

Condemnation And The Developer



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By Jamie B. Seward

When can a condemning authority use its power of eminent domain for development-related improvements? And what can the developer do if the condemning authority refuses?

DEVELOPER'S APPROVALS are often conditioned on the provision of public improvements such as road widening. When the improvements require the property of private owners, a government agency may use its condemnation authority on behalf of the developer at the developer's expense. But, what if the government agency refuses to use its condemnation authority? This article will discuss the circumstances in which the condemning authority can use its power of eminent domain to acquire property for improvements and what the developer can and should do to acquire property in the event the condemning authority cannot use its power of eminent domain.

THE POWER OF EMINENT DOMAIN • The power to take, or condemn, private property for public use is an inherent power of state government. Condemnation is the process by which the state exercises the power of eminent domain — the inherent power of a sovereign government to acquire private property for public use. *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 335 (Md. 2007). Limitations on condemnation authority are a result of both federal and state constitutions. (For

purposes of this discussion, Maryland will be used for the state law examples.) This tremendous power must be handled carefully.

The constitutions establish two requirements for taking property through eminent domain. First, the real property must be taken for a “public use” and, second, just compensation must be provided to the property owner from whom the property is being taken. The property owner is generally entitled to a judicial proceeding prior to the taking of the property. However, the constitution in Maryland allows “quick take” condemnation in certain circumstances prior to a court proceeding. For example, the Maryland State Highway Administration (SHA) has the power of quick take condemnation pursuant to §§8-318-339 of the Transportation Article of the Annotated Code of Maryland. The state can condemn property for a highway purpose pursuant to the statute. A “highway purpose” is certainly a public purpose, but situations arise in which public purpose is questioned.

There is tremendous concern for fair, equitable treatment in acquiring private property for public purpose. The founding fathers placed a high value on the protection of private property. The U.S. Constitution expresses this philosophy in the Fifth Amendment: “No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” The 14th Amendment to the U.S. Constitution extends to states the requirement of following due process when acquiring privately owned property. A question often asked by developers, in the context of improvements required by their approvals necessitating the acquisition of private property, is when can a condemning authority use its power of eminent domain for those types of acquisitions?

Before discussing when the power of eminent domain can be used in the context of developer-required improvements, it is important to understand the concept of a preferred alignment. Without a

preferred alignment, there can be no public purpose. Without public purpose, there can be no use of eminent domain.

The Importance Of A Preferred Alignment

Whether or not a preferred alignment has been selected plays an important role in whether the state can use its condemning authority. The location of the actual roadway must be determined before a highway purpose, which is a public purpose, can be established. Therefore, it is important to understand the process of how a preferred alignment is selected.

Once the need for a highway project has been identified, the state highway agency determines a broad, general location, known as the corridor, where the potential road may be constructed. Alternate routes, or alignments, within the corridor will then be considered. Once the alignments have been identified, a detailed study of each alignment is undertaken.

From a property acquisition perspective, key elements of the alignment study are the number of people and businesses that will be displaced, the estimated cost to acquire the real property for the project, the estimated cost to relocate those eligible and/or to move personal property from the right of way. Included in the study of the alternate alignments in which federal aid is provided is the analysis required by the Environmental Protection Agency (EPA) pursuant to the National Environmental Policy Act (NEPA), which is known as the NEPA analysis.

The NEPA analysis is broad and considers the social, economic, and environmental impacts caused by the construction of various alternative alignments being considered. In addition to the NEPA analysis, public involvement is essential in terms of informing the public of the potential impacts of each alignment. The public is encouraged to participate in the selection process and may comment on the alternative alignments.

After thorough consideration of the advantages and disadvantages of potential alignments, the state agency will decide which approach best serves the public needs and will select the preferred alignment. Once a preferred alignment is selected, the condemning authority may commence acquisition activities.

If a preferred alignment has been selected, the condemning authority will likely be able to use its power of eminent domain in the event a developer is unable to negotiate the acquisition of real property from a private property owner. Since a preferred alignment had been chosen, the condemning authority would have a clear nexus between highway purpose, a public purpose, and the acquisition. The developer may be required to fund the acquisition activities, in which case an agreement of understanding would be developed by and among the parties setting forth the terms and conditions of the acquisition activities.

If alternate alignments are still being considered by the agency, the likelihood is that the condemning authority would not be able to justify its use of eminent domain. From the property owner's point of view, there is no nexus between highway purpose and the acquisition when the agency is not yet certain that the property will actually be needed. Since the property acquisitions would be the sole responsibility of the developer and considering the property would ultimately be donated to the government for ownership and maintenance, the parties would set forth the terms and conditions of the acquisition process in an agreement of understanding.

Agreements Of Understanding

It is important for a developer to be aware of its rights and responsibilities when it is required to acquire private property pursuant to their development approvals. During the planning and design phases of a project, a developer is often obligated to make improvements to the roadways surrounding

the project. Often, these improvements are required for safe access and mitigation of development-generated traffic effects. The required road improvements may necessitate the acquisition of real property from private property owners. Ultimately, the property acquired for the road improvements will be donated to a public agency, which will then own and maintain the road improvement. Private entities rarely, if ever, own and maintain public roads. The developer's rights and responsibilities should be set forth in an agreement of understanding before the commencement of acquisition activities.

Agreements of understanding between the condemning authority and developer should be developed when right of way activities are involved. These right of way activities may include obtaining donations, dedications, or acquisition of property rights at fair market value. When the condemning authority is able to use its power of eminent domain to acquire private property not acquired by the developer, an agreement by and between the developer and the condemning authority must also be established before the start of the acquisition of land by the developer. Alternatively, if the condemning authority is not able to use its power of eminent domain to acquire the property, the condemning authority will advise the developer that the developer is solely responsible for acquiring the property that will ultimately be donated to the state agency.

The Maryland SHA, a modal agency of the Maryland Department of Transportation, has set forth guidelines for the acquisition of real property by developers for roadway improvements that are required for safe access to and from state roadways and mitigation of development-generated traffic impacts. The guidelines also establish the circumstances of the state's involvement in the acquisition of land not acquired by the developer for the above-described purposes. A checklist based on these guidelines has been provided and can be found at the end of this article.

Responsibilities Of Developer When Acquiring Property To Be Donated

When a developer is solely responsible for acquiring property to be donated pursuant to its development approvals, the developer and the donee agency must work together. The donee agency must ensure that the developer is aware of its responsibilities and that the proper steps are followed. In Maryland, when a developer intends to donate property related to a road improvement, the developer will contact the donee agency for donation procedures and direction. For example, a developer in Maryland should consult the SHA District Office and Access Permits Division with respect to donation requirements. The developer will also be directed to the plats and surveys office of the SHA to receive direction for the development of plats, which meet the standards of and are acceptable to the SHA. The plats used by the developers during negotiations with private property owners may not be SHA-issued plats, but must be acceptable to SHA. The goal is to avoid the appearance of collusion on the part of the developer and the state agency.

The developer will be advised that any offer made by the developer or its representatives to a private property owner must be based on fair market value. Fair market value is determined by an appraisal. The offer to a property owner may not be less than the fair market value as determined by an appraisal. Further, the developer will be advised to ensure that all parcels from which property was acquired have continued, legal access, if necessary. The instrument of conveyance from the private property owner to the developer must include language stating that the property being acquired is to be dedicated to public use. However, the grantee to which the property is to be conveyed is the developer and not the state agency. The developer or its representatives must not use the threat of condemnation during negotiations.

It is the responsibility of the developer to provide any and all releases for the fee area being donated before the donation. For example, if a lien encumbers the property, the developer must obtain a lien release. The lien release must then be recorded among the land records prior to the state accepting the property as donated. Before donating the property, the developer is also responsible for clearing the property of hazardous materials.

The donation of the property to SHA must be made as one assemblage and shown in the format of a SHA plat. Once the developer successfully assembles the properties to be donated, the developer must provide an up-to-date title examination for the properties along with a title certificate, if required, demonstrating developer's ownership of the property to be donated. If there are any defects in the title, the developer may be required to provide a title insurance policy in an amount sufficient to indemnify the donee against all future claims. The developer must agree that the state agency will retain any prior rights to utilities existing within the donated right of way.

After the donee agency has been provided with the proper materials, including any releases, a deed will then be prepared by the state agency. Once the deed is prepared, necessary signatures from the developer's agents will be obtained. The donee agency will handle recordation of the instrument of conveyance too. However, there are always individual property owners with whom successful acquisition negotiations are unsuccessful.

When Negotiations Fail And Condemnation Authority Is Unavailable

There always seems to be one property owner with whom negotiations fail. Typically, this is the property owner from whom the smallest parcel of land is required. No matter how hard the negotiator tries or how much just compensation is offered, the property owner simply will not convey the property to the developer. This lovely scenario is usually

coupled with the fact that the condemning authority cannot use its power of eminent domain, because a preferred alignment has not been selected and public purpose is lacking.

To use a recent example, SHA was approached by a developer before the commencement of the developer's acquisition activities. In connection with the developer's project, the developer was required to make certain improvements. The improvements consisted of the construction of curb cuts and access improvements in addition to road widening improvements. Upon completion of the improvements by the developer, the developer was to donate the property to the state which would then own and maintain the improvements.

In this instance, a preferred alignment had not been selected. Therefore, SHA was not in a position to use its power of eminent domain in the acquisition process. This was cause for concern on the part of the developer. The developer understood that the threat of condemnation could not to be mentioned and can never be mentioned, but the developer was able to explain to the property owner that the property acquired would ultimately be donated to the SHA. Not surprisingly, the parcel for which negotiations failed was the smallest parcel of the acquisitions.

The owner of the incredibly small parcel wanted to donate the property directly to SHA instead of to the developer. If the developer had successfully negotiated the acquisition from this property owner, it would have been part of the assemblage donated to the state by the developer. In this very special case, SHA was able to develop an agreement with the developer whereby the developer would pay the property owner directly and the property owner would then convey the property to SHA instead of to the developer. This situation is not typical, but illustrates the myriad of possibilities when the power of eminent domain is not available and negotiations fail. Maintaining open lines

of communication and creative thinking can often solve issues as they arise.

Before approaching the state for an alternative solution when the developer is unable to acquire property from a private property owner, the developer should first seek guidance from the jurisdiction in which the project is located. The jurisdiction may or may not be able to assist the developer with the acquisition of property. Often, jurisdictions have some condemnation authority and, if a nexus between public purpose and the acquisition can be made, it is likely that the power of eminent domain can be used. It is this nexus between the acquisition and public purpose that must be present and runs the risk of being challenged.

Challenges To Public Purpose

Having your real property condemned is not a pleasant or desirable experience. It is understandable, then, why a property owner would seek to stop the condemnation with a challenge to the public necessity of the condemnation. Recently, I was involved in a case in which a developer had a project and a major retailer was the anchor tenant. The condemning authority was able to use its power of eminent domain to acquire property for a deceleration lane, a road improvement, required by the development approvals. The property owner challenged the public purpose of the state's acquisition of property for the deceleration lane. The property owner alleged that the condemning authority was acting on behalf of and as an agent for the developer and the major retail tenant that would ultimately occupy the development. This is exactly the scenario a condemning authority seeks to avoid.

After the developer's negotiations with the property owner failed, the state filed a Land Acquisition Petition pursuant to a quick take condemnation, pursuant to section 8-318-331 of the Maryland Transportation Code, to acquire property in fee simple and for a temporary construction easement for the deceleration lane. In addition to filing plats

showing the metes and bounds descriptions of the property, rights and interests to be acquired. The state deposited just compensation into the court's registry to the use of the property owner. The just compensation was based on a sole source appraisal obtained by the state.

The taper section of the deceleration lane was to run along the front of the condemned property. The original improvements on the condemned property included grassy lawn area along the frontage. Curbing ran along the state's right of way line and within the existing state right of way. The building improvements located on the larger part of the real property, from which the condemned portion was being taken, would remain unchanged after the completion of the deceleration lane. The state's acquisition would, in essence, not affect the function of the business, a used car lot, located on the property.

In this situation, the developer obtained conditional approval for its commercial development and a major retail tenant planned to occupy the development. Considering the increase in traffic counts due to the location of the major retail tenant in the development, the county where the development was to be located required the developer to construct improvements, including the deceleration lane. In order for the developer to satisfy the county's adequate public facilities regulations, construction of the deceleration lane was required.

Before any property is condemned, among other things, Part III of Title 8 of the Maryland Transportation Article requires the state to complete appropriate engineering and other studies, prepare a construction plan that shows the location of the improvements to be constructed, the length of the construction and the width of the right of way necessary for the construction; prepare plats; perform engineering and real estate studies, evaluations, and investigations necessary to determine the fair market value of the property to be acquired, and the fair compensation for any resulting damage to the

remaining property of the owner. Md. Code Ann. Transp. §8-320. The plats and estimates prepared by SHA must then be approved, signed, and filed for record with the Secretary of the State Roads Commission and the State Archives. Md. Code Ann. Transp. §8-321. The plats and estimates are kept as part of the public record. Md. Code Ann. Transp. §8-322.

Pursuant to the grant of an access permit by the state and the county's approval of the development, SHA determined that a deceleration lane was appropriate to ensure the safety of the traveling public. Since the development will result in an increase in traffic counts, the deceleration lane will accommodate the traffic increase and ensure the safety of drivers. The deceleration lane, upon completion of construction, will be part of the existing road, which is owned and maintained by SHA, not the developer and not the major retail tenant.

It was also necessary for SHA to verify the county's support before entering into an agreement with the developer for acquisition activities. The county supported the acquisition of the real property, which enabled the developer to make the requisite improvements. In the event the county did not support the development, SHA may not have engaged in acquisition activities.

Substantiating Public Purpose

The private property owner argued that his property was being acquired for a purpose other than a public purpose. However, a deceleration lane accommodates an increase in traffic counts and improves the safety of the road for the traveling public. The condemned property will be titled to the state and become a permanent part of the state highway system. It is clear that the private property was being acquired for a public road improvement to facilitate the safety of the traveling public, which is a clear public purpose.

It is well-established law that "necessity is for the condemnor and not for the courts to decide,"

and this determination will not be set aside unless it is proven to be so oppressive, arbitrary, or unreasonable as to suggest bad faith. *Washington Suburban Sanitary Commission v. Santorios*, 199 A.2d 206, 208 (Md. 1964). SHA determined the acquisition of the condemned property was needed in order to improve the safety of the road. Therefore, SHA's determination could not be deemed oppressive, arbitrary, or unreasonable, as a matter of law. See also *DeBotton v. Commonwealth, Department of Transportation*, 552 A.2d 1150 (Pa. Commw. Ct. 1989). The private property owner was not oppressed by the condemnation, since the business on the property is currently functioning and operational. In addition, ingress and egress to the property owner's business did not change. The private property owner was compensated, financially, for the acquisition. The state's determination to acquire the condemned property followed the process set forth in Title 8 of the Maryland transportation code and was neither arbitrary nor unreasonable. The property owner lost the challenge and SHA was able to use its condemnation authority to improve the road with a deceleration lane.

The traveling public will continue to utilize the road, albeit more safely, following the installation of the deceleration lane for which the condemned property was acquired. With respect to public use, the Maryland Court of Appeals observed that "there will always be a public purpose when property is obtained for actual public use..." *Valsamaki*, supra, 916 A. 2d at 350 n. 24. The deceleration lane is currently being used by the public, including the private property owner and his customers, on a daily basis.

With respect to challenges to determinations in accordance with its constitutional and statutory mandate, the Maryland Court of Appeals noted, "And any other conclusion would result in substituting, for the discretion reposed in the commission, judicial judgments, and would dislocate and disrupt the entire machinery and policy of the state, in re-

spect to the establishment and maintenance of a state road system, by placing the administration of one of the most important functions of the officials entrusted with effecting the policy of the state in the hands of the courts of the 23 counties of the state rather than in the hands of a single administrative agency." *Murphy v. State Roads Commission*, 149 A. 566, 571 (Md. 1930). See also *State Roads v. Franklin*, 95 A.2d 99 (Md. 1953); *Rollins Outdoor Advertising v. State Roads Commission*, 481 A.2d 1149 (Md. 1984). SHA is provided the discretion with which to determine how to best operate, improve, and maintain the state highway system. Here, the deceleration lane improves the state highway system as it is an improvement for the purpose public safety.

Avoiding Abuse Of Process

A private property owner may argue that the condemning authority is abusing due process in an attempt to thwart the condemnation. The private property owner in the case I've been discussing alleged that the acquisition of his property was for the major retail tenant's benefit and, as such, is an abuse of the SHA's power of eminent domain. However, SHA owns and is responsible for the maintenance of the deceleration lane. Further, SHA did not convey the property to another party. When the legislature authorizes a commission or other agency to take and acquire land for a public purpose by condemnation, the selection of the land to be condemned is a matter for the commission to decide. *Franklin*, supra; *Johnson v. Consolidated Gas, Electric Light & Power Co.*, 50 A.2d 918 (Md. 1947); *Murphy*, supra. When the taking is challenged, the questions for the court to decide are limited to whether there is any necessity justifying the taking and whether the decision of the commission is so oppressive, arbitrary or unreasonable as to suggest bad faith. See *Nichols on Eminent Domain*, §411[2] (Matthew Bender, 3d ed. 2011), *Murphy v. State Roads Comm'n*, supra. The acquisition is not unreasonable as it is for a public purpose, i.e., the safety of the

traveling public through the construction of the deceleration lane.

The property owner also alleged that the state acted fraudulently in acquiring his property. In *Masson v. Reindollar*, 69 A.2d 482, 485 (Md. 1949), the court held that it would not control or review the exercise of the discretionary power of the State Roads Commission, unless such exercise is fraudulent or such abuse of discretion as to amount to a breach of trust. Any other rule would have the effect of substituting the decisions of the courts for the discretion reposed in the Commission, and would disrupt the policies of the Commission, taking the administration of their important functions out of the hands of a single state agency and placing them in the hands of the courts. *Id.* The acquisition did not amount to a fraud, a breach of trust or an abuse of discretion. It was impossible for the state to respond in any manner other than to note the public necessity of the acquisition and the state's compliance with Title 8 of the Maryland Transportation Code.

The property owner also alleged bad faith on the part of SHA, but those allegations were unsubstantiated. The burden is on those challenging the condemnation to establish such bad faith. *County Comm'rs v. Schrodel*, 577 A.2d 39, 46 (Md. 1990). There was no indication that the state abused its discretion. The necessity for the taking does not have to be absolute: all that is required is that it be reasonable under the circumstances. *Johnson*, supra, at 922. It is reasonable and necessary to acquire property for a safety improvement and that is just what SHA did in this instance.

The Nexus Between Acquisition And Public Purpose

The concern on the part of SHA, as a condemning authority, is that SHA may be subject to liability if it fails to base its acquisition decisions on a public purpose such as traffic safety. Further, SHA has an interest in avoiding the appearance of

acting on behalf of a private entity when using its condemning authority. After all, the state's power of eminent domain in the context of an acquisition for a road improvement may only be used for that public purpose.

Further, SHA may be subject to a claim that it arbitrarily exercised its police power resulting in damages from the taking of a private property right absent just compensation. The case of *Langelly Shopping Center v. State Roads Commission*, 131 A.2d 690 (Md. 1957), in which a concrete median was constructed eliminating a left in/left out access to a shopping center, established that a legitimate traffic safety reason must exist and SHA may not act arbitrarily. The shopping center's owners argued that the state acted arbitrarily when it constructed the concrete median and the restriction on access constituted a taking of private property for which they were entitled to just compensation. The court in *Langelly* rejected the shopping center's owners' claims, because access was not denied. Rather, access was restricted. Further, legitimate traffic safety reasons, including heavy traffic at one of the busiest intersections in Montgomery and Prince George's Counties, supported SHA's decision. The court, however, did recognize the need for a legitimate traffic safety reason.

When a condemning authority uses its power of eminent domain, it must establish a clear relationship between the acquisition and the public purpose for which the property is being taken. In *Township of West Orange v. 769 Associates, L.L.C.*, 775 A.2d 657 (N.J. Super. Ct. App. Div. 2001), *rev'd*, 800 A.2d 86 (N.J. 2002), a developer had obtained dedicated road access to its proposed project, but wanted to condemn more property to provide additional access to facilitate more intensive development of the site. The New Jersey Supreme Court held that the proposed taking of the defendant's property constituted a valid public use. It is imperative that a nexus between the taking and a public purpose be clear.

Sometimes, a private party may inadvertently benefit from a condemnation. In the case of *HTA Ltd. Partnership v. Massachusetts Turnpike Authority*, 747 N.E.2d 707 (Mass. App. Ct. 2001), the court upheld the right of the Massachusetts Turnpike Authority to condemn land for park-and-ride lots adjacent to the turnpike. Such lots were part of a compliance plan under the Clean Air Act, intended to encourage carpooling activities. The court determined that there was a nexus between the lots and the turnpike. However, the plaintiff argued that the land taken had been selected to benefit a private owner by providing access to its property. The court determined that an incidental private benefit was acceptable as long as the primary purpose for the taking was public. When a clear public purpose cannot be determined, the taking may be subject to challenges as being an abuse of condemnation authority.

The Definition Of Public Purpose

The term “public use” has been given broad interpretation by the Maryland courts. The Maryland Court of Appeals has recognized takings that provide a “public benefit” or “public purpose.” Courts have also held that government may not simply transfer property from one private party to another. In *Van Witsen v. Gutman*, 29 A. 608 (1894), the Court of Appeals invalidated a condemnation by Baltimore City when the court found that the transfer would have benefited one private citizen while costing others. However, the Court of Appeals has not forbidden the transfer of property from one private party to another. In *Prince George’s County v. Collington Crossroads*, 339 A.2d (Md. 1975), the court authorized the county to use its condemnation authority to take private property for the purpose of economic development even though the property was not blighted. The court in *Collington* held that, “projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the state or its subdivisions, are public uses, at least

where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide.” *Id.* at 289.

The property owner I’ve been discussing as an example alleged that the acquisition of his property was solely to benefit the development and its major retail tenant and not for a legitimate public purpose. Condemnation of private property for a public highway or road is a proper public use. *Anne Arundel County v. Burnopp*, 478 A.2d 315, 319 (Md. 1984). Safety is a public purpose. The determination that a deceleration lane would improve the safety and efficiency of the road was made by the state in its discretion. The presumption is that the commission is guided and influenced by considerations affecting the utility of the entire system, as well as by the effect of the proposed improvement on conditions local to the territory in which it is to be established. *Murphy*, *supra*. Here, the public purpose of safety is paramount and guided the agency in its decision.

The condemnation of private property for a public highway, street or road constitutes a “public use” within the meaning of Article III, section 40. While the decision of whether a particular use is “public” is ultimately for the judiciary, a court will give weight to the determinations of the legislative and executive branches of government. *City Council of Baltimore v. Chertkof*, 441 A.2d 1044, 1050-52 (Md. 1982); *Pr. George’s Co. v. Collington Crossroads*, *supra*, *Boswell v. Prince George’s Co.*, 330 A.2d 663, 667-68 (1975); *Herzinger v. City Council of Baltimore*, 98 A.2d 87, 93 (Md. 1953); *Riden v. Phila., B. & W. R.R. Co.*, 35 A.2d 99, 102 (Md. 1943). When the legislature has determined that a proposed use is public in character, it may delegate, to a board, commission, or other agency, power to ascertain and determine what property is needed for that use. *Murphy v. State Roads Comm’n*, 159 Md. 7, 15 (1930). The legislature conferred authority on the state to acquire private property for road and transportation purposes, such as for improvements to state highways. There can

be no doubt that the purpose for the condemnation is public in nature.

Alternative Condemning Authorities

Where the condemning authority has a project including a developer limit of work, county executives or commissioners may look to the state for assistance in acquiring private property. Before the commencement of acquisition activities, the state requires that an agreement of understanding be executed by the state and the county whereby the county formally requests the state's assistance and acknowledges that the acquisition is for a public purpose with a public benefit.

The state requires advanced funding for acquisition costs from the developer and/or the county. The developer and/or the county will be required to make full payments for all costs associated with the acquisition and the county must demonstrate support for the project, in writing, to the state. The property will be conveyed by the county, or donated by the developer, directly to the state in this situation. The state becomes involved acquisitions under these circumstances when the property to be acquired is consistent with a preferred, selected alignment, not an alternative.

The developer or the county is then obligated to abide by the acquisition guidelines which require the developer's negotiation agent to:

- Personally contact each real property owner or the owner's designated representative in order to explain the acquisition process to the property owner, including the right to accompany the appraiser during inspection of the property;
- Provide the owner with a written offer of the estimate of just compensation, based on an appraisal, for the real property to be acquired and a summary statement of the basis for the offer;

- Give the property owner an opportunity to consider the offer; and
- Conduct negotiations without any attempt to coerce the property owner into reaching an agreement. For example, the negotiator should be careful not to imply that the negotiation, and in particular the offer, is a "take it or leave it" proposition. Similarly, the threat of condemnation must be avoided. If the negotiations fail, the condemning authority may then step and use its power of eminent domain to acquire the real property.

In the event right of way is required for roadway improvements by the county or approvals and the developer is not responsible for acquiring the right of way, the county must acquire the right of way for the roadway improvements. If the county cannot acquire the required right of way, the development-generated traffic must be decreased.

CONCLUSION • Cooperation between the developer and the condemning authority is vital to the success of the acquisition process. Once a developer learns private property will be needed for development-related improvements, the developer must become aware of its responsibilities with respect to those acquisitions. It is also in the developer's best interest to determine whether or not their required improvements fall within a preferred alignment. Once that determination is made, the developer can proceed with establishing an agreement of understanding, if necessary, and acquire private property accordingly.

**PRACTICE CHECKLIST FOR
Condemnation And The Developer**

- With respect to the acquisition of real property for improvements by developer to be donated to government agency:

___ If a developer is unable to acquire land from a private property owner, the developer is directed to seek guidance from the county in which their development is located. The county may assist the developer with the acquisition of land necessary for the developer to comply with local requirements;

___ Any offer to a private property owner for their land should be based on fair market value;

___ A developer must ensure that the parcel from which land was acquired has continued, legal access, if necessary;

___ The instrument of conveyance from the private property owner to the developer must include language stating that the property being acquired is to be dedicated to public use;

___ A developer may not use the threat of condemnation during negotiations for the acquisition of land from a private property owner;

___ The grantee to which land is being conveyed is the developer, not the government agency;

___ In Maryland, the developer may not use a SHA plat when negotiating with a private property owner for the acquisition of property, but said plat must be acceptable to the SHA;

___ The developer must donate the property to the government agency as one assemblage and, in Maryland, the assemblage must be shown in the format of a SHA plat;

___ It is the developer's responsibility to provide any and all releases for the fee area being donated before donation;

___ The developer is responsible for clearing the donation property of hazardous materials before donation.

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