

## EMINENT DOMAIN

### *STATE OF NEBRASKA*

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Last revision: October 1, 2011

#### **Who Is Eligible To Condemn?**

The State and its agencies. Neb. Rev. Stat. § 76-725 Municipalities.  
§ 14-366; § 15-229; § 19-709.  
Counties. § 23-325.  
Public Utilities. § 70-667; § 86-302.  
University of Nebraska and State Colleges. § 85-133; § 85-319.  
Public Schools. § 85-319; § 79-1095.  
Irrigation Districts. § 46-125.  
Library Boards. § 51-210.  
Airport Authorities. § 3-503; § 3-601.  
Pipelines. § 57-1101.  
County Fair Boards. § 2-262.  
Public Irrigation Districts. § 46-125.  
Railroads. § 74-308.  
Natural Resources Districts. § 2-3234.  
Sanitary Improvement Districts. § 31-736.  
Joint Public Agencies created two or more public agencies. § 13-2505.  
Public Cemetery Associations and Churches owning Cemeteries. § 12-201.  
Public Housing Agencies. § 71-15, 113.  
Rural Water Districts § 46-1008.

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## **What Can Be Condemned?**

### **Private Property.**

Private real property or any interest therein, may be condemned for public use. Personal property on the condemned real estate may be acquired with the real estate. Neb. Rev. Stat. § 76-701.

### **Public Property.**

Public lands may be condemned if the legislature has given authority to do so. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). The Nebraska Supreme Court has sometimes stated that the grant of the power of eminent domain must be strictly construed and looked for specific statutory authorization. At other times the court has relied upon legislative purpose and intent to read such power into the statutory grant. Compare *State v. Boone County*, 78 Neb. 271, 110 N.W.2d 629 (1907) (statutory authority to acquire land for roads did not authorize acquisition of public school land for road construction); and *SID No. 1 v. Nebraska Pub. Power Dist.* (authority granted to an entity engaged in the transmission of electricity to acquire right-of-way over and under lands was sufficient to authorize acquisition of right-of-way for electric transmission lines over public property).

### **Economic Development.**

In 2006, as a response to *Kelo vs. City of New London*, 125 S. Ct. 2655 (2005), the Nebraska Legislature adopted restrictions on the use of eminent domain for economic development purposes, although such use of eminent domain has never been recognized as valid in Nebraska outside the context of blighted and substandard areas. The restrictions apply to the acquisition of property for an economic development purpose, which is defined as including subsequent use by a commercial for profit enterprise, or for the purpose of increasing tax revenue, employment or general economic conditions. The statute lists exceptions to appease the concerned condemners, but these in general would be covered by the definition of “economic development purpose”.

The statutory changes allow the use of eminent domain if the property is abandoned or has defective title.

The legislation also dealt with the use of eminent domain to acquire agricultural lands for economic benefit projects, prohibiting a taking of agricultural lands under the guise of a declaration of blight or substandard conditions. See LB 924 (2006). Prior to this legislation, a blight determination had been used a number of times, combined with tax increment financing, to take “vacant” land for development.

### **The Condemnation Proceedings:**

#### **Power Generally.**

Condemnation proceedings in Nebraska are governed by Nebraska Constitution,

Article I, Section 21: “The property of no person shall be taken or damaged for public use without just compensation therefore.”

Nebraska’s right to compensation is broader than the federal right. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

The general procedure for all condemnations is established by the legislature at Neb. Rev. Stat. § 76-701 et seq.

Uniform condemnation procedures (with many exceptions) are found at § 252501, et seq. The uniform procedure provides for pre-condemnation public hearing, location selection information, and landowner notification.

#### **Prior to Commencement of Condemnation.**

For many public projects, there must be an informational public hearing, following notice to all affected landowners. Neb. Rev. Stat. § 25-2504. At the hearing, the condemner is required to explain the need for the project and why the route or location was selected, and must receive questions and objections from the public. The uniform procedure requires 45 days notice to the owner(s) of any interest to be condemned, prior to commencement of negotiations. The notice informs the owner of the project, the selection of the location, the need to acquire the property, the authority for the acquisition, the description of the property, the interest to be acquired, and the agency approvals which are required. § 25-2503.

#### **Good Faith Negotiations.**

The condemner must negotiate in good faith with the owner of the interest to be condemned. *State v. Mahlock*, 174 Neb. 190, 116 N.W.2d 305 (1962). The requirements of good faith negotiations may include:

- A definite description of the property to be acquired;
- An offer of a specific dollar amount, based upon valid valuation information;
- An attempt to obtain the owner's acceptance of the offer; and
- A document for the owner to sign to accept the offer.

The ability of the property owner to accept or reject. *Prairie View Tel. Co. v. Cherry County*, 179 Neb. 382, 138 N.W.2d 468 (1965).

However, good faith negotiations may require only "an offer made in good faith and an attempt to induce the owner to accept it." *State Dept. of Roads v. Mahloch*, 174 Neb. 190, 116 N.W.2d 305 (1962). This issue is before the Nebraska Court of Appeals at the time of this writing. See *Krupicka v. Village of Dorchester*, Neb. App. #A11-000044.

Virtually all condemnations are preceded by appraisal, but it has not been established whether an appraisal is always necessary. If the property to be acquired is expected by the condemner to exceed \$100,000 in value, an appraisal by a certified appraiser must be obtained. Neb. Rev. Stat. § 13-403.

### **The Proceeding.**

The condemner files a petition in the county court of the county in which the property or some part of it is situated. Neb. Rev. Stat. § 76-704 - 704.01.

The condemner serves a notice of condemnation on each owner of an interest in the property by certified mail or personal service at least ten days prior to the hearing before a board of appraisers.

The county judge, upon determining that the petition states a taking, appoints a board of appraisers and sets a hearing date. The county judge acts only in an administrative capacity. § 76-706; *Scheer v. Kan.-Neb. Natural Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954); *Missouri River-Papio NRD v. Willie Arp Farms, Inc.*, 15 Neb. App. 484 (2007). The condemnee must be given at least 10 days notice of the hearing. There is no opportunity for discovery. The 3 member board of appraisers consists of a real estate appraiser and 2 other persons selected by the judge. They must be disinterested freeholders of the county. The county judge swears in the board members, but does not attend the board hearing. The board holds an informal hearing, listening to all interested parties. The board must view the property. § 76-709. The board then assesses the damages the condemnee will sustain, and files a return of appraisers with the judge, setting forth the damages to each condemnee. § 76-

710. The only rules of procedure for board of appraisers hearings are to listen to all interested persons and to view the property. Neb. Rev. Stat. § 76-710.

Each condemnee is entitled to a separate award of damages. *Katelman v. O’Fink*, 84 Neb. 185, 120 N.W. 938 (1909).

The date of filing of the petition is the date of taking and the date of valuation. *Chaloupka v. State, Dept. of Roads*, 176 Neb. 746, 127 N.W.2d 291 (1964). There is no record made at the board of appraisers hearing, and the Board’s award cannot be used as evidence on appeal. *Bickels v. State Dept. of Roads*, 178 Neb. 825, 135 N.W.2d 872 (1965).

### **Appeal.**

Either side may appeal within 30 days after the return of appraisers. The appeal is to the district court of the county in which the condemner’s petition was filed. Neb. Rev. Stat. § 76-715. A notice of appeal, request for transcript, and appeal bond, with notice to all interested parties, is filed in county court. A petition on appeal is then filed in district court. § 76-717.

Only filing and service of the Notice of Appeal are jurisdictional. *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 191 (2008). An Affidavit of Service of the Notice of Appeal on all parties is required. Service may be made by regular mail with Affidavit of Service filed with the court. Neb. Rev. Stat. § 76-715.01.

Any award to any condemnee which is not appealed is final. *City of Hastings v. Peter Ellis Farms, Inc.*, 216 Neb. 550, 344 N.W.2d 640 (1984).

The appeal is heard as a civil action at law, and the rules of procedure and discovery apply. Matters of law, including challenges to good faith negotiations, public need or public use, are raised on appeal. They are determined by the court, and the amount of compensation to the condemnee is determined by a jury of twelve.

Challenges to the condemnation are heard in a preliminary trial prior to empanelling a jury for determination of compensation

Further appeal as to errors of law or the verdict of the jury may be appealed to the Nebraska Court of Appeals the same as any other civil action.

The determination of damages in condemnation has often been said to be of a local nature to be made by a jury and its verdict will not ordinarily be interfaced with if it is based upon the evidence. *State Dept. of Roads v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1983).

### **Passage of Title.**

The condemner must deposit the award of the board of appraisers in county court within 60 days of the award. The condemner is then entitled to take possession. Neb. Rev. Stat. § 76-711. However, the condemner may not dispossess the condemnee until the condemner is ready to devote the property to a public use, and the condemner does not obtain title or other interest condemned until the property is put to the public use for which taken. § 76-714.

### **Procedure to Challenge Condemnation:**

#### **Appeal.**

In county court, only the sufficiency of the petition to state a taking can be challenged. It is not necessary to make objections to the condemnation to preserve them for later challenge. *Scheer v. Kansas-Nebraska Natural Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954).

Challenges to the condemnation, such as lack of statutory authority, failure of condemner to negotiate in good faith, lack of public use or public need, or failure to provide sufficient notice, are raised by pleadings in district court on appeal. *Chimney Rock Irrigation District v. Fawcus Springs Irrigation District* 218 Neb. 777, 359 N.W.2d 100 (1984). It is the condemner's burden to prove these prerequisites. *Dawson v. Papio NRD*, 210 Neb. 100, 313 N.W.2d 242 (1981). Such challenges are heard and determined by the district judge prior to empaneling a jury for determination of compensation. *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978); *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995).

#### **Injunction.**

In some situations, an action in district court for injunction may be proper to prevent the county court from proceeding. *Father Flanagan's Boys' Home v. Millard School District*, 196 Neb. 299, 242 N.W.2d 637 (1976); *City of Lincoln v. Cather & Sons Construction, Inc.* 206 Neb. 10, 290 N.W.2d 798 (1980).

If there is no temporary injunction to stop the project pending the outcome of the challenge to condemnation, and no motion to stay the project, the right to challenge can become moot. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

#### **Collateral Attack.**

A challenge to the condemnation must be by injunction in District Court or appeal to District Court from the county court proceeding. A challenge cannot be made by collateral attack. *Duffy v. School Dist. No. 1 of Washington County*, 200 Neb. 702, 265 N.W.2d 212 (1978).

### **Inverse Condemnation:**

If the condemner takes or damages property without instituting condemnation proceedings, the condemnee may file a condemnation petition with the county judge. The proceedings are the same as if the condemner had filed. Neb. Rev. Stat. § 76-705. The statutory procedure is not exclusive. The property owner may elect to file suit in district court for damages, as the constitutional protection of property is self executing. *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985).

If filed in district court, a claim for damages may be joined with a claim for regulatory taking or claim for relief under 42 U.S.C. § 1983, or with a request to enjoin a nuisance. *Whitehead v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994); *Dishman v. NPPD*, 240 Neb. 452, 482 N.W.2d 580 (1992).

The date of taking in an inverse proceeding is not the date the petition is filed, but is the date of actual appropriation for public use. *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

A 10 year statute of limitations applies, from the date of appropriation. The rules of adverse possession apply in determining the running of the statute of limitations. Neb. Rev. Stat. § 25-202; *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977); *Kimco v. Lower Platte South NRD*, 232 Neb. 289, 440 N.W.2d 456 (1989).

The procedures of the Political Subdivisions Tort Claims Act do not apply. *Kula v. Prososki*.

### **Just Compensation Valuation Issues:**

The amount of damage is peculiarly of a local nature and is determined by a jury. An appellate court will not interfere with a verdict based upon admissible evidence. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

Just compensation must be determined as a two part process:

The fair market value of the property taken, and

Any decrease of the fair market value of the remaining property, to the extent that the decrease was proximately caused by the taking.

*Moyer v. Nebraska City Airport Authority*, 265 Neb. 201, 655 N.W.2d 855 (2003); Nebraska Jury Instructions 2d (hereinafter NJI2d) 13.01.

The definition of fair market value which must be used is “the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.” *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004); NJI2d 13.02.

Any increase or decrease in the fair market value of the property prior to the date of valuation caused by the public project for which the property is acquired, or by the likelihood it will be acquired, other than physical deterioration within the reasonable control of the owner, shall be disregarded. Neb. Rev. Stat. § 76710.01; NJI2d 13.02. When relevant, the condemner is entitled to a jury instruction to not compensate for any decrease in value caused by physical deterioration which the condemnee could have reasonably prevented. NJI2d 13.02.

Compensation must be measured as of the date of taking. NJI2d 13.01. The condemnee has the burden of proof of the loss sustained. *Clearwater Corporation v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

While the condemner is required to negotiate in good faith prior to commencement of condemnation, and must inform the condemnee in most cases of its estimate of just compensation, the condemner is not required to disclose appraisal information prior to appeal to district court. Common practice is to trade appraisals after appeal has been filed.

### **Highest and Best Use - Zoning.**

Valuation and all elements of damage must be consistent with highest and best use. *Westgate Recreation v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). Highest and best use must be based upon a use which is legally permissible. However, a highest and best use based on an anticipated change in zoning may be considered if there is a reasonable likelihood that the change would occur in the near future and it has a present effect on value.

*Lybarger v. State, Dept. of Roads*, 177 Neb. 35, 128 N.W.2d 132 (1964); *Iske v. MUD*, 183 Neb. 34, 157 N.W.2d 887 (1968).

Zoning has been used occasionally as a tool to decrease the value of property in anticipation of public acquisition, and to prevent development pending acquisition. The use of zoning for such purposes has been challenged successfully in trial courts, but has not been decided on appeal. (An unpublished opinion of the court of appeals was decided upon other grounds). Condemners



argue that the statutory prohibition of evidence regarding a decrease in value resulting from the project is applicable, and that any objection to the zoning itself must be made in an injunction action to challenge that zoning.

### **Severance Damage.**

Severance damage compensation is to include consideration of all elements of inconvenience and annoyance, not taken item by item, but to the extent that taken as a whole, they detract from the market value of the remaining property. *Heye Farms v. State, Dept. of Roads*, 251 Neb. 639, 558 N.W.2d 306 (1997). Severance damage takes account of the economic effect caused by the severance of the part taken from the whole, “as a going concern”. Neb. Rev. Stat. § 76710.01. Going concern is merely a way of determining whether the property is damaged more than would be expected, due to unity of use as a whole. *Pieper v. City of Scottsbluff*, 176 Neb. 561, 126 N.W.2d 865 (1964).

Only non-speculative elements may be considered. Fears of the owner, not supported by knowledge of actual present or potential danger, cannot be used as a basis for loss of market value. *Armbruster v. Stanton-Pilger Drainage District*, 169 Neb. 594, 100 N.W.2d 781 (1960); *Application of Burt County Public Power District*, 163 Neb. 1, 77 N.W.2d 773 (1956). If the plans for the project indicate a specific type of severance damage, such as drainage problems, then the property owner will be charged with knowledge of those problems and must ask for compensation in the original condemnation proceeding. *Moyer v. Nebraska City Airport Authority*.

### **The Unit Rule – Larger Parcel.**

The unit rule generally applies to the property itself, its uses and improvements, and the interests in the property. The elements of the property cannot be separately valued and then added together, but must be valued as a unit, as the sum of the parts cannot exceed the whole. However, this does not mean the entire property under the same ownership must always be appraised as a single, larger tract where there are different highest and best uses or areas which do not contribute the same amount to value. *Y Motel v. State, Dept. of Roads*, 193 Neb. 526, 227 N.W.2d 869 (1975).

Where the property is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis and has been called the controlling and determining factor. *Walter C. Diers v. State Dept. of Roads*, 17 Neb. App. 561, 767 N.W.2d 113 (Neb. App. 2009).

### **Lost Profit / Volume of Business.**

The loss of future business profits is not compensable, as profits are not a loss of property value and are too dependent upon management skill. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991); *James Poultry v. City of Nebraska City*, 135 Neb. 787, 284 N.W. 273 (1939).

Volume of business may be used if it is shown to affect the value of the property as a consideration in the open market. *Y Motel, Inc. v. State, Dept. of Roads*, 193 Neb. 526, 227 N.W.2d 869 (1975) (motel value was based upon gross room rents).

### **Reasonable Access.**

Loss of reasonable access to any street or road abutting the property is compensable. Reasonable of access is a question of fact. *Balog v. City of Lincoln*, 177 Neb. 826, 131 N.W.2d 402 (1964). Temporary loss of access is compensable. *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 913 (1996). Medians, one-way streets, or barricades on one end of a street, are not compensable. *Verzani v. State, Dept. of Roads*, 188 Neb. 162, 195 N.W.2d 762 (1972); *W.E.W. Truck Lines v. State, Dept. of Roads*, 178 Neb. 218, 132 N.W.2d 782 (1965).

Generally, creation of a circuitous route is not compensable, as the injury is not to access and is not different from injuries suffered by the public. *Kraft v. City of Lincoln*, 182 Neb. 187, 153 N.W.2d 725 (1967). However, in an extreme case, a more circuitous route for an owner at the end of a newly created dead-end may have a compensable loss. *Steck v. Platte Valley P.P. & Irr. Dist.*, 132 Neb. 822, 273 N.W. 268 (1937).

A drastic reduction of the traffic on a street is not compensable, as there is no vested right in the traffic. *Intern. Mov. and Storage v. City of Lincoln*, 226 Neb. 213, 410 N.W.2d 483 (1987).

### **What Is Not Allowed As Evidence Of Value?**

Assessed tax value. *Lieneman v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974).

Award of the board of appraisers in county court. *Bickels v. State, Dept. of Roads*, 178 Neb. 825, 135 N.W.2d 872 (1965).

Compensation awarded to other project condemnees. *Papke v. City of Omaha*, 152 Neb. 491, 41 N.W.2d 751 (1950).

Offers to the condemnee or other project owners.

The amount paid for the property by the condemnee, unless the transaction qualifies as a comparable sale. *Clearwater Corporation v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

The appraisal report or a synopsis of the report. *Westgate v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

Likelihood that the project will result in special assessments. *Application of the City of Lincoln*, 161, Neb. 680, 74 N.W.2d 470 (1956).

Probability the condemner will not use all of the property or rights taken. *Loup v. Loup River PPD*, 150 Neb. 864, 36 N.W.2d 261 (1949).

Replacement cost of improvements which are inconsistent with highest and best use. *Westgate v. Papio-Missouri River NRD*.

Future desired or planned uses which are not consistent with highest and best use. *Iske v. MUD*, 183 Neb. 34, 157 N.W.2d 887 (1968).

Income approach to value when there is adequate data for comparable sales approach. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

Reproduction cost approach only, unless there is a lack of comparable sales or the improvements are uniquely well adapted to the existing use. *Westgate v. PapioMissouri River NRD*.

Evidence of the value of trees and landscaping, other than the extent to which they increase the value of the land. *Walkenhorst v. State, Dept. of Road*, 253 Neb. 986, 573 N.W.2d 474 (1998) (mature trees on agricultural land).

The cost to cure a compensable item of damage, unless such cost does not exceed the loss of value caused by the item. *Lansman v. State, Dept. of Roads*, 177 Neb. 119, 128 N.W.2d 569 (1964).

### **Large Multi-Use Tracts.**

Generally, a property is to be valued as a unit, not as separate uses or parcels. This is generally determined by looking at unity of ownership, proximity, and use. However, large multiple-use properties, where the highest and best use of different areas is distinct and separate, and the land is divisible, may be valued as separate parcels. *Y Motel v. State, Dept. of Roads*; *State v. Platte Valley P.P. & Irr. Dist.*, 147 Neb. 289, 23 N.W.2d 300 (Neb. 1946); *Walter C. Diers v. State Dept. of Roads*, 17 Neb. App. 561, 767 N.W.2d 113 (Neb. App. 2009).

The land and its improvements cannot be separately valued under the sales approach, but must be valued as a unit. *Westgate v. Papio-Missouri River NRD*.

In exceptional cases, the value of the whole may be more or less than the sum of the separate interests. *State v. Platte Valley P.P. & Irr. Dist.*

### **Who May Testify?**

Testimony as to value is not limited to credentialed appraisers. An owner of the property who is familiar with the property and its value is entitled to testify as to value for the existing use, without further foundation. *Langfeld v. State, Dept. of Road*, 213 Neb. 15, 328 N.W.2d 452 (1982). This applies to the president of a closely held family corporation. *Johnson's APCO Oil Company v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979). However, ownership alone does not qualify the owner to testify as to value for other purposes. *American Central City, Inc. v. Joint Antelope Valley Authority*, 281 Neb. 742 (2011).

Any other witness may testify as to value only after establishing their familiarity with the property and the state of the market. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998).

Ordinarily whether a witness has adequate foundation to be allowed to testify as to value is a matter of sound discretion of the trial court, but the determination will be reversed on appeal if such discretion is abused. *Liberty Development Corp. v. Metropolitan Utilities Dist. of Omaha*, 276 Neb. 23, 751 N.W.2d 608 (2008).

If a witness is shown to not possess the necessary familiarity, then their testimony is without foundation and should be stricken. *Clearwater Corporation v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

However, appraisers are held to a higher standard and must be able to provide adequate foundation based upon proper research. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). While it is not clear whether the Supreme Court of Nebraska requires USPAP compliance, state statute does clearly require a credentialed appraiser's testimony to be based upon a USPAP compliant appraisal, subject to regulatory discipline. Neb. Rev. Stat. § 76-2206.

### **The Appraisals.**

The preferred method of appraisal is the comparable sales approach. If the appraiser has sufficient comparable sales to use the approach, then the income

and cost approaches may be used for verification, but not as separate indicators of value. *Westgate v. Papio-Missouri NRD; Patterson v. City of Lincoln*.

The trial judge has wide discretion in deciding whether to allow a witness to testify as to value, and in deciding whether sufficient foundation exists to allow a sale to be used as a comparable. *Swanson v. State, Dept. of Roads*, 178 Neb. 671, 134 N.W.2d 810 (1965).

The necessary foundation for use of a comparable sale as foundation and background for an expert's opinion is less than when used as substantive proof of value of the condemned property. *Clearwater Corporation v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981).

Foundation for a comparable sale includes:

Similarly situated.

Sold at about the same time.

Similar market conditions.

Arms length transaction with no unusual circumstances.

The sale to the condemnee may be shown, if it is a comparable sale. *Clearwater Corporation v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

A sale by or to a governmental entity which possesses eminent domain power is not disqualified if shown to be a sale for fair market value. *Firethorn Investment v. Lancaster County Board of Equalization*, 261 Neb. 231, 622 N.W.2d 605 (2001) (tax valuation case, not condemnation).

Expert witness testimony as to value is purely advisory and is not binding on the trier of fact. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994).

Trial judges have recently been given a greater role as a "gatekeeper" in determining the admissibility of expert testimony, and motions in limine combined with requests for "Daubert" hearings are becoming common. See *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

### **Special Benefits.**

Special benefits must be pleaded and proved by the condemner. *Frank v. State, Dept. of Roads*, 177 Neb. 488, 129 N.W.2d 522 (1964).

If special benefits are an issue, the condemnee is entitled to an instruction that general benefits may not be offset against general damage, but condemnee must request it. *Frank v. State, Dept. of Roads*.

Special benefits must be special in kind, not just in degree, to the property taken. General benefits arise from the fulfillment of the public project which justified the taking, and special benefits arise from the peculiar relation of the land in question to the public improvement. *Richardson v. Big Indian Creek Watershed Con. Dist.*, 181 Neb. 776, 151 N.W.2d 283 (1967).

Special benefits may not be offset against the value of the property taken, but only against severance damages. *Omaha v. Howell Lumber Co.*, 30 Neb. 633, 46 N.W. 919 (1890).

To be offset, the special benefits must be material and capable of being reflected and measured in the value of the property immediately after the taking. A witness cannot simply allege such benefits if there is no valid attempt to quantify. *Phillips v. State Dept. of Roads*, 167 Neb. 541, 93 N.W.2d 635 (1958). *Richardson v. Big Creek Watershed Con. Dist.*

### **Crop Damage.**

If the acquisition is an easement, the damages shall include growing crops and fences damaged by initial construction. Neb. Rev. Stat. § 76-710. The growing crops are measured by the difference between the value at maturity if there had been no injury less the expense of harvesting and delivering the crop to market. *State Dept. of Roads v. Dillon*, 175 Neb. 350, 121 N.W.2d 798 (1963). If the land is under lease to a third party farmer, that third party is entitled to recover such damage as a condemnee. *State Dept. of Road v. Dillon*.

### **How Are Various Ownership Interests Treated?**

Each owner of an acquired or damaged interest is entitled to a separate award for their loss of value. It is the duty of the condemner to negotiate with each interest and to bring each interest into the proceeding. The awards are to be several and not joint, and must be separately awarded according to the interests.

*Grace Land*

*& Cattle Co. v. Tri-State G & T Ass'n., Inc.*, 191 Neb. 663, 217 N.W.2d 184 (1974); *State Ex-Rel. Katelman v. O'Fink*, 84 Neb. 185, 120 N.W. 938 (1909); *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978).

A condemnee cannot force the condemner to bring in another condemnee with an interest in the property. If the condemner fails to make the owner of any interest a party, it renders the proceedings ineffectual as to that interest. *Missouri River – Papio NRD v. Willie Arp Farms, Inc.*, 15 Neb. App. 984 (2007).

Each interest holder has the right of appeal. A mortgagee may appeal independently of the owner, and a tenant in common may appeal separately from other co-owners. *Grace Land & Cattle Co. v. Tri-State G & T Ass'n., Inc.*; *Omaha Bridge and Terminal Rr. Co. v. Reed*, 69 Neb. 514, 96 N.W. 276 (1903). An award which is not appealed is not considered on appeal. *City of Hastings v. Peter Ellis Farms, Inc.* 216 Neb. 550, 344 N.W.2d 640 (1984).

A leasehold interest is valued by looking at the terms of the lease and the uses to which the leasehold is readily adaptable. A lessee cannot claim damages beyond the term of the lease unless it is shown that renewal is likely. *Dawson v. City of Lincoln*, 176 Neb. 311, 125 N.W.2d 908 (1964); *James Poultry Co. v. City of Nebraska City*, 135 Neb. 787, 284 N.W. 273 (1939).

A leasehold's value is the rental value of the lease less the rent reserved in the lease. *Balog v. State, Dept. of Roads*, 127 Neb. 826, 131 N.W.2d 402 (1964); *NJI2d* 13.25.

A mortgagee is an interest holder, and is to be made a party to the proceeding. Damages to the title holder should go first to payment of the mortgage. *Northwest Mutual Life Insurance Co. v. Nordhues*, 129 Neb. 379, 261 N.W. 687 (1935); *Dodge v. Omaha & S.W.R. Co.*, 20 Neb. 276, 29 N.W. 936 (1886); *Omaha Bridge and Terminal Rr. Co. v. Reed*.

A possibility of reverter is not a compensable property interest. *State v. Cheyenne County*, 157 Neb. 533, 60 N.W.2d 593 (1953).

An unexercised option is not a compensable property interest. *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 106 N.W.2d 727 (1960).

A tax lien holder is an owner of an interest in the property. *State v. Missouri Pac. Ry. Co.*, 75 Neb. 4, 105 N.W. 983 (1905).

The right to a condemnation award is personal, and stays with the original interest holder upon sale or assignment of the interest, absent an agreement to the contrary. *Croft v. Scotts Bluff County*, 121 Neb. 343, 237 N.W. 149 (1931).

### **What If The Condemnation Is Abandoned?**

The condemning authority must pay the award of the board of appraisers to the clerk of the county court within 60 days of such award, or the condemnation is abandoned. Neb. Rev. Stat. § 76-711. Prior statute gave the condemner 60 days to decide whether to appeal or abandon. It was interpreted as allowing 60 days within which condemner could abandon. See *Bowley v. City of Omaha*, 181 Neb. 515, 149 N.W.2d 417 (1967). Nebraska law is not clear as to whether this is the exclusive right to abandon.

If abandoned, the condemnation cannot be instituted again within two years from the date of abandonment. § 76-711.

### **Attorney Fees And Costs:**

The district court may award attorney fees and fees of two expert witnesses for the appeal to district court, if:

Condemnee appeals and increases the award 15% or more above the award of the county court board of appraisers, or

Condemner appeals and does not decrease the award to less than 85% of the award of the board of appraisers, or

Both condemner and condemnee appeal and the award is increased in any amount. Neb. Rev. Stat. § 76-720.

“May” in the statute means “shall” award condemnee attorney and witness fees if the condition is met, and the only discretion of the court goes to the reasonable amount. *Prucka v. Papiro NRD*, 206 Neb. 234, 292 N.W.2d 293 (1980). Fees for services prior to the appeal to district court are not included. *In re SID no. 384 of Douglas County*, 259 Neb. 351, 609 N.W.2d 679 (2000).

If the condemner appeals, the condemner pays all court costs. If only the condemnee appeals and does not increase the award, the court may, in its discretion award the condemner its court costs, but not attorney or expert witness fees. § 76-720.

If the condemnee can be shown to have induced the county court board of appraisers to issue a low award of compensation, then an award of attorney and witness fees may be denied. *Thacker v. State, Dept. of Roads*, 193 Neb. 817, 229 N.W.2d 197 (1975).

Dismissal for lack of condemnee’s good faith negotiations or no public purpose requires an award of condemnee’s attorney and witness fees and costs. § 76-720.



If the court finds that the condemner cannot acquire the property by condemnation, or that the condemnation is abandoned, the court shall award reasonable expenses, fees and costs. § 76-726(1).

In an inverse condemnation proceeding, the court shall award reasonable attorney, appraisal and engineering fees actually incurred if judgment is rendered in favor of the condemnee or the matter is settled. § 76-726(2).

The trial court's award of attorney and expert witness fees will not be disturbed on appeal in the absence of an abuse of discretion. *Y Motel v. State, Dept. of Roads*.

It is in condemnee's best interest to present a timely motion and fee application following entry of judgment, supported by time records and affidavits as to the influencing factors, but it is the trial judge's duty to award a reasonable sum. *Pruka v. Papio NRD*.

The non-exclusive factors to consider in determining the reasonable amount of fees include:

- Importance of the case.
- Result.
- Difficulty.
- Degree of professional skill demonstrated.
- Diligence of the attorney.
- Ability required and experience.
- Experience and training of the attorney.
- Time and labor necessarily required.
- Fees customarily charged for such services in the area.
- Whether attorney/client fee agreement was for fixed or contingent fee.

*Pruka v. Papio NRD; Y Motel v. State, Dept. of Roads; Jensen v. State, Dept. of Roads*, 184 Neb. 802, 172 N.W.2d 607 (1969).

The condemnee's claim for attorney fees on appeal to the Nebraska Court of Appeals or Nebraska Supreme Court must be made by filing a motion supported by an affidavit to justify the fee sought for services in the appellate court. This filing must be within 10 days of the opinion of the court or entry of the order disposing of the appeal. Nebraska Supreme Court Rules of Practice and Procedure, Rule 10 (f).