

TOWN OF NAHANT EMINENT DOMAIN FREQUENTLY ASKED QUESTIONS

What is Eminent Domain?

If the United States government, or a State, or a municipality needs land for a public use, it can negotiate the purchase with a private owner and enter into a contract for a voluntary sale. When there is a valid public use and purpose and no private owner is prepared to sell voluntarily, eminent domain is used to acquire title. This is referred as a taking by eminent domain. Technically, the power of eminent domain is the power to take private property without the consent of the owner for a public use or purpose.

What can be taken by eminent domain?

Any interest in real estate and any part of the land area. Eminent domain can be used to take the entire land area or only a part of or an interest in that land.

What is a public purpose?

A public purpose is where the objective is the public welfare and from which the public benefits. The most common examples of public purposes are public infrastructure (roads, water, sewer), public parks and recreation, police, fire and public-school buildings.

Is land conservation a public purpose?

Yes. Conservation and protection of natural resources are valid public purposes.

Has there ever been a taking by eminent domain for conservation purposes?

Yes. Takings of conservation and preservation easements are common to protect open space, natural resources, watershed, wetlands, woodlands, historic properties and similar areas throughout the Commonwealth.

Does the government have to pay for private property taken by eminent domain?

Yes. The United States Constitution and the Massachusetts Constitution each guarantee that when property is taken by eminent domain the owner is to be paid “just compensation.”

What is “just compensation?”

Just compensation means “fair market value.”

What does “fair market value” mean?

Fair market value is the highest price that a willing buyer pays to a willing seller in a free and open market. Framed as a question: How much money would the property have sold for had the owner voluntarily decided to sell it?

What is the procedure for the Town of Nahant to take by eminent domain?

The Town has 2 statutory options: Massachusetts General Laws Chapter 79 (“Chapter 79”) or Massachusetts General Laws Chapter 80A (“Chapter 80A”).

What is the procedure under Chapter 79?

The Nahant Board of Selectmen (“the Board”), authorized by town meeting, adopts an Order of Taking (“Order”) which describes the property, states the interest taken (*e.g.*, fee, easement) and the purpose for which the taking is made. The Order must then be recorded within 30 days of adoption in the Essex County Registry of Deeds. Recording the Order is the act of taking; title vests in the Town upon recording. It is also the date of value.

At the time of adoption of the Order, the Board makes an award of just compensation. The owner may accept the award as full and final compensation or as an award *pro tanto*, literally meaning “as far as it goes,” but understood to mean “without prejudice.” An owner accepting the award *pro tanto* has 3 years from the date of recording to file a lawsuit for a jury to determine whether the award paid by the Town is just compensation.

What is the procedure under Chapter 80A?

The Board, authorized by town meeting, adopts an Order of Intention to Take which describes the property, states the interest taken, the purpose for which the taking is made and includes an estimate of just compensation. The Order must then be recorded within 10 days of adoption in the Registry of Deeds. Within 10 days of recording, the Town must commence a lawsuit in court to establish the right to take and for a determination of damages.

Just compensation is determined first by a panel of 3 commissioners (similar to arbitrators) appointed by the judge. If either party is aggrieved by the commissioners’ award, a trial by jury will then be held. The Town may abandon the taking any time up to issuance of final judgment. If abandoned, the Town must reimburse the owner all of its costs. Costs include court costs, discovery related costs (depositions, document production), expert fees (appraisers, engineers), attorney’s fees and an amount of money to compensate for the loss of the property’s use during the period of time it was threatened with the taking. Business loss (income generated by the owner’s business operations, *e.g.*, grants or tuition) is not recoverable. If the Chapter 80A proceeding is not abandoned, title will vest in the Town upon final judgment and the Town must pay the owner the compensation determined.

What are the basic advantages and disadvantages of each approach?

Under Chapter 79, the Town owns the property immediately and with it comes the obligation to pay just compensation.

Under Chapter 80A, the Town does not own until it decides whether to pay the amount of money awarded either by the commissioners or later by a jury. During this time, it is likely that the court will enter an order preventing Northeastern from building until the matter is resolved. If the Town abandons, it loses any interest in the property and must pay the costs [see comment above] incurred by all parties.

Under both approaches, the Order must (i) describe the property, (ii) the interest to be taken, and (iii) the purpose for which the taking is made.

- (i) The property under consideration is the undeveloped 12.45± acres of coastal open space, natural resource area to the east of the Murphy Battery, the area atop the Murphy Battery from its base, and Canoe Beach (Bathing Beach is not being taken), being a portion of the 20.42± acre parcel at East Point off Nahant Road and Swallow Cove Road abutting Lodge Park currently owned by Northeastern University. Northeastern University operates its Marine Science Center (“MSC”) , on the remaining 7.97± acres.
- (ii) The interest proposed to be taken is a **conservation easement** in the undeveloped 12.45± acres of coastal open space, natural resource area to the east of the Murphy Battery, the area atop the Murphy Battery from its base, and **an access easement** to Canoe Beach. No MSC building will be taken; all MSC’s physical improvements to the land will be left untouched and intact.
- (iii) The purpose of the taking is for conservation, preservation, public access and passive recreation.

What is a conservation easement?

A conservation easement is an interest in real property restricting future use to preservation, conservation, wildlife habitat or some combination of those uses. Public access and passive recreation may also be provided.

Will the public have access to Canoe Beach and Bathing Beach after the taking?

Yes. The proposed taking is intended to protect the public’s right of access to Canoe Beach.

Will the public have access to the 12.45± acre open space area after the taking?

Yes. The proposed taking is intended to protect the public’s right of access to all open space areas, including the oceanfront.

Will the public’s access to Lodge Park remain the same after the taking?

Yes. The Town will retain all existing easement rights including its rights to access Lodge Park.

What is the negative impact on Northeastern if a conservation easement is taken?

The easement will prevent Northeastern from building atop the Murphy Battery or into the 12.45± acre open-space area. Northeastern will have to share access to and use of those areas and to Canoe Beach with the general public.

What impact does the conservation easement have on the 7.97± acre portion which remains?

None. Northeastern will continue to own that portion of the property with all buildings and other improvements intact, including the Murphy Battery.

Does the conservation easement prevent or limit Northeastern from using any of the MSC buildings and other improvements (e.g., parking lots, water intake, etc.) on the 7.97± acre property remaining?

No.

Does the conservation easement prevent Northeastern from expanding its buildings and other improvements on the 7.97± acre property remaining?

No.

How much money is the Town prepared to pay to Northeastern?

A final decision has not been made; however, the Board has been provided with expert guidance. If an easement is taken on the 12.45± acre land only portion, then the question is what is the fair market value of the land?

- (i) For FY 2020, the assessed value of the land and buildings is \$5,388,500. The land portion accounts for \$3,421,300 for the 20.42± acres or about \$167,550 per acre ($\$3,421,300 \div 20.42 \text{ ac}$).
- (ii) The Town engaged real estate appraiser Emmet T. Logue, MAI. It is Mr. Logue opinion that the land has a value of \$200,000 per acre.
- (iii) Northeastern will still own the underlying land but it is much less valuable. If before the taking, the land has a value of \$167,550 - \$200,000 per acre, after the taking, the land has a value of \$41,888 - \$50,000 (i.e., a 75% reduction in value).
- (iv) The Town must compensate Northeastern for that 75% reduction in value. The estimate of the award then is in a range of between \$1,564,505 ($75\% \times \$167,550 = \$125,663 \times 12.45 \text{ acres}$) and \$1,867,500 ($\$150,000 \times 12.45 \text{ acres}$).

Is there any reduction in value to the 7.97± acre property remaining?

This is referred to as “severance damages,” meaning that when a portion of the property has been severed off, the Town must compensate the owner for any loss in value to the part which remains. It is the Town’s position that because Northeastern can continue to use the remaining property and all of the MSC buildings the same way, the conservation easement will cause no diminution in value to the part which remains. No severance damages will be awarded by the Town pro tanto.

Waterfront land in Nahant is worth much more than \$200,000 per acre. How does the Town justify this estimate of fair market value?

Fair market value of land depends on what can be built on it. The Town created a Natural Resource District for zoning purposes in order to protect natural resource areas. East Point is in a Natural Resource District and has been for over thirty years. The Natural Resource District does not allow any private development for residential, commercial or industrial use. If East Point could be developed into waterfront condominiums, for example, a for-profit developer would likely pay more than \$200,000 per acre. Due to Natural Resource zoning, East Point cannot be developed for that or any for-profit use. It is conservation land.

What if Northeastern loses money from grants, tuition and conferences, will that be considered in awarding compensation?

No. This type of income is considered business revenue. Lost business revenue is not compensable in an eminent domain taking of real estate.

What if Northeastern disagrees with the amount awarded as just compensation, what are its remedies?

Under Chapter 79, Northeastern has the right to accept the amount of money awarded by the Town *pro tanto* and sue for additional damages within 3 years from the date the Order is recorded. It is a jury case where Northeastern will present its evidence of fair market value. Typically, it takes about 2 - 2½ years to resolve the matter. COVID-19 has made this timeframe less predictable.

Under Chapter 80A, Northeastern has the right to present its evidence of fair market to the commissioners and then to a jury if unhappy with the commissioners' decision. The commissioners' hearing is to occur "speedily." If a jury trial is requested after the commissioners' hearing, the commissioner's decision is evidence of value and the typical timeframe of 2 - 2½ years to resolve the matter is likely.

Is interest owed?

Yes. Under Chapter 79, interest is owed on all sums recovered above *pro tanto* from the date of recording until the date of payment. Interest is in accordance with the weekly average of the one-year constant maturity treasury yield. Today that rate is less than 1% per year. Under Chapter 80A, interest runs at 6% after final judgment until date of payment.