Indiana Association *of* Cities and Towns

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Indiana's New Eminent Domain Law

HB 1010 Eminent domain (Wolkins) was signed into law (P.L.163-2006) by the Governor on March 24, 2006. Outlined below are the provisions of the law, which are effective immediately.

General Changes to Indiana Eminent Domain Law

Before a municipality sends out another Uniform Land Acquisition Letter, it now needs to

1. change the landowner's response time in the letter from 25 days to 30 days and make a few other language changes in the letter as set out in the law;
2. establish a proposed purchase price, preferably by motion at a public meeting by the board/commission with eminent domain authority;
3. be prepared to provide the landowner with an appraisal or other evidence used to establish the proposed purchase price;
4. be prepared to conduct a good faith negotiation with the owner of the property and
5. realize that an additional 30 days may be added to the landowner's time to respond to the condemnation complaint thereby increasing the time it will take to get possession of the parcel.

Additionally, the law says that municipalities generally will need to file a condemnation complaint not more than two years after the acquisition offer letter to the owner of the property or it will be prohibited from filing a condemnation complaint for three years for the same or substantially same project.

The new law significantly increases the amount that can be awarded as litigation expenses, including reasonable attorney's fees, to a "winning" landowner. Now the landowner who goes through a trial and recovers more than what the condemnor offered 45 days before the trial to settle the case may receive the lesser of $25,000 or the fair market value of the property being acquired. This change could be interpreted to mean that a landowner can receive these costs in an inverse condemnation case.

Restrictions on the Use of Eminent Domain

The greatest changes resulting from the bill will be felt when local governments want to redevelop an area or acquire parcel(s) of ground to spur greater economic health in an area. The intent of the new law is to minimize the acquisition of parcel(s) by, or with the threat of, eminent domain for

economic develop projects. The restrictions upon the use of eminent domain discussed below do not apply 30 years after the acquisition of the real property.

Restrictions discussed below will apply to a condemnor who exercises the power of eminent domain to acquire a parcel of real property from a private person with the intent of ultimately transferring ownership or control to another private person for a use that is not a public use.

In other words, if the need for eminent domain is because of one of the public uses defined below, the general eminent domain procedures apply. If the need for eminent domain does not fall within the "public uses" below, the use of eminent domain will trigger all of the criteria and damages outlined below. The projects that do not qualify for the general eminent domain laws are referred to as private to public to private (ppp) or private to private projects.

A "public use" is government's or general public's possession, occupation and enjoyment of a parcel of property for fundamental governmental services including highways, bridges, airports, ports, certified technology parks, intermodal facilities, and parks and the government's leasing of a parcel it owns by a lease with a right of forfeiture of a highway, bridge, airport, port, certified technology park, intermodal facility, or park and certain utilities. The term does not include the public benefit of economic development, including an increase in a tax base, tax revenues, employment, or general economic health.

Some parcels in a "ppp" project area will not be eligible for condemnation at all and may be acquired only through a purchase at whatever cost the seller wants and the condemnor is willing to pay. The parcel, to qualify for eminent domain acquisition, must be one of the following types:

1. have a structure that is a public nuisance;
2. have a structure that is unfit for human habitation;
3. have a structure that is a fire hazard or other public safety threat;
4. have a structure that is not fit for its intended use because of infrastructure deficiencies
5. is a vacant or abandoned parcel in a substantially developed neighborhood in a nuisance-type condition that has not been remedied within a reasonable time after notice;
6. has delinquent taxes exceeding the assessed value;
7. is environmentally contaminated or
8. is abandoned.

In addition, the parcel must accomplish more than only increasing the property tax base of the unit and it may be placed in mediation to determine if a reasonable alternative without the parcel could be devised.

If the condemnor tries to condemn the parcel without meeting the above criteria, the condemnor will pay the attorney fees of the landowner. If the condemnor rightfully condemns the parcel it will pay the following:

1. for residential property - 150% of fair market value; for agricultural land - 125% of fair market value and all other land at 100% of fair market value;
2. other damages under 32-24-1 and "any loss incurred in a trade or business that is attributable to the exercise of eminent domain"
3. relocation costs (Federal guidelines) and
4. possible attorney fees of up to 25% of cost of acquisition if the jury finds more than the offer 45 days before trial

There is one exception in a "ppp" project area where the criteria to use eminent domain does not have to be supported on each and every parcel. If the "ppp" area is located in 1 county, consists of 10 acres or more and the condemnor has already secured clear title to 90% of parcels, then it could condemn the last 10% of the parcels as long as none of those parcels are occupied by the parcel owner as a residence and the legislative body for condemnor adopts a resolution by 2/3 vote that authorizes condemnor to exercise eminent domain over a particular parcel of real property. The payments to the landowner under this exception will be 125% of fair market value for the land, other damages under 32-24-1 and "any loss incurred in a trade or business that is attributable to the exercise of eminent domain", relocation costs (Federal guidelines) and possible attorney fees of up to 25% of cost of acquisition if the jury awards more than the last offer before trial.

Signs

Besides the changes to the eminent domain laws, HB 1010 affects local government's conduct toward signs, sign owners and the landowners where signs are located. Neither a state agency nor a political subdivision may require that a lawfully erected sign be removed or altered as a condition of issuing a permit, license, variance, or other order concerning land use or development unless the sign owner is compensated under the eminent domain laws or has waived compensation in writing.

The Board of Zoning Appeals (BZA), and perhaps Plan Commissions, should consider preparing a form that would constitute a "written waiver of the right to and payment of compensation by the municipality to the sign owner" should there be a request for removal or alteration of a sign during a covered proceeding. In consultation with your municipal attorney, determine

1. when a landowner seeking a land use or development permit, license, variance or other "order" with an already lawfully existing sign on the property is involved in a zoning petition, permit or license process is asked for a waiver and
2. who should be asked to obtain the appropriate signatures on the waiver form.

The form should remove from the BZA or Plan Commission the obligation to pay the sign owner eminent domain damages and/or perhaps place the obligation on the landowner, assuming that the sign owner and the property owner are not the same entity.

Again, consult with your local municipal attorney to consider whether you need any ordinance amendments or whether rule changes are sufficient to implement the waiver form. Next consider when and how the waiver option will apply or be implemented after a careful review of the law.

The law includes all signs – billboards, ground signs, wall signs, portable signs – to name a few. If the waiver form has not been signed and the sign owner can argue that the municipality has "ordered" the removal or alteration of a legal sign, then arguably an inverse condemnation action will lie with the possibility of the assessment of costs at the lesser of a $25,000 damages award or the value of the property taken.

Miscellaneous Provisions Regarding Eminent Domain

A privately owned cemetery may no longer exercise the eminent domain power. Certain library boards may only exercise eminent domain power if the specified legislative body in the library district adopts a resolution specifically approving it.

HB 1017 Property appraisers (Welch) changed the provisions regarding the court appointed appraisers in the eminent domain process. The law (P.L.113-2006), effective July 1, 2006, requires one disinterested freeholder and two disinterested licensed appraisers rather than 3 freeholders. This bill also requires that one of the disinterested licensed appraisers must reside not more than 50 miles from the property being appraised.