

# Ten Common Misconceptions about Eminent Domain

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Eminent domain is currently receiving much public attention, some of it emotionally charged. The realities of North Carolina law may be surprising to someone who has no direct experience with eminent domain. This article summarizes responses to ten common misconceptions about eminent domain, drawn from the book *Eminent Domain and Local Government in North Carolina: Law and Procedure* (for more information about the book, see the sidebar on page 44).

### **Misconception 1. Eminent domain is a newly created power.**

Eighteenth-century English laws, which are the foundation of the American legal system, authorized the use of eminent domain to acquire land for roads, bridges, fortifications, and other improvements. North Carolina's courts always have viewed the state legislature as having the inherent power to do the same. Early state laws authorized local governments to use eminent domain to acquire land for roads. Some even authorized conscription of people living nearby to work on the road's construction, for up to six days annually east of the Blue Ridge Mountains and up to ten days west of them. Conscription for road construction was discontinued in the nineteenth century, but governments continued to use eminent domain to acquire land for highways and later for canals, railroads, and other public improvements. As the demand for public improvements has intensified and government projects have become more interrelated with private development, some particular uses of eminent domain have been questioned and challenged, but the use of



the power for public projects has been a legislative prerogative for centuries.

### **Misconception 2. Government pays only what it wants to pay for property that it takes by eminent domain.**

The United States and North Carolina constitutions require that "just compensation" be paid to an owner whose property is taken by eminent domain. "Just compensation" means payment of the market value of what is taken. Market value is determined according to recognized methods of real estate valuation, such as comparison with similar properties. Spe-

cific valuations often are contested, but the general principle of compensation at market value is well established.

### **Misconception 3. State agencies and local governments determine their own powers of eminent domain.**

A government authority may not assume that it has the power of eminent domain merely because such a power would be useful. The legislature must authorize the use of eminent domain for the intended purpose. The North Carolina General Statutes authorize local governments to use eminent domain to

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carry out their common functions, such as building schools, roads, parks, hospitals, libraries, office buildings, and water and sewer systems. The statutes authorize state authorities, such as the Departments of Transportation and Administration, to use eminent domain for state highway and construction projects. They also have authorized public utilities and other authorities to use eminent domain for certain purposes.

#### **Misconception 4. Compensation must be paid for any interference with private property.**

Government activities usually have an impact on the neighborhood in which they are located. Government has a “police power” to restrict the uses of private property in order to protect public health and safety, even if a restriction results in a loss of value. The law tries to distinguish between changes in value that must be borne by landowners generally and those that unusually affect particular properties and constitutionally entitle owners to compensation. For example, the courts have held that the owners of land along a highway are not entitled to compensation just because changes are made to restrict travel, but if a particular parcel is negatively affected in an unusual and substantial way, compensation may be required.

#### **Misconception 5. Business owners must be paid for lost profits.**

When government takes the land on which a business is operated and the

owners must move or curtail their operations, the owners may believe that they are losing future business profits. North Carolina law does not require compensation to be paid in such a circumstance. The general rule applied by the courts, subject to limited exceptions involving unusual uses of eminent domain, is that loss of profits from a business operation is not an element of constitutionally required compensation when eminent domain is used to acquire the land on which a business has operated.

#### **Misconception 6. Landowners can delay a project by contesting compensation.**

In most situations involving the use of eminent domain, the only issue that requires a court resolution is a dispute about the amount of required compensation. The law enables governments to move forward with projects without having to wait for a final resolution of compensation disputes. Under North Carolina law, most acquisitions rely on a “quick take” procedure, by which the government acquires title and the right to possession of the property as soon as the government files a complaint, a declaration of taking, and a deposit of estimated compensation with the court. The quick-take procedure applies to acquisitions for roads, sidewalks, schools, and utilities, among other purposes. If the government is taking property for purposes to which the quick-take procedure does not apply, in most cases the title will vest in the government when the owner files an

### **For More Information on Eminent Domain**

*Eminent Domain and Local Government in North Carolina: Law and Procedure*, by Charles Szypszak, may be ordered from the School of Government website, [www.sog.unc.edu](http://www.sog.unc.edu), by following the link to Publications and then searching for “eminent domain.”

answer. Contesting compensation does not further delay the transfer of title.

#### **Misconception 7. Government may use eminent domain only when there is no other way to construct the project.**

The North Carolina Supreme Court has held that authorities with the power of eminent domain have discretion to determine the property to be taken if the purpose is legislatively authorized and constitutionally permissible. Decisions about project needs are not subject to court approval except when facts indicate that the government is acting in bad faith on no conceivably legitimate basis. North Carolina’s courts presume that public officials act legally and in good faith. Someone claiming otherwise must be able to prove it in order to challenge the manner in which a government is exercising its authority to use eminent domain.

#### **Misconception 8. An eminent domain case can easily be abandoned.**

Once a government files an eminent domain case, abandoning the acquisition may be difficult, even if the government and the owner agree to do so. Usually the title to the property transfers as soon as an eminent domain case is filed, and in most cases, owners withdraw deposited compensation at that time. If the government has a change of plans, there likely will be complications to unravel, and the resolution of the issues may require court involvement.

## Misconception 9. Judges have recently expanded the use of eminent domain.

In the much-publicized 2005 case *Kelo v. City of New London*, the U.S. Supreme Court upheld a Connecticut city's use of eminent domain to acquire land for a private developer as part of a project to rejuvenate an economically troubled area.<sup>1</sup> The decision reflected the Court's historic deference to the elected legislature's judgment about when to use eminent domain. The North Carolina Supreme Court has similarly tended to defer to the General Assembly's judgment about when to authorize eminent domain. Although some may perceive eminent domain as being used expansively, legislatures are taking this step using the discretion that the courts have traditionally accorded them. Some state legislatures have been less inclined than others to authorize the use of eminent domain. The North Carolina General Assembly does not currently authorize the use of it for economic development in the manner employed in *Kelo*.

## Misconception 10. "Playing hard ball" is better than trying to reach an agreement.

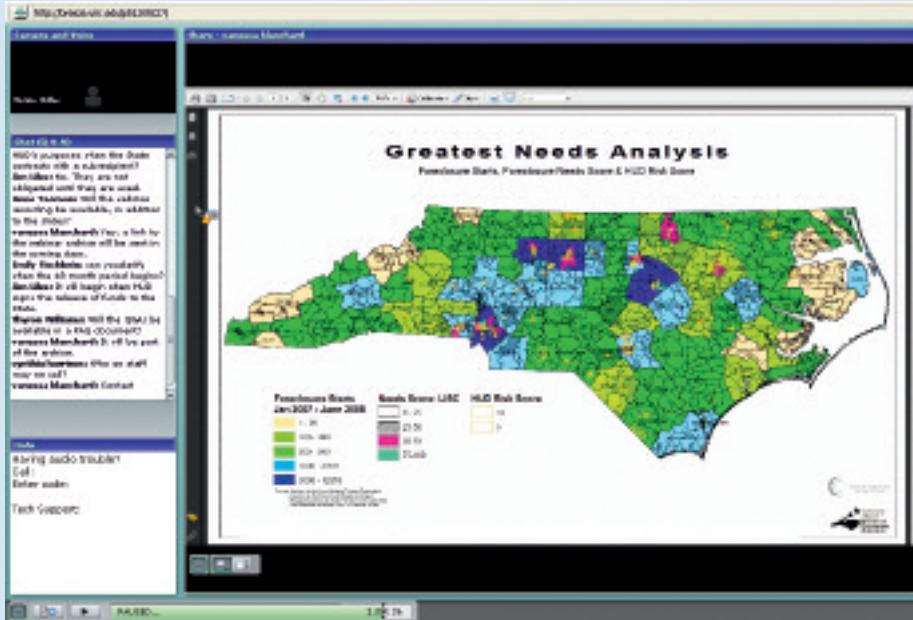
A government and a property owner have reasons to try to agree on a compensation amount rather than become embroiled in litigation over it. Governments have a constitutional obligation to pay compensation that is just, and they should be willing to discuss a reasonable amount with owners rather than take aggressive positions and incur litigation expenses. For their part, owners should not assume that intransigence will be rewarded. A government likely will be more flexible about compensation before positions have hardened and litigation expenses have begun to mount. Marginal gains in compensation by pursuing litigation are likely to be consumed by litigation costs. Owners typically recover some costs for appraisers, engineers, and plats in litigation, but the process quickly consumes resources, and parties usually must bear significant costs themselves, including attorney fees.

### Note

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

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timetable for the program's implementation. Information about the NSP is available at [www.nccommerce.com/en/CommunityServices/](http://www.nccommerce.com/en/CommunityServices/).

During the webinar, participants were invited to submit questions through an online Q&A window on their computer screens. Their questions were then answered in real time, either by a text reply onscreen from one of three DCA staff members monitoring the questions or

by Miller at appropriate points during her presentation.

Participants reported that the webinar was a positive experience, and they provided favorable feedback on both the content and the technology-driven delivery. For more information on the webinar or the CED Program, contact Lobenhofer at [lobenhofer@sog.unc.edu](mailto:lobenhofer@sog.unc.edu) or 919.843.7736.

## Local Government Supports Better Coordination among Nonprofits

**W**ith schools, counties, and municipalities currently experiencing a budget crunch, tensions may heighten as cuts affect citizens seeking help from nonprofit providers and government agencies. How can vital services be maintained with less money? Instead of focusing only on the lack of money, nonprofits in one community came together in a daylong workshop on coping with the crunch in realistic, but creative ways.

In late October, the Orange County Human Services Advisory Commission convened a meeting of nonprofit direc-

tors to think proactively and discuss the question, What can the nonprofit network do within its own sphere to strengthen its capacity to provide effective, compelling services to residents? More than fifty participants spent time naming the strengths of the local nonprofit network, identifying shared interests, and creating new alliances for problem-solving.

Although money is tight for most nonprofit and government service providers, human capital and considerable experience are not in short supply. The challenge is to identify and make the most of the nonmonetary

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