Compulsory Reading

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Separated by a common language: Eminent Domain and Compulsory Purchase – law and practice

I was lucky enough to attend the International Rights of Way Association's annual education conference in Denver, Colarado last month as a representative of the Compulsory Purchase Association.

As its name implies IRWA is international but most of its 7,000+ members are Americans with a significant contingent of Canadians. It is very much focussed on education - offering credentials and qualifications together with networking and a professional support system. As well as providing a presentation (with Meyric Lewis

KC and Henry Church), I particularly enjoyed attending a number of talks and workshops on legal and practical issues in compulsory purchase in the States. One of the most enlightening was a talk by attorneys **Steve Silva** and **Jillian Friess Leivas** of **Nossaman LLP** on recent developments on eminent domain decisions and legislation. Steve has been kind enough to look over this article and provide his thoughts on it (although any remaining errors are, of course, my own).

In this article, I've decided to focus on three specific areas of difference between the US and the UK.

- The process (or lack of it) for securing compulsory purchase powers
- The use of powers to enable private sector redevelopment
- The way in which acquiring authorities engage with claimants

Before I do so, it's worth understanding some of the terms used in the States.

Image source: Channel 4

Eminent Domain refers to the power held by federal, state and local governments to compulsorily purchase property. It derives from the 17th century legal concept that all property (and not just real estate) is under the dominium eminens (supreme ownership) of the state. The power can be delegated to agencies or utility companies for public purposes.

Condemnation is the equivalent of compulsory purchase deriving from the 5th amendment to the United States constitution "…*nor shall private property be taken for public use, without just compensation*." There is a split of legal authority on whether condemnation is a "purchase" or is - as the text says - simply a "taking".

Taking is the term used in the United States Constitution. It requires just compensation whenever private property is taken for public use. In addition to direct condemnation suits, sometimes a government can accidentally or unintentionally take property—such as by paving a road on the wrong parcel of land.

Inverse Condemnation is where the owner of a property seeks to force the state to acquire the property or at least pay for alleged damages (what we would call injurious affection) on the basis that either the government has physically taken the property or that overly burdensome regulation of the property reduces its value significantly. It is similar to our blight and purchase notice processes but without the restrictions with reference to rateable value.

Rights of Way refers to the acquisition of an interest in land for linear projects. A right of way may be full fee ownership of the land or may be in the nature of an easement. The grant of rights of way for railroad companies opened up the American west and provided plots or sub-plots for any number of classic Hollywood Westerns (and oddly enough, Who Framed Roger Rabbit). Rights of way are still essential for new railroad projects as well as highways and roads, gas and oil pipelines, and electricity cable.

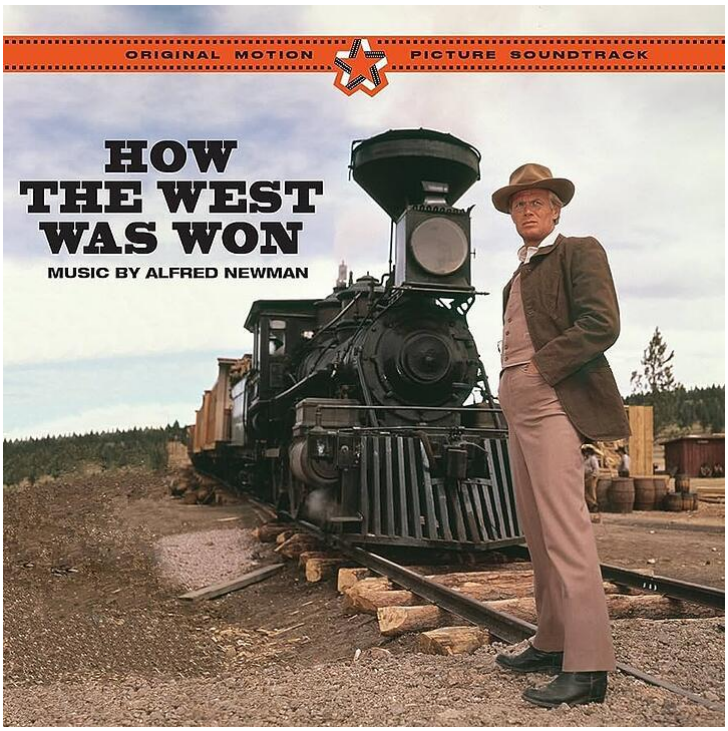

Image source: Amazon Music

The process for securing powers of compulsory purchase

This is quite simple - there isn't one.

For a UK practioners, this is probably the biggest single legal difference between the two systems and a rather counter-intuitive one as we tend to see the States as being more culturally protective of individual property rights than the UK.

In the States, the power of eminent domain is viewed as an inherent, inalienable, and inevitable aspect of sovereign power. Thus, if a government or an agency or a delegate has eminent domain, it can simply exercise its powers. For the federal government in particular, the United States Supreme Court has noted that the government may simply occupy land with no particular process — subject only to subsequently paying just compensation – **Kirby Forest Industries, Inc. v. U.S.** (1984) sets out three different methods by which the federal government can acquire land compulsorily. None of these include a federal constitutional objection period, a requirement to submit a compulsory purchase order for confirmation by an

independent inspector or any form of public inquiry. Similarly, each state is free to adopt whatever procedure it deems suitable. And even within states, different entities may be subject to different requirements. In a **recent California decision**, for example, an appeals court upheld the exercise of eminent domain by a utility company with no prior public hearing nor specific government approval of the exercise—while noting that a municipality would have been obligated to undertake more preliminary steps.

Instead, if a property owner wishes to challenge the exercise of eminent domain, she will need to seek judicial review of the decision to do so. As Steve and Jillian made clear in their talk, property law is largely a state (rather than federal) matter so the basis on which a challenge might be successful will vary depending on the state's constitution and jurisprudence. In general, when an acquiring entity files an eminent domain suit, the landowner has an opportunity during that suit to contest the entity's right to take the property. Nevertheless, it's a reasonable generalisation that the courts are reluctant to interfere with a decision by a public body to exercise its powers of eminent domain unless it is manifestly unreasonable or ultra vires. This deferential approach is traditionally supported by the concept of separation of powers, with the judicial branch loath to second-guess any decision by the legislative and/or executive to acquire a particular property. To every general rule there are exceptions, of course. Some states—such as Nevada—provide an opportunity for challenges to the right-to-take to be heard by a jury.

The use of powers to enable private sector redevelopment

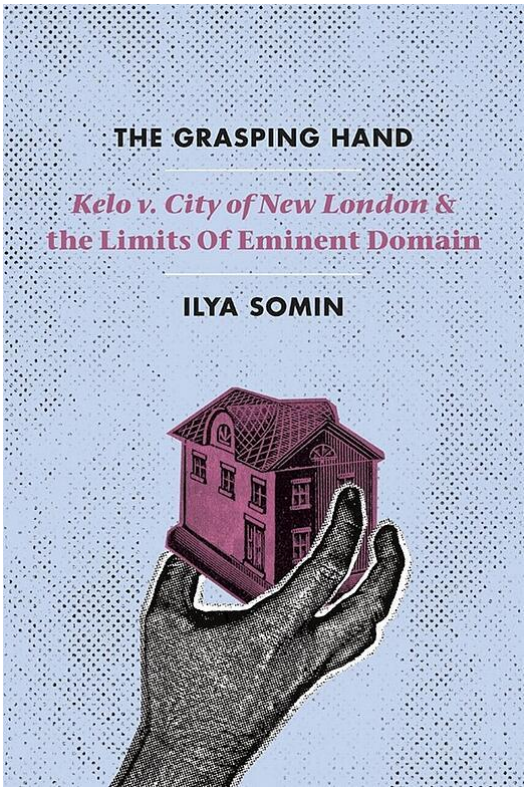

Image source: University of Chicago Press

The most famous (or infamous depending on your point of view) legal decision relating to eminent domain is **Kelo v City of New London** (2005), in which the US Supreme Court held by a 5 to 4 majority that it was permissible for a local government to exercise eminent domain for comprehensive redevelopment by a private company. The City of New London contended that the development would bring about public benefits because it was "…*projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront area.*"

Suzette Kelo, the lead plaintiff in the litigation, contended that economic benefit did not constitute a "public use" within the meaning of the 5th amendment. By contrast, since the 1980s, almost all significant regeneration scheme in the UK has been undertaken by private developers either by themselves or by way of joint ventures with public authorities. The Town and Country Planning Act 1990 specifies that economic (as well as social and environmental) well-being of the local community are necessary requirements for the granting of compulsory purchase powers in a regeneration context. The use of compulsory purchase powers to enable private sector redevelopment therefore seems uncontroversial to us provided it can be

shown that the proposed redevelopment brings about benefits to the community as a whole.

In the States, however, the Kelo proceedings were highly contentious with 40 amicus curiae briefs filed at the court, the majority supporting Ms Kelo. The opposition saw libertarians united with groups such as the NAACP who argued that eminent domain was used disproportionately against poor and ethnic minority communities (as documented by Robert Caro in **the Power Broker**, his monumental biography of Robert Moses and the reconstruction of New York). Meanwhile, the conservative opposition was pithily summarised by Justice Clarence Thomas in a dissenting judgement - "*Though citizens are safe from the government in their homes, the homes themselves are not*".

There was widespread opposition to the Kelo decision leading to a large number of states amending their constitutions or adopting statutes to prohibit the use of eminent domain to benefit a private party, although the Institute for Justice (which **campaigns** against what it considers to be eminent domain abuses) considers that many of those amendments are cosmetic rather than substantive.

Ironically, had the regeneration proposals of the City of New London been made by the City of Actual London and required the promotion of a CPO to be considered at inquiry, they would probably have failed even though the use of compulsory purchase powers to enable private sector regeneration is generally uncontroversial. This is because the scheme itself was not properly funded and because deliverability and viability is a **key test** to be passed at any inquiry into the merits of a compulsory purchase order. The regeneration of New London ultimately never took place because the developer could not get financing although Ms Kelo and her neighbours were all displaced.

Engagement with claimants

At the IRWA conference, I attended several sessions on claimant engagement and was struck by the superiority of the American approach to ours. The fact that there is no CPO to object to probably has the effect of making the process less adversarial, but more importantly the onus is on the acquiring authority to establish the compensation payable to the claimant rather than on the claimant to prove her loss.

With national laws applicable where federal funding is used, 50 state constitutions and various layers of government, it's impossible to avoid generalisation. So please take it as read that the following does not apply universally to claimant engagement in the States but appears to be a fairly standard approach.

The acquiring (or in American, condemning) authority is required to appoint and pay for an appraiser (i.e. a valuer) to assess the market value of the property including its "*highest and best use*" i.e. any hope or development value.

The appraiser and the appraisal must conform with a number of state laws and national and state standards. Anecdotally at least, it appears that the appraisers are generally trusted as being independent of the acquiring authority. If the claimant considers that the appraisal doesn't reflect the full value of the property, she can get her own appraisal undertaken and if agreement can't be reached challenge the appraisal in court (decided in most states by a jury!). Nevertheless, it seems that disputes are relatively rare.

Surprisingly, the 5th amendment requirement that "just compensation" be paid does not legally encompass disturbance. However, a number of states require that relocation costs are payable and the Uniform Relocation Act 1970 extends that requirement to all federal projects and to any projects which receive federal funding. Notably, compensation for loss of business goodwill and profits is generally not a subject for compensation.

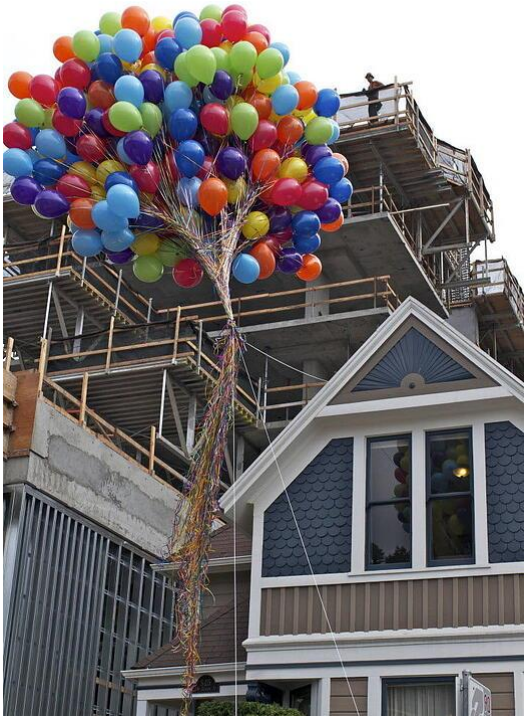

Image source: oregonlive.com

In practice, many authorities will appoint a relocation agent to assist residential and business occupiers. Again, practice may vary a lot between states and projects but from attending a workshop at IRWA in which various relocation agents discussed their experiences and issues, I was struck by the empathy and professionalism they brought to their work. The development of specialist experts who help displaced individuals and businesses would be a huge step forward in the UK if endorsed by (and paid for!) acquiring authorities.

Conclusion

The American Revolution took place before there were really any projects requiring compulsory purchase or eminent domain and so it is unsurprising that there are considerable differences between our two systems. Nevertheless, they are both based on common legal concepts deriving from the Magna Carta and the balance between the protection of individual property rights and the need for a modern state to provide infrastructure and facilitate urban improvement.

Sadly, in the UK (or at least in England), compulsory purchase has become increasingly litigious and adversarial at both authorisation and claim stages. We have a lot to learn from practice in the States and it would be wonderful if the forthcoming Law Commission review was accompanied by an investigation by Government on best practice learning from other jurisdictions. I know that Steve, Jillian and other IRWA luminaries would be more than happy to help.

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