemnor shall make the offer prior to acquiring the property and shall also wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.

While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages that the owner may recover. *Litchfield v. Bond*, 186 NY 66, 74 [1906].

Procedure

EDPL §304 requires the condemnor to make a written offer of compensation after property is acquired. The condemnee can elect to accept the offer as payment in full or it can accept the offer as an advance payment and pursue a claim for additional compensation. The procedure allows condemnors to acquire property without having to wait until valuation claims are resolved. It also enables condemnees to collect some compensation even if the condemnee deems the condemnor's offer to be inadequate. In theory this mitigates the impact of the condemnation. Justices sitting in the condemnation part will not tolerate delay in authorizing an advance payment. There is no excuse for failing to make an expeditious advance payment, as the condemnor is supposed to appraise the property at issue prior to its acquisition.

A delayed payment is also detrimental to the condemnor because interest accrues on the amount of compensation that was owed on the title vesting date, calculated from the title vesting date to the date of payment. *Matter of City of New York (Brookfield Refrig. Corp.)*, 58 NY2d 532 [1983]. In addition, a former property owner cannot be removed from the acquired property until a payment is made. See *Commr. of Transp. v. Sunny Lbr. Supply NY, Inc.*, 40 Misc.3d 590 [Civ Ct, New York County 2013].

Unfortunately, there are situations when it is difficult for condemnees to obtain proper advance payments. One example is when a condemnor refuses to release an advance payment because it asserts that there is a conflict of title.

In the event of a conflict, the condemnor is to deposit the funds with the Clerk of the Court. The EDPL provides a mechanism to implead all parties and to have a hearing before the Supreme Court justice assigned condemnation matters to determine the appropriate party who is entitled to the funds. EDPL §304(D).

State of New York

EDPL §304(E) is applicable to acquisitions by the State of New York where the Court of Claims has exclusive jurisdiction. According to that provision, there are three situations when the attorney general can deposit an advance payment into a comptroller account that does not accrue statutory interest. The first is when a condemnee accepts the advance payment but there is a conflict of title. The second is when a condemnee does not accept the offer as payment in full or as an advance payment and the offer is deemed rejected because the condemnee does not notify the condemnor that the advance payment is accepted within 90 days of the date of the acquisition. The third is when there is a federally aided project and the condemnor determines that it is necessary to deposit the advance payment in order to proceed with the awarding of a construction contract to comply with federal laws, rules, and regulations.

The problem with EDPL §304(E) is that the state relies on that statute to deposit advance payments into comptroller accounts as a matter of course to suspend the accrual of statutory interest regardless of whether the deposits are justified. See *Blau Rock, LLC v. State*, Ct Cl, Jan. 15, 2015, Scuccimarra, J. Motion No. SP-170; *The Other Heights, LLC v. State*, Ct Cl, Nov. 7, 2014, Mignano, J. Motion No. SP-163 (The authors' firm represented the condemnees in these cases.)

Automatic deposits of advance payments are contrary to the purpose and intent of the eminent domain procedure law. According to EDPL §101, it is the purpose of the law to, among other things, expedite payments to property owners and to establish rules to reduce litigation. EDPL §301 provides that "[t]he condemnor, at all stages prior to or subsequent to an acquisition by eminent domain...shall make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement." The deposit delays the payment of compensation, and it creates additional, unnecessary litigation.

It has been held that the state's obligation with respect to advance funds is

...to give the condemnee its advance payment as easily and as expeditiously as possible, subject only to the condemnee's obligation to cooperate by providing what is reasonably required, not what the State has decided to extract from the condemnee, and thereby achieve what it has not been able to achieve in the Legislature and appellate courts, by withholding its money.... *The Other Heights, LLC v. State of New York* (Ct. Cls., Nov. 7, 2014, Mignano, J.) (citing *Matter of Mazur Bros. Realty, LLC v. State*, 117 AD3d 949 [2d Dept. 2014]).

When the state deposits an advance payment into a comptroller account, the condemnee's only way of challenging that action is by initiating a distribution proceeding in the Court of Claims, a Special

Proceeding that is time-consuming and requires the condemnee to incur an expense. EDPL§304(2).

Trade Fixtures

There are other situations where it may be difficult for a condemnee to obtain an advance payment with statutory interest. A condemnor may refuse to pay compensation for trade fixtures because it asserts that a tenant's lease precludes the tenant from making a trade fixture claim.

Other condemnors may argue that a trade fixture award is not required if the value of fixtures is included in the valuation of the real estate. In *Pack It Away v. NYSUD*, 1686/2012, NYLJ 1202618546938 at *1 [Sup Ct, Kings County, Aug. 9, 2013], a court denied a condemnor's motion to dismiss a trade fixture claim when the condemnor argued that a fee award included the value of the fixtures. (The authors' firm represented the condemnee in this case.)

In finding that the value of the fixtures was not included in the value of the fee, the court noted the general rule that "[w]here the land and fixtures are owned by different entities, and the owner of the fixtures has retained the right to remove them, it is entitled to a separate award for the value of the fixtures." It also noted that "[w]here the owner of the fee is also the owner of the fixtures, it is entitled to be compensated for the fixtures, as well as the fee, provided that the fixtures are not inconsistent with the highest and best use of the property."

Condemnors have also attempted to avoid their obligation to pay statutory interest on trade fixture awards when a tenant stays in possession after its lease has been terminated by eminent domain. However, in a case that is still cited as law, an appropriation of land by the state, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures. *Jackson v. State*, 213 NY 34, 36 [1914].

If a tenant uses and occupies property that has been acquired, then its obligation is to pay the condemnor for the fair and reasonable value of the use or occupancy from the date of acquisition to the date the property is vacated and possession is surrendered to the condemnor. EDPL §305. There is no provision in the EDPL that enables a condemnor to suspend statutory interest on a condemnation award because a tenant uses trade fixtures that have been acquired by eminent domain.

Conclusion

Advance payments with statutory interest should be paid quickly and easily to help mitigate the impact of eminent domain. Condemnors should pay what they are required to pay according to the law without requiring condemnees to initiate unnecessary proceedings.

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