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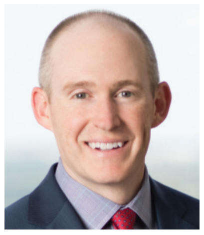
THE INFRASTRUCTURE INVESTMENT AND JOBS ACT WILL INCREASE EMINENT DOMAIN ACTIVITY—GET READY



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After much debate, President Biden signed into law the $1.2 trillion bipartisan Infrastructure Investment and Jobs Act last November. The Act provides for $550 billion in new federal spending in infrastructure.

The Act will undoubtedly lead to a significant increase in eminent domain activity to acquire the property rights necessary to implement new infrastructure projects. Many businesses are not ready.

For the most part, businesses do not devote a lot of resources to eminent domain. The business folks are too busy running the company to worry about it, and in-house legal departments pay little attention to it either. After all, it's fairly rare for a typical business to be impacted by eminent domain.

Eminent domain is often treated as "found money," rather than a traditional "cost" to the business. This is because the business will recover something no matter how things turn out, since the condemning authority is legally required to provide some measure of compensation. That can be a pleasant break from the business having to actually pay money out to claimants. And while some businesses may use real estate counsel regularly, eminent domain is real estate litigation, a niche practice area requiring a specialized skill set, and most real estate lawyers are not equipped for it.

The result? Rather than considering a legal challenge to the taking or seeking to maximize its monetary recovery, the business tries to push the condemning authority for a little more than is initially offered and focuses on how the changes to the property can be "worked around." Matters fall through the cracks, and money—often significant money—is left on the table!

It is time to change how businesses think about eminent domain. Real estate is one of the most valuable assets many businesses own, and the exercise of eminent domain to take all or part of that real estate will have a very real impact on the business in the long run.

A property owner should never blindly rely on the condemnor's appraisal, which tends to understate the amount of just compensation due. For a taking of any significant magnitude, especially one involving loss of parking or an impairment of access, the business should obtain its own appraisal. Only then will it have a full picture of the property's value, both before and after the project.

Additionally, most condemnors will not seriously entertain a counter from a property owner unless it is supported by an appraisal. Although a typical appraisal will cost a mere $5,000 to $10,000, it can often lead to an exponential increase in compensation. Nevertheless, many businesses balk at the cost. That mentality has to be overcome if a business is going to successfully navigate an eminent domain taking.

Large brick-and-mortar retailers—the businesses likely to be most impacted by an across-the-board increase in infrastructure spending—should audit how eminent domain matters are handled. Who receives notices from condemnors? What happens once it's received? If the response is not consistent, systematize it and train personnel to follow the protocol. If that seems daunting, consult qualified eminent domain counsel. Smaller businesses should designate a point person and formulate a response plan. And all businesses should consider lining up qualified eminent domain counsel ahead of time.

In many states, including Ohio, a condemnor can file an eminent domain lawsuit shortly after sending written notice communicating its intent to acquire the property. A business may find it difficult to complete an appropriate search for counsel by the time its pleading is due in court, and a failure to take timely—and informed—action risks losing valuable rights. ■

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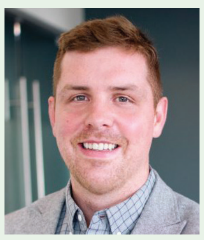
UNDERSTANDING THE BENEFITS OF A SERIES LLC



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Originally set to become effective starting January 2022, Ohio's new LLC Act went into effect on Feb. 11. In general, a series LLC offers a considerable amount of flexibility on how the owners of an LLC may conduct business. It permits owners to maintain separate assets within a single business entity while reducing the need to create additional entities with the Secretary of State.

Traditionally, a non-series LLC limits the owner's liability to the specific assets owned by that LLC. In other words, if the owner of the LLC wanted to isolate certain assets within the LLC from other assets, the owner would need to form multiple LLCs. In this situation, each LLC owns assets separately and operates different lines of business. Each separate LLC must be formed with the Ohio Secretary of State.

In contrast, a series LLC can take the structure mentioned above and essentially consolidate it within one single series LLC, meaning just a single filing with the Secretary of State.

The series LLC can have separate "cells" within it. Each cell within a series LLC can segregate the liability of the assets owned by that particular cell from the assets in every other cell within that same series LLC.

If properly implemented, the creditors of one cell within the series LLC cannot reach the assets of another cell within that series LLC. The series LLC is like the parent LLC in a holding company structure, while each cell within the series LLC essentially operates like a subsidiary of the parent entity.

The series LLC offers another option for structuring your LLC in the future. A business owner who wants to change its existing parent/subsidiary structure into a Series LLC can do so by merging the subsidiaries with the parent entity and amending the surviving entity's articles of organization and operating agreement to comply with the new requirements for a series LLC.

A series LLC has certain requirements, per the new LLC statute:

1. The paperwork filed with the Secretary of State must state that the LLC may have one or more series of assets.

2. The operating agreement for the series LLC must have certain elements, including either or both of the following: (1) separate rights, powers or duties with respect to specified property or obligations of the LLC, or profits and losses associated with specified property or obligations; (2) a separate purpose or investment objective.

3. At least one member must be associated with each cell within the series LLC.

Also, it should be noted that the records for the series LLC must be kept separate for each cell within the series LLC. However, it is crucial to diligently keep records of which cell in a series LLC contains which assets, so as not to lose the liability protection within the series LLC, one of the primary purposes of this structure. ■