

NEBRASKA CONDEMNATION  
MANUAL FOR OWNERS  
"JUST COMPENSATION" IN NEBRASKA

William G. Blake, 2005, 1<sup>st</sup> Revised Edition, 2009

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# **NEBRASKA CONDEMNATION MANUAL FOR OWNERS “JUST COMPENSATION” IN NEBRASKA**

## **INTRODUCTION**

Eminent Domain, also known as Condemnation, is the power to take private property for a public purpose. This manual is intended to give the Nebraska property owner a basic understanding of the condemnation process. This manual does not provide an opinion on any specific condemnation legal issue or factual situation, and it is not a substitute for advice from a licensed and qualified eminent domain attorney.

Condemning authorities typically hand out fact sheets outlining of the condemnation process. However, these fact sheets are often inadequate to provide property owners with the information they need to understand the situation, their rights and options.

This manual relates to condemnations in Nebraska by the State or its political subdivisions. It does not deal directly with condemnation by the Federal government. Many of the concepts remain the same when dealing with the United States, but the procedures will be different.

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## UNDERLYING LAW

The Fifth Amendment to the United States Constitution provides that private property cannot be taken for public use, without just compensation.

Similarly, Article 1, Section 21 of the Nebraska Constitution requires that “the property of no person shall be taken or damaged for public use without just compensation.”

“Just compensation”, in general, has been interpreted to mean fair market value. A property owner is entitled to compensation equal to the market value of 1) the property taken; and 2) the loss of value of the property remaining after the taking. Other measures of compensation can apply to unique properties which have no adequate market.

The constitutional requirement is that private property can only be taken for “public use”.

The law makes complex distinctions between actual takings (physical invasions for public use) and regulatory takings (excessive regulation) of property. The initial power to control a public entity’s use of the power to condemn private property lies with the legislature. Our unicameral has exercised this right at Chapter 76, Article 7 of the Nebraska Revised Statutes. The Unicameral has established procedures which generally must be followed before commencing condemnation actions (with many exceptions), at Chapter 25, Article 25. Further, relocation assistance for those displaced from property by a public project is provided at Chapter 76, Article 12 of the Nebraska Revised Statutes.

It is common that a property owner is left with a remainder of property which is less valuable as a result of the condemnation. This gives rise to the second part of the entitlement to compensation, which is for the reduction in value of the property remaining after the taking, often referred to as “severance damages”.

## **CAN THEY CONDEMN?**

### **Do they have the right to take my property**

The state, its counties and municipalities, many other local government agencies and utilities, as well as railroads, all have the power of eminent domain.

Not every acquisition of private property by a governmental body is under the power of eminent domain, although this distinction is sometimes not effectively conveyed to a property owner. Also, while a governmental body may have the power of eminent domain, it may not have the power to take the property it desires, or all of the property it desires. Further, it may not have the power to take the property at the time it desires.

The decision by the governmental body to take your property is not final. The final decision lies with the Court. Substantial deference to the local decision is given, but the governmental body is required to show a need for the property taken and a valid public use.

If you do not consent to have your property taken, then the government body which is attempting to acquire your property must file a condemnation proceeding, where you can require that body to prove to the Court that your property is reasonably necessary for a public project.

The condemning authority can only take the amount of property necessary for a valid public purpose. Further, it can only take the amount of property presently needed. Within reason, planning for future expansion is allowed if the need can reasonably be identified at the present time. On the other hand, you cannot require the condemning authority to take all of your property, or more than it wants to take, unless you are going to be left with an uneconomic remnant.

### **Public Use**

The Constitution requires that property can only be taken for "public use." Historically, such things as public parks, streets and highways, and sites for government occupied structures were typically allowed. The concept of public use necessarily expanded to include flood control and conservation easements, and urban redevelopment of substandard and blighted areas. Today, condemning authorities attempt to use condemnation to expand the concept of public use by conveying condemned property to another private owner for economic development. Ongoing litigation challenges this as beyond the scope of "public use."

## **PLANNING FOR CONDEMNATION**

**My property is going to be condemned. What should I do?**

### **Appearance/Maintenance**

Maintain the appearance of the property. It is common, particularly in redevelopment areas, for owners to stop maintaining their property as soon as they learn that it will be acquired through condemnation. While it is normally wise in such situations to not spend significant amounts to improve the property, and it may be just as wise to delay significant repairs and replacements as long as possible, basic maintenance is extremely important. Maintain the appearance of the property, and keep everything in working order. Even to the trained professional eye, appearance is very important. The condemning authority may be taking photographs or inspecting the property long before they give notice that the property will be condemned. Keep the property looking as good as possible.

### **Prior Value Estimates**

Tax valuations are not admissible evidence in a condemnation jury trial. However, tax value is indicated in appraisal reports, and it can persuade a board of appraisers in county court.

An appraisal obtained by the owner within a reasonable period of time prior to condemnation may be discoverable by the condemning authority, even though the owner does not plan to use it.

It is common for an owner to want to challenge a tax assessment for the reason that the property has less value than the county's valuation. Similarly, in marital or business dissolutions, it is common to argue for a low value. The owner must remember that such arguments may be used against him in the condemnation proceeding. An owner asserting the property is worth twice the condemning authority's appraisal has little credibility when it is pointed out that he argued for a much lower value a year ago in a divorce proceeding.

### **Seek Legal Advice**

Property owners often attempt to negotiate with the condemning authority without legal advice, seeking such advice only when they are unable to reach what they believe to be a satisfactory agreement. This is generally the result of the normal and

understandable desire to avoid legal fees. However, this is similar to attempting to complete an IRS Form 1040 for the first time, without using either a tax consultant or an instruction book. In general, it is a wise owner who, early in the process, seeks the advice of a lawyer when faced with a likely condemnation. The owner may not be able to avoid the condemnation, but with the assistance of a condemnation lawyer, he can often take action which may help the case.

## **Leases/Mortgages**

Mortgages, deeds of trust, and leases almost uniformly have condemnation clauses which may greatly affect the division of the award of compensation in a condemnation case. A condemnation may trigger other rights, such as the right to terminate a lease. Parties to a lease rarely give careful consideration to condemnation clauses while negotiating mortgages and leases, and such clauses cannot speak to all of the condemnation possibilities. The owner and tenant should consult their attorneys regarding such condemnation clauses early in the condemnation process.

If you are in the process of negotiating a lease, as either landlord or tenant, then the best time to consider the condemnation clause is in the lease itself. Such clauses sometimes are not carefully prepared, and a poorly drafted condemnation clause can create problems for all parties to the condemnation. Properly drafted condemnation clauses provide for allocation of the condemnation award, whether it be the result of a partial or full taking. They also consider termination rights if a significant portion of the property is condemned or a potential reduction of rent in the case of a less severe taking. The section of this Manual dealing with allocation of awards may be helpful in this regard.

## **Title - Extent of Ownership**

The amount of property held as a unit (unity of title, location and use) can be very important. This can affect the appraisal and negotiation processes as well as the method of appraisal and the remainder to be considered for severance damages. This area should be considered by the owner and the owner's lawyer well in advance of commencement of negotiations.

## **Zoning**

Zoning and other land use restrictions, including the local comprehensive plan, can greatly affect the highest and best use of the property, thereby affecting the fair market value. The zoning restrictions in place at the time of the acquisition are generally used in determining highest and best use. Attention must be paid to the land



use restrictions in advance of condemnation to ensure that they reflect the reasonable and likely use of the property, as well as to protect against the possible use of such restrictions by the local jurisdiction to reduce the value of the property in anticipation of acquisition.

### **Building Permits**

Owners often learn of a planned public acquisition while obtaining a building or other permit from the local jurisdiction. The owner has a right to continue using the property, including construction of improvements, but permits may be withheld or delayed until condemnation can be commenced. This is valid where statutory authorization provides a reasonable time period to negotiate for the acquisition and then requires either acquisition at a negotiated price, condemnation, or issuance of the permit.

While property owners have the right to improve the property prior to condemnation, just compensation will be based on fair market value at the time of acquisition. The owner must also consider how judges, jurors and appraisers will perceive an attempt to make expensive improvements in anticipation of a public acquisition.

### **Crops**

A farmer has a right to plant crops in the normal course prior to the filing of a condemnation, and the law provides for payment of crop damages in addition to land value. The condemning authority will generally work with a farmer to either pay crop damage or to mark the area of acquisition so as to avoid the expense and effort of planting crops in that area.

## EMINENT DOMAIN PROCEDURE

The purpose of this statement is to generally and briefly outline for the property owner the steps that are taken to acquire property by eminent domain.

Property owners, and others with an interest in the property, such as mortgage holders and tenants are normally first notified of a proposed project after preliminary studies have been conducted and proposed plans have been drawn. Public hearings are held to explain the project and to hear public comments. These hearings are not opportunities to negotiate, and changes to the project are not made at that time. They serve to educate the property owner on what to expect, and to let the condemning authority know the level of opposition which may be encountered. Unforeseen problems or better alternatives may surface at these hearings. However, in many cases, enough time and money have gone into the selection of location and design that it is unlikely any significant change will be made. Occasionally, local politics will result in changes to the original plan.

After the public hearing(s), the property owner is informed that the property will be acquired. The owner is given a brief outline of the process and notification that it will be appraised. The appraiser selected by the condemning authority then attempts to contact and interview the property owner. This is an excellent time to seek competent legal advice, if the owner has not already done so. It is not generally wise to refuse to speak to the appraiser, but it must be remembered that the appraiser is taking notes, and anything the owner says may be used against him.

After the appraisal has been completed, the owner is contacted by the condemning authority and an offer is made to acquire the specific property desired for the project at a specific price. The owner is given an opportunity to make a counter-offer as to price. The property owner may or may not be given the appraisal or specific information regarding the basis for the offer. Remember, first that the negotiator is taking notes, and second, that the appraisal was conducted by someone hired by the condemning authority.

If an agreement with the owner cannot be reached, documents to begin an eminent domain proceeding are filed by the condemning authority with the county judge in the county where the property is located. The county judge then appoints three local property owners who are familiar with local real property values to serve as a board of appraisers. After proper notification to the property owner of the time and place of hearing, the appointed appraisers view the property and listen to statements of the property owner or their representatives as to their opinion of land value and damages. They also hear statements from the condemning authority's representatives. The appointed board of appraisers will then file a formal report of their findings of value with the county judge.

While the owner is not required to attend the hearing, it is very important to do so. The owner may elect to present their own statement to the board of appraisers or may wish to retain an attorney to represent them, and may also retain an appraiser at the owner's expense. Unless the owner elects to retain an attorney and appraiser, the hearing is conducted at no expense to the owner. All interested parties have a right to be represented at this hearing.

The condemning authority deposits with the county judge the amount of the board of appraisers' award before it can take physical possession of the property. If neither party appeals to the district court, the money awarded to the owner is available to the owner after 30 days from the filing of the award by the board of appraisers. The owner should make inquiry of the county judge as to when the award was filed.

If either the owner or the condemning authority is not satisfied with the report of the appraisers appointed by the county judge, either may appeal to the district court of the same county for a determination of value by a Jury. In this situation, it is often possible for the owner to stipulate to withdraw a portion of the award without affecting the appeal.

If there is a mistake of law made in the district court, an appeal may be taken to the Nebraska Court of Appeals or Nebraska Supreme Court.

Settlement negotiations may occur at any stage in these proceedings.

## REAL ESTATE APPRAISALS

### The Basics

The condemning authority will, in all but a few minor cases, obtain an appraisal by a person authorized by law to appraise real estate. If the taking is considered very minor, then a shortcut method of obtaining information regarding the owner's loss of value may be used.

Not all appraisals are created equal. An appraisal is an expression of opinion, based upon the expertise and independence of the person conducting the appraisal.

The basic purpose of the appraisal is to approximate, as close as possible, the loss of fair market value of the real estate as a result of the taking. If only part of the property is taken, then the appraisal will include an analysis of the property before the taking, as well as an analysis of the property after the taking. The opinion of damages, or compensation to be received by the owner, will include the value of the property actually taken, plus the loss of value of the property remaining after the taking.

Typically, condemning authorities retain an independent appraiser, and such appraisals are sometimes reviewed by staff appraisers who are full time employees of the condemning authority. Some condemning authorities have begun to rely only on appraisals by staff appraisers. Further, some of these staff appraisers are "registered" appraisers. A registered appraiser is legally permitted to perform the appraisal service, but he or she has not met the more rigorous education, experience, and testing standards required to obtain the designation of "licensed" or "certified" appraiser. The owner should question whether an appraisal performed in-house by a staff appraiser can be truly independent.

Appraising property in the condemnation setting is somewhat specialized, requiring adherence to rules of law which are not found in other situations. An appraisal which does not comply with those rules, or an appraisal which does not make the proper analysis of the property, may not be admissible as evidence. It is important to select the right appraiser, and to make sure that the appraiser fully understands the appraisal assignment. A wise owner discusses this with a condemnation attorney prior to retaining an appraiser.

Property owners are often told, during the negotiation process, such things as:

"You will only be paid what our appraiser says, and nothing more."

"You will be paid what we think it is worth."

"You won't get anything more than the tax valuation, that's the market value."

“It has to be appraiser this way”.

Property owners are entitled to just compensation, which is the combination of the fair market value of the property taken and the loss of value suffered to the property remaining after the taking. The tax valuation is not allowed as evidence of value in condemnation, and the condemning authority’s appraisal is only one person’s opinion of value. The property owner is entitled, in every case, to obtain their own expert to give them an independent opinion.

## **How The Appraisal Is Done**

Real estate appraisers generally use three methods: the market approach, the cost approach, and the income approach. There are several variations to each of these approaches, depending upon the circumstances of the property. The appraiser attempts to use all three approaches, if deemed appropriate. In some circumstances, however, all three approaches cannot be used.

The appraiser attempts to arrive at an indicated value under each of the three approaches, and then analyze the three approaches together to arrive at a final estimate of value.

## **Market Approach**

The market approach, or sales approach, is the preferred approach when adequate sales of comparable property in the area are available. In this approach, the appraiser looks for sales which are similar in location, time and use. The sales are to be arm’s length transactions between willing sellers and willing buyers. The appraiser will make adjustments as deemed appropriate by the appraiser for such things as date of sale, location, quality and size of improvements, etc., to make the sale more closely comparable to the property being appraised. The appraiser will then use these sales to arrive at an indicated fair market value of the property.

The adjustments to the comparable properties may be positive or negative, depending upon whether the appraiser believes the comparable property’s characteristics are better or worse than the subject property. These positives and negatives adjust the price of the comparable property up or down to make it more directly comparable to the subject property. For example, one comparable piece of land may have sold for \$10 per square foot, and another comparable property sold for \$5. The appraiser may think that the location of the first sale property is 25 percent superior to the subject property, while the second sale property is 50 percent inferior to the subject property. \$10 - 25 percent would indicate a value of \$7.50 per square foot, and

\$5 + 50 percent would also equal \$7.50 per square foot. Using this extremely simplified example, the indicated value of the subject property would be \$7.50 per square foot.

### **Cost Approach**

The cost approach analyzes land value, using comparable land sales, with much the same process as described above. This approach then looks at the current cost of the improvements, such as buildings, driveways and parking lots, and then looks at the current physical and functional depreciation of those improvements. The depreciation is subtracted from the cost of construction. The land and improvement values are then added together for comparison with the results of the other approaches.

If for example the appraiser determines the land value is \$50,000, the cost of constructing the building on the property was \$100,000, but the building has 15 percent physical and 10 percent functional obsolescence, the total indicated value would be \$125,000.

### **Income Approach**

The third approach, the income approach, looks at the potential income stream from the property. Most commonly, it treats the property as an income producing rental property. Comparable rental properties are considered to arrive at a typical rental rate for the property. Expenses are then subtracted from the gross rent to obtain a net rental value. These expenses include vacancy rates, management costs, taxes, etc. The net annual rental value is then divided by a capitalization rate. The capitalization rate represents the typical rate of return an investor would expect from similar rental properties. The capitalization rate is stated as a percentage of return, with the annualized net rent divided by the capitalization rate. For instance, net rent of \$100,000 per year with a 10% capitalization rate yields in indicated fair market value of \$1,000,000. The higher the capitalization rate, the lower the value. The capitalization rate is affected by such things as current interest rates and rates on other investments, as well as the risk associated with a particular type of property.

Property owners often ask whether the appraiser will use the actual rents obtained from the property. Actual rent does not establish the fair rental rate. While the appraiser may consider actual rent, fair market rent is based upon rents obtained from similar properties, and must reflect current rental rates. Adjustments to similar rental rates will be made by the appraisers, similar to the adjustments made to sales under the market approach.

## HIGHEST AND BEST USE OF THE PROPERTY

Before the appraiser examines comparable sales and rents, the appraiser must consider the highest and best use of the property. This determination drives the rest of the appraisal process. If the highest and best use is row crop agriculture, the appraiser will look at data involving similar agricultural property, rather than commercial or residential sales and rents. Analyzing damages to the property consistently with the highest and best use of the property is critical.

In order to be the highest and best use, the use must be physically possible (or at least highly likely to become possible in the foreseeable near future), legally permissible and financially feasible. The "highest and best use" will be that which meets these requirements and supports the highest present value. For instance, a convenience store on a corner property might be the most productive use of the property, supporting the highest present value. However, if the property is presently zoned for residential use, and is in an existing residential area, then the appraiser is likely to determine that a convenience store would not be a legally permissible use and might be expected to select some type of residential development as the highest and best use. In many cases, the existing use of property, particularly if substantially improved, will be considered the highest and best use of the property, but this is not necessarily so.

### The Unitary Whole

The comment that "It has to be appraised this way" is generally in the context of the issue of the extent of the property to be appraised. Generally, all of the contiguous property under the same ownership will be appraised as a single unit. Some condemning authorities will mistakenly argue that this is the "unit rule" and that it must be the method of appraisal. It is a misapplication of the unit rule, but is correctly seen as the larger parcel rule or rule of the unitary whole. It is most useful when referring to it as the "slide back" or "backland" rule. This means that a highway widening along the edge of a cornfield does not take the most valuable part of the field, but rather, the land area with the most value simply slides back.

The statement "It has to be done this way" is often based upon an effort to blend the value of property with a low value highest and best use (such as wetlands) with the value of land under the same ownership which has a high value highest and best use (such as highway frontage with commercial zoning). The unitary whole principle is a general rule, not an iron-clad doctrine. In other words, it may not be correct that the property "has to be appraised this way".

## **Date Of Valuation**

The date that the condemning authority files a condemnation petition in county court is considered the actual date of taking, which is the date of valuation. The appraisers select their data and make their adjustments based upon this date of valuation.

## **How Will My Maintenance Of The Property Be Accounted For In The Appraisal?**

Maintaining the property is extremely important. First, a lack of maintenance will make the property appear less valuable. There is a natural tendency for appraisers and jurors to look at a poorly maintained property and wonder why they should care. Secondly, maintenance is reflected in each of the approaches to value. A well-maintained property may cause poorly maintained properties to be adjusted upwards or may cause them to not be selected as comparables. Good maintenance can have the same effect on the selection of rental rates. Under the cost approach, the level of maintenance has an obvious effect on the estimate of depreciation. Good or poor maintenance for a significant period of time can even alter the highest and best use.

## **What About The Price I Paid For The Property?**

Your purchase of the property may be used as a comparable sale if it meets the requirements of being comparable in time and condition of the property, as well as an arm's length, fair market transaction. The appraiser, as well as a board of appraisers or a jury, may consider such a purchase to be the most comparable sale. However, if the property has appreciated (or depreciated) in value since it was purchased, the property owner remains entitled to just compensation based upon fair market value on the date of taking.

## **What About A Property Which Is Very Much Like Mine And Is Very Near My Property, Which Sold A Few Weeks Ago At An Extremely High (Or Low) Price?**

Such a sale may or may not qualify as a fair market sale. Comparable sales are to be arm's length transactions between willing sellers and willing buyers. Some sales are under distress, sold by someone who must sell in a hurry for whatever price can be obtained. Other times, the sale may be to a highly motivated buyer who wants a particular location and will pay a premium to get it. A good example of a distressed sale is someone who needs to pay their debts to avoid lawsuits, and the only way to do so is to sell a property immediately. On the other hand, a large corporation which is trying to assemble a large piece of real estate from smaller parcels will sometimes pay a large premium to acquire the final piece of the puzzle.



## **Why Are The Appraisals So Different?**

Appraisals, while based upon substantial objective data obtained from the marketplace, and conducted in a framework which is intended to provide a meaningful, reliable and predictable method of analysis, inherently rely upon many subjective factors. In the final analysis, they are in fact educated opinions of value. The appraiser's knowledge of the property, understanding of the requirements of eminent domain law, and knowledge of the taking, will all affect their opinion of value. The care with which the appraiser selects the highest and best use and their knowledge of the data available in the market place, as well as their adjustments to the data are all critical to the result. It is important to have an appraiser who is truly independent and who fully understands the appraisal assignment and appraisal methods appropriate to the situation. It must also be remembered that since appraisals reflect opinions of value, appraisers often simply disagree at any number of points in the process.

### **Other Value Opinions.**

An expert or non-expert may be allowed to offer an opinion in court if they can show a familiarity with the property and knowledge of the market. A real estate broker may sometimes be able to provide a Buyer's Price Opinion (BPO). A BPO is not an appraisal and it does not offer a substitute for an appraisal by an appraiser credentialed by the Nebraska Real Property Appraiser Board. Only a credentialed appraiser can perform an appraisal. As a practical matter, opinions of value from anyone other than an appraiser generally carry little weight in court. Opinions and information from brokers and others can be helpful in settlement negotiations, and often provide very valuable background and foundation for the appraiser.

Owners may sometimes wish to avoid the expense of paying a lawyer and an appraiser, and try to handle the condemnation trial pro se (by themselves). While this can be successful, that probably will not be the case. An experienced condemnation lawyer knows the rules and how to use them to your advantage to achieve a fair result.

## **NEGOTIATIONS**

After the condemning authority has obtained its appraisal, the property owner will be contacted by the authority's agent to commence negotiations. The initial contact is generally by mail, and for many projects this first contact must be at least 45 days prior to commencing actual negotiations. The notice will include a number of required elements, including a statement of the property proposed to be acquired and the compensation proposed to be paid.

### **Preliminary Notice**

If the acquisition is one for which the notice and hearing procedure is required, a notice of the hearing will be published in a newspaper of general circulation in the county in which the property is located.

### **Public Hearing**

At the hearing, the condemning authority explains the project and the necessity for the proposed acquisition, and briefly explains the rights of the affected property owners. The condemning authority is required to hear and consider any objections. The hearing is sometimes treated as a mere formality, with very little information given and little, if any, consideration given to objections or different ideas. It is fairly obvious that at this stage in the process, after specific property owners have been contacted, plans have been prepared to the extent that the exact property to be acquired has been determined, it is unlikely that there will be a chance to seriously impact the decision making process. However, such hearings can be a good source of information, and they should not be ignored by the property owner. It is not too late to make changes to individual acquisitions or to the project in general.

### **Good Faith Negotiations**

The condemning authority is required to enter into good faith negotiations with the property owner. This is a term which is very often misunderstood by property owners. Neither good faith nor actual negotiations are required as those terms are commonly understood. Rather, this is a legal requirement as a condition which must be fulfilled by the condemning authority before it can file a condemnation proceeding in county court. There are several elements which must be fulfilled to meet the requirement:

a. An actual offer submitted which describes the exact property and interests therein to be acquired, and a statement of the compensation to be paid. The property owner can expect to receive a proposed written contract containing a legal description of the taking, together with a drawing of the property showing the area to be acquired, and the items for which compensation is to be paid.

b. A reasonable effort to induce the owner to accept. While the agent for the condemning authority will ask for a counteroffer from the property owner, there is no requirement that they give serious consideration to the counteroffer, as true negotiations are not required. The negotiator attempts to induce the property owner to accept, and this is the stage where statements are often made to the property owner regarding the compensation they can expect to receive. The owner must remember that the negotiator is the agent of the condemning authority, but may not have the authority to make an agreement which is binding upon the condemning authority. It should also be remembered that the agent will be taking notes.

The acquisition contract presented to the property owner is a legally binding document, and as with all written agreements, it must be read carefully and with the understanding that any promises not stated in the agreement are not binding. If there appear to be discrepancies, or there is language that is not fully understood, then the property owner should seek legal advice from a condemnation lawyer, and not rely upon clarifications by the condemning authority's negotiator.

## **COMMON QUESTIONS / COMPLAINTS**

### **I Don't Understand The Legal Description**

Some condemning authorities attempt to use their own shorthand methods to describe the taking, referring to "stations" as marked on their construction plans. These are not adequate legal descriptions. The property owner has a right to see the legal description and to have it on the contract. It is important to have a legal description which, once recorded with the Register of Deeds, can provide adequate and reasonable notice regarding the exact interests in the property that have been acquired.

Legal descriptions can also be difficult to read. A right-of-way drawing should be provided to the property owner, which shows the exact area(s) to be acquired. Following the legal description as stated in the written document with that shown on the right-of-way drawing should help. If not, professional help in reading the legal description may be necessary.

### **The Proposed Agreement Does Not Say What I Want It To Say.**

The agreement presented to the property owner is usually a form, written the way the condemning authority prefers. This does not mean that changes cannot be made, and changes are often made to fit specific circumstances. As mentioned above, the property owner must not simply accept the promises of the negotiator or other agents of the condemning authority. If it is important, then it should be stated in the agreement.

### **They Won't Let Me See Their Appraisal.**

A good indication of the true meaning of "good faith negotiations" is that condemning authorities in Nebraska have not been required to show their appraisals to the property owners. Historically, appraisal information was rarely disclosed during the negotiation process, other than disclosing the final amount of indicated compensation. In recent years, it has become more common to disclose the appraisal information, or at least part of that information. The Nebraska Department of Roads, as the "lead agency" in Nebraska due to its administration of federal highway funds, has stated in its acquisition guidelines that condemning authorities "should" provide a copy of the appraisal to the property owner, or should at least allow the owner to review the appraisal.

The stated reason for keeping the condemning authority's appraisal a secret is that disclosure gives the property owner an unfair advantage. The property owner may take that appraisal to another appraiser, who will have the advantage of attacking

someone else's work, rather than conducting their own objective appraisal. In reality, property owners often wonder how it can be fair, or even good faith, to tell them that they must sell while refusing to provide the information upon which the condemning authority bases its offer of compensation. If the property owner disagrees with the offered compensation, they face paying their own legal counsel and potentially their own appraiser. When the condemning authority provides its appraisal information to the property owner in the negotiation process, it merely helps to level the playing field. This is particularly so when the condemning authority's appraisal is a short form appraisal or has been conducted in-house.

The true reason the appraisal is a closely guarded secret is to maintain the condemning authority's built-in advantage. An appraiser who has confidence in their work has little to fear from routine disclosure.

## **WHAT ABOUT THE DAMAGE TO MY BUSINESS?**

### **I Will Have To Move And I Will Lose A Lot Of Profit For A Long Time**

The Nebraska and United States Constitutions require payment of "just compensation" for the taking of private property for public use. This has long been defined by the Courts to mean loss of property value, although nothing in either constitution so states. As explained elsewhere in this manual, the compensable loss is the value of the property taken, and the loss of value to the remaining property as a result of the taking. Loss of business, either gross business or profits, is not compensable. Often, information regarding the amount of business is not allowed as evidence of loss of property value. In certain circumstances, the loss of business reflects lost property value.

The rationale for not compensating for loss of business has often been stated in terms of good management. Profit has been considered to be a matter of good or bad management decisions, and not a result of government takings. However, this is not necessarily the case. Management has an obvious relationship to profitability. Just as certain is the fact that moving a business will result in a loss of profits for a significant period of time. The true reason for not compensating for lost profit is the recognition that the public cannot afford to pay everybody for everything, and the loss experienced by being required to rebuild a business is simply part of the price of citizenship.

Some states have business damage statutes which allow property owners and tenants who operate businesses on condemned property to recover compensation in certain situations. Nebraska is not one of those states.

If the property owner believes that there will be a loss of business, then he or she should discuss this fact with a condemnation attorney to determine whether any of the loss can be reflected in the valuation of the property.

### **What About The Cost Of Relocating?**

A property owner or occupant required to relocate as a result of public acquisition is entitled to relocation assistance. A determination of entitlement is made by the condemning authority about the same time as the appraisals are conducted. This is not a matter of whether a property owner finds it desirable or convenient to remain at the same location, but rather, whether it will be necessary to move. It is usually obvious that the taking of a few feet of right-of-way for a street widening will not require anyone to relocate. Adding a median in a commercial street may well directly cause many businesses to relocate, but it does not give rise to relocation assistance, as the median is not a taking of a property right. On the other hand, taking of an entire property will require relocation.

When relocation is required, the property owner is notified of the right to assistance. This will include payments for the cost of moving, remodeling to adapt a new premises to the same use, the cost of searching for a new premises, and can include such things as additional tax payments for a period of time.

Denial of relocation assistance or a determination regarding the amount of such assistance is not final. It may be appealed. The property or business owner does not have total freedom to accept or reject a proposed relocation property, but the owner is also not required to simply accept an unreasonable relocation proposal made by the condemning authority. The relocation assistance law is liberal enough that litigation over the amount of assistance or the need for such assistance is fairly unusual. The most common dispute regarding relocation assistance is not the determination of whether assistance is available or the amount of assistance, but is the selection of relocation sites. In this regard, the property owner must keep in mind that the condemning authority is not required to pay for upgrades, and that the property owner is not entitled to search indefinitely for the perfect property. The relocation law provides for assistance in relocating to comparable replacement property. If the condemning authority determines that relocation assistance is necessary, the property owner will be given a manual which provides a fairly good outline of the program, and will be contacted by a relocation assistance specialist who is the agent of the condemning authority.

## **What About My Tenant, Or My Mortgage Lender?**

Every owner of an interest in property is entitled to compensation based upon the value of their interest. In determining these values, the first step is to determine the total loss to the property as a unit. This total loss is then broken into the amounts to be awarded for the actual property interests, including the owner, the tenants, mortgage holders, etc. Condemning authorities sometimes negotiate with a property owner for an amount of compensation, and expect the property owner to sign a warranty deed, promising to convey free and clear title. The property owner is not required to do this. Each owner of an interest in the property is entitled to negotiate with the condemning authority for their own award, and they are not required to act as the agent of the condemning authority to help acquire other interests in the property. Mortgages, deeds of trust, as well as leases, will usually have compensation clauses which allocate the compensation. It may be to the property owner's advantage to discuss the elements of compensation with other entities with interests in the property during the negotiation process. Mortgages normally allow the mortgage holder to require all of the compensation to be paid to the mortgage holder in reduction of the debt. The mortgage holder may or may not enforce this right, and may or may not charge a significant administrative fee to review the matter.

Remember, if settlement cannot be reached with an interest holder, it is not the property owner's obligation to conduct these negotiations. Neither is it the property owner's obligation to warrant title. It is the condemning authority's obligation to conduct good faith negotiations with each holder of an interest to be condemned as a condition precedent to filing eminent domain proceedings against that interest. An experienced condemnation lawyer can often provide valuable assistance in working through this negotiation process among the interested parties.

## Will I be Paid Crop Damages?

Crop damage for a transmission easement such as power lines or pipelines, is compensable, whether it results from the initial survey work, the project construction or maintenance. Depending upon timing, crop damage may or may not be compensable when land ownership is transferred.

The owner and tenant will want to reach an understanding as to how to split the crop damage prior to entering into an agreement with the condemning authority.

The crop damage to which the owner and/or tenant is entitled is based upon the net value of the crop at harvest, less costs saved by not harvesting. However, many condemning authorities will pay based upon a presumed rate of production at a current market rate.

## THE NEGOTIATED AGREEMENT

Landowners will often overlook the language in the agreement offered by the condemning authority, either because it is difficult to understand or because the owner believes she has no say in the matter.

The owner can often negotiate to change the terms of the agreement as well as the compensation. In many cases the terms of the agreement are much more important than the amount of compensation. Condemning authorities may ask for numerous items in the agreement which are valid, reasonable requests in an arms length transaction, but which the owner simply would not agree to in such a transaction. Terms are sometimes requested which have important and long lasting ramifications, but which cannot be included in a condemnation proceeding. (See Good Faith Negotiations, above at pages 15-16).

**Read the agreement.** If you do not understand anything in the agreement, or do not feel comfortable agreeing to any provision, seek legal counsel before signing. If you feel pressured to sign, seek legal counsel before signing. Reputable, trustworthy negotiators will not attempt to dissuade you from seeking counsel. Title warranties, tort rights and responsibilities, and environmental warranties are just a few such areas which may be included in the proposed agreement, but which may not be forced upon the owner may not be imposed through the condemnation process.



## TITLE AND POSSESSION

### WHEN DO I LOSE POSSESSION?

#### **Negotiated Sale**

If the owner and the condemning authority reach agreement without condemnation proceedings, then the written agreement will provide for a date of transfer of title or interest, as well as a date of transfer of possession or right of entry. This may be a specific date, or the agreement may refer to a number of days notice to the property owner. The date of transfer is sometimes a critical issue to the property owner, and concessions from the condemning authority may be possible to leave the owner in possession until the condemning authority puts the property to the use for which it is being acquired.

#### **Acquisition Through Court Proceedings**

If agreement is not reached through negotiations, and acquisition is through eminent domain proceedings filed in court, then the condemning authority is not entitled to possession until each of the following has occurred:

- a. The board of appraisers appointed by the county judge has held a hearing and entered an award of compensation;
- b. The amount of the award has been deposited in county court by the condemning authority; and
- c. The condemning authority is ready to devote the property to a public use.

The title and interest which the condemning authority seeks to acquire is not transferred until the property is put to the public use for which it is taken.

A copy of the deed, easement or award of the board of appraisers is recorded with the county register of deeds to serve as the record of the acquisition.

## **Personal Property And Fixtures**

The condemning authority does not acquire personal property unless it is inventoried and included in the acquisition. The difference between personal and real property is sometimes unclear with respect to irrigation systems or trade fixtures. In most cases the condemning authority does not need the personal property, and may not need the structures or fixtures, or even trees and fences. Salvage rights may be negotiable.

The property owner can be held liable for loss of property value caused by the owner's unauthorized removal of personal or real property.

## **Surveys And Examination Of The Property**

Condemning authorities are authorized, after negotiations with the owner have failed, to enter the property to examine and survey it for the purpose of condemnation. They are required to inventory any personal property damaged by the survey or examination. Damage to personal property or growing crops as a result of the survey or examination is compensable.

Some condemning authorities have statutory grants of authority to enter the land prior to negotiations to inspect and survey. For obvious reasons, the condemning authority will generally want to inspect and do at least some survey work prior to negotiations. Both sides are benefitted by a well-defined description of the acquisition prior to entering into negotiations.

## **Tenants**

It is normally advantageous to the owner to have the tenants remain in possession as long as possible. If the acquisition is only a partial taking, then vandalism and maintenance can be problematic after the portion to be acquired has been vacated. Further, if a tenant vacates the premises and terminates the lease prior to the required date, then the owner may lose valuable rental income.

It is the condemning authority's responsibility to acquire the interest of the tenant(s) by negotiations with each tenant, but it is to the owner's advantage to be fully aware of those negotiations. Condemning authorities will sometimes "encourage" tenants to vacate as soon as possible, and it is common for tenants to begin looking for a new premises as soon as they learn of the intended acquisition. The condemning authority has no right to place itself in the position of the landlord by giving notice to tenants to vacate, unless the necessary property rights have been acquired by negotiation or condemnation.

Most commercial leases provide for termination of the lease or reduction of rent upon public acquisition of part of the property. Negotiations need to take place with the condemning authority and with tenants regarding the termination or continuation of the tenancy.

The condemning authority will occasionally fail to negotiate with a tenant, expecting the owner to sign a warranty deed and deal with the tenant. This is a mistake which can be troubling for both sides. An owner who signs a warranty deed should be very careful to deal with the tenant issues, but if the case goes to court, the obligation to deal with the tenant rests with the condemning authority.

### **Premature Vacation of Premises**

Owners and tenants should not forget that while it may be preferable to move from a premises prior to the date the property is needed for public use, a tenant or owner in possession who prematurely moves to a new location can forfeit their rights to relocation assistance.

A knowledgeable condemnation attorney can assist the owner in the negotiations regarding each of these areas of concern.

## APPEAL/JURY TRIAL

After the entry of the award by the three-member board of appraisers appointed by the county judge, (see section on Eminent Domain Procedure) the Condemner and Condemnee each have the right to appeal to district court. The appeal must be filed in county court within 30 days after entry of the award by the three-member board. Specific jurisdictional steps must be followed to properly file the appeal. Neither the county court nor district court can provide advice on how to complete this process.

A Complaint is filed in the district court, similar to the Complaint in any other civil lawsuit. All other parties have the opportunity to answer or otherwise respond to the Complaint. There are opportunities for depositions of parties and witnesses, Interrogatories, requests for admission, and other discovery. There may be motions and hearings on preliminary issues before trial, the same as in other civil cases.

In most cases, the only issue is the market value of the real estate. Where there is a partial taking, this issue takes the form of “before” taking and “after” taking values.

The property owner may raise other important issues in district court, which are conditions precedent to the Condemner’s right to condemn, including:

- whether the planned use will be a valid public use;
- whether all of the property being condemned is necessary for the public use;
- whether good faith negotiations took place; and
- whether required notice, hearing and approval procedures were followed.

These issues are preliminary issues to be decided by the District Court Judge prior to trial.

The property owner can normally expect the case to be tried six months to a year after filing the appeal. If there are preliminary issues to be decided, or extensive discovery, they will extend the time before the case is tried. In addition to the potential challenges to the taking, such preliminary issues can involve questions as to what evidence is admissible, what issues will be heard, who can testify and the substance of the testimony that will be allowed, and the discovery that may be allowed.

If the condemnation survives challenges to the right to condemn, the question of property value is set for trial before a jury of twelve citizens of the county. Selecting a jury drawn from the combined list of all registered electors and licensed drivers is the initial step in the trial. Each side is entitled to a fair and impartial jury.

Each party's attorney has the right to question a panel of 18 potential jurors at the beginning of the trial (called voir dire). This process is used to eliminate those who may be biased for or against one side, and to assist in obtaining a balanced, fair jury. If, during the voir dire, it is discovered that a juror cannot be impartial or fully attentive, the judge removes that person from the panel, and another name is drawn from the pool to restore the panel to 18. After voir dire, the Condemner and Condemnee each choose three jurors to be eliminated, thus arriving at the final twelve. One or more alternate jurors can also be selected through this process.

After jury selection, the attorneys make brief opening statements to the jury to inform them about the basic facts of the case and what they expect to prove. The Condemnee, who bears the burden of proving damages, presents evidence first, followed by the Condemner.

In most cases, the owner is qualified to offer an opinion of value and usually testifies. Others may testify as to various aspects of the property, including the history of its use, zoning and engineering issues and other areas of concern which may be foundational to an opinion of value. Maps, photos and public records are used to show the property to the jury.

The heart of the condemnation trial is the testimony of the real estate appraiser(s). Each side will have at least one appraiser testify as to their opinion of value. There are rules, often complex and confusing, which govern the methods of appraisal for condemnation purposes, and if not followed carefully, the testimony of the appraiser may be severely limited or even disallowed altogether. A great deal of time is spent by the lawyer and the appraiser in preparing for the appraiser's trial testimony.

Condemnation trials are rarely entertaining. The appraisers begin by describing their experience and claim to expertise. They then move into an explanation of how appraisals are conducted, a description of the property being condemned and an explanation of how the appraisal process and methods apply to the property. The appraisal testimony becomes numbers and mathematics, discussing comparable properties, adjustments, income streams and capitalization rates, replacement costs and percentages of depreciation, with the jury being constantly bombarded with a confusing stream of numbers. This is the real test of the expertise and skill of the condemnation lawyer in eliciting the story, and of the appraiser in telling it. A juror who cannot follow the information or cannot stay awake through a barrage of numbers may not find the presentation persuasive.

Certain issues are not allowed into evidence. The jury is not informed of:

- Real estate tax valuation;
- The award of the county court board of appraisers;

- Settlements and offers to settle with other owners;
- Increases or decreases in value caused by the project (except for the occasional issue of special benefits to the remainder of the property);
- The appraisal document itself or a summary thereof; and
- Settlement offers between the Condemner and Condemnee.

Following the Condemnee's presentation, the Condemner will offer evidence to tell the other side of the story. Their exhibits will be offered and more witnesses will be examined.

As in any trial, the opposing lawyer has the opportunity to cross-examine each witness, and there may be redirect and recross-examination of witnesses.

At the close of the evidence, the attorneys make closing arguments to the jury and the jury is instructed as to the applicable law. The Court will arrange for the jury to view the property as a group. After viewing the property, the jury retires to the jury room with the exhibits to deliberate and make a decision. Generally, decisions must be unanimous during the first six hours of deliberation, and must receive a majority of ten or eleven thereafter.

The jury verdict can be overturned by the trial judge, but this power must be exercised only when the verdict cannot be supported by the evidence or law. It can be appealed to the Nebraska Court of Appeals, and possibly to the Nebraska Supreme Court. However, reversal by either court is likely only if the trial judge made a serious mistake regarding evidence or other serious mistake of law, or the jury's decision is not within the range of the competent evidence. In most cases, the jury verdict will be final. The decision whether to appeal, and the likelihood of success of appeal must be thoroughly discussed with the condemnation lawyer prior to making a decision whether to appeal.

## **Common Questions Regarding The Trial Process**

### **1. What If There Are Multiple Pieces Of Property?**

Each separate parcel is usually tried by itself. There is often a question as to whether two adjacent parcels under the same ownership are in fact separate. It is possible to try all parcels under the same ownership, whether separate or not, in the same trial. In rare instances, even separate parcels under separate ownership can be tried together.

**2. What About Tenants Or Other Interests?**

All entities holding an interest in the property being acquired will be included in the condemnation, and will have the right to participate with their own attorney at trial. All such interests have the right to seek and obtain an award for their portion of the lost market value.

**3. Will I, The Owner Or Other Interest Holder, Be Required To Be There?**

Yes. Plan to be at the entire trial, seated before each session begins, if you expect the jury to take your claims seriously.

**4. Will I Need To Testify?**

Very probably so. The jury expects to hear from the person who claims a right to compensation.

**5. How Can I Tell My Side To The Jury?**

By testifying at trial. This is the only way you can directly provide information to the jury.

**6. How Long Will The Trial Take?**

Even the simplest case will take at least two days, and three to five days is common. Some trials last even longer. The more expert witnesses who testify, the longer the trial takes.

**7. Does The Property Owner Attend The Preliminary Hearings?**

It depends on the nature of the hearing. If the hearing involves evidence regarding good faith negotiations, then the property owner will probably need to testify regarding those negotiations. Other hearings, such as those on preliminary motions challenging the claims in the complaint or involving disagreements about discovery are typically heard by the judge in chambers with only the attorneys present. Do not assume that you will or will not need to attend a hearing. If your lawyer does not tell you whether to attend, then ask.

**8. Can I Lose Money As A Result Of The Appeal?**

Yes. The question of value is tried anew, with no reference to the award by the board of appraisers in county court other than in determining whether the property owner is entitled to payment of attorney and expert witness fees and costs. Regardless

of which side appeals, the award can be decreased. The jury is not aware of the award in county court. Further, the appeal process is costly. Attorneys and expert witness are expensive, and depending on the amount of the jury's verdict, the property owner may have to pay their own attorney and witness fees and costs. (See Attorney/Expert Witness Fees and Costs.)



## **ATTORNEY/WITNESS FEES & COSTS**

### **What About My Expenses in Obtaining Just Compensation?**

Substantial expenses can be incurred in the legal process to obtain just compensation. The land owner may be required to pay some or all of these expenses. In most circumstances, the right to be reimbursed for expenses is based upon comparing the amount of the award of compensation in county court with the award in district court. The owner should expect to be required to pay all expenses incurred in the negotiation and county court processes.

### **Attorney And Witness Fees**

If the Condemnee appeals from the award of the county court board of appraisers, and the award in district court is at least 15 percent greater, or if the Condemner appeals to district court and the award is not decreased by more than 15 percent, or if both sides appeal, and the award is increased at all, then the district court judge must award to the Condemnee a "reasonable" amount for attorney fees for the appeal, plus reasonable expenses for up to two expert witnesses. For example, assume that the county court board of appraisers awards compensation of \$100,000 and the Condemnee incurs attorney fees of \$1,500 during the good faith negotiations and county court proceedings. The Condemnee then appeals to district court and the jury awards \$150,000. The Condemnee has spent an additional \$20,000 for attorney fees, \$5,000 for an appraiser's fee, plus \$2,000 for an engineering and geological study. An award of \$115,000 would be a 15 percent increase, so the Condemnee would be entitled to an award of a reasonable amount not exceeding the \$27,000 incurred in the district court appeal for the attorney and two experts.

Note:

- The award does not include attorney and witness fees incurred in county court.
- The district judge has a great amount of discretion in looking at the complexity of the case, the experience and skill of the attorneys and witnesses, the outcome, and the prevailing rates in the area, etc.
- The amount awarded by the district judge is not necessarily based upon the agreement between the Condemnee and the attorney or witness, and it does not affect the obligations under such agreements.
- The Condemnee is not at risk for payment of the Condemner's attorney and witness fees.

- Miscellaneous expenses are always incurred for time missed from work to meet with attorneys and witnesses or to attend court proceedings. These expenses are not compensable.
- The Condemnee may be awarded additional attorney fees if an appeal is taken by either party from the district court to the Court of Appeals or Supreme Court, if the Condemnee is successful in that appeal.

### **Court Costs**

Court costs include such things as filing fees, service of subpoena, deposition expenses, and the fees for the county court board of appraisers. The Condemner pays all court costs in county court. The Condemner pays all costs on appeal if the Condemner files an appeal, and pays costs on appeal if the Condemnee appeals and increases the award in any amount. The Condemnee pays district court costs if only the Condemnee appeals to district court and is not successful in obtaining an increase above the award of the county court board of appraisers.

## **INTEREST, TAXES AND OTHER ISSUES**

### **Interest**

The Condemnee is entitled to interest, currently (2005) 6 percent per annum on the county court award, if an appeal is taken to district court. The Condemner can avoid paying some or all of the interest by offering to stipulate to the withdrawal of part or all of the award of the county court board of appraisers. Interest on the amount offered ceases on the date the stipulation or offer to stipulate is filed with the district court. Some Condemnees are reluctant to accept an offer to stipulate for withdrawal, but it has no negative impact on their rights.

If the final award after trial is less than the amount withdrawn, then the Condemnee must repay the excess. For example, if the Condemner urges a county court award of \$50,000 and the board of appraisers awards \$100,000, the Condemner will pay the entire \$100,000 to the clerk of the county court. After the appeal has been filed, the Condemner will probably stipulate to withdrawal of \$50,000. Interest will stop accruing on that amount. Assume the jury then awards \$75,000. The Condemnee will be entitled to interest on \$75,000 until the date of filing the stipulation to withdraw, and interest thereafter on \$25,000.

### **If There Is An Appeal To District Court, Can The Award Of Compensation Be Decreased?**

Yes. At trial, the amount of the award of the county court board of appraisers is irrelevant except for determining eligibility for attorney and witness fees.

### **When Do I Receive The Money?**

If an agreement is reached between Condemner and Condemnee, payment may take several days to several weeks after signing the agreement. If an award is entered by the board of appraisers in county court and there is no appeal filed within 30 days thereafter, the county judge will then order payment to be made. If an appeal is filed, then except for any amount withdrawn by stipulation, payment will not be received until after the appeal process has been completed.

### **What About Income Taxes?**

Compensation received as a result of condemnation, or under threat of condemnation, is an involuntary conversion. The owner has the right to reinvest the

compensation within a period of time and thereby defer payment of income taxes on any gain. This applies to the compensation for the property taken as well as to severance damages to the remainder, but the rules differ and it can be important to clearly distinguish between the two.

Consult with a tax specialist when designating a portion of the payment as interest, fees, or costs. Internal Revenue Service regulations impact the compensation, whether obtained through settlement or court proceedings.

**MINIMUM ACQUISITION PROCESS – AFTER PRELIMINARY DESIGN PROCESS TO POSSESSION**

1. Survey of property (if no soil borings needed)	2 weeks
2. Final design	1 month
3. Title Search	2 weeks
4. Preliminary contact with owner, as willing buyer/seller	1 week
*5. Environmental impact statement and other government agency approvals	4 months
6. Appraisal	2 months
*7. Notice of hearing to owners and public	2 weeks
8. Public Hearing and decision to proceed to acquisition by negotiations/condemnation	2 weeks
*9. Waiting period prior to negotiations	1 month
10. Negotiations	1 month
11. Condemnation in County Court Turning over to attorney and filing in County Court Notice to owners Hearing, award of compensation Right of possession	1 month
TOTAL CONDEMNATION PROCESS <b>MINIMUM</b> APPROXIMATE TIME, FROM PRELIMINARY DESIGN TO POSSESSION	1 year
12. Appeal to District Court (if any party chooses) and Jury trial	3-18 months

If there will be federal participation in funding, there will be additional time consuming steps, such as approval of the preliminary plan by federal agencies, environmental impact assessments, approval of final plans, etc. Also, there may be issues such as unexpected lack of funding, wetlands, artifact or burial sites, all of which can greatly extend the process.

\* Not always required

Willing seller/buyer process may result in acquisition any time after appraisal