# EMINENT DOMAIN AND CONDEMNATION LAW

# For Engineers and Land Surveyors

From Half Moon Education
Land Laws For Civil Engineers and Land Surveyors
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## 1. The Source of Eminent Domain Power.

"Eminent Domain" comes from the Latin term *dominium eminens*, which means supreme lordship. Articulated by Hugo Grotius in a Dutch legal treatise in 1625.

> "The property of subjects is under the eminent domain of the state…for the end of public utility, to which those who founded civil must be supposed to have intended that private ends should give way."
> "When this is done the state is bound to make good the loss of those who lose their property."

**The Magna Carta, 1215.**

King John met with his noblemen at Runnymeade Meadow in an attempt to end constant rebellions. He was required to accept that the will of the King was not arbitrary, and to proclaim in writing that his subjects had certain liberties. This was the Great Charter of the Liberties of England, or Magna Carta. (It only protected the barons, not the serfs.) Neither King John nor the barons followed it, and the Pope rejected it, but it remained as the Foundation for Freedom.

Three clauses remain as British statute today, including, "NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right." (Emphasis added.)

**The importance of private property in Colonial America.**

The American War of Independence was the result, more than anything else, of the colonists desire to protect their property – land, homes, money – from seizure by the King's agents.

--The Stamp Act of 1765.
--The Tea Act of 1773.
--Quartering of Soldiers.
--Lexington and Concord.

When General George Washington addressed the Continental Army to rally them before the Battle of Long Island in 1776, he began with:

> "The time is now near at hand which must determine whether Americans are Freemen or slaves, whether they are to have any property they can call their own, whether their houses and farms are to be pillaged and destroyed."

Preamble to the May 10, 1997 Resolution of the Continental Congress, precursor to the Declaration of Independence:.

> "[A]ll powers of government of the colonies (should) be exerted by the people of the colonies, for preservation of peace and for the defense of their lives, liberties and properties." John Adams

**The Constitution of the United States of America.**

Third Amendment: No soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Fifth Amendment: [N]or shall private property be taken for public use, without just compensation.**

**Constitution of the State of Nebraska.**

Article 1, Section 21: The property of no person shall be taken or damaged for public use without just compensation therefor.

**Questions raised:**

1. What is property?
2. What is a taking (or damage)?
3. What is a public use?
4. Who can take?
5. What is just compensation?
6. What is the procedural framework for enforcement? How do we recognize the eminent domain of the public while protecting the rights of the owner of the property?
7. What if the public takes the property without compensation?

Note: "Eminent Domain" and Condemnation do not appear in Constitutions. Constitutions do not grant government the power, but rather, limit the power.

**The Takings clause is self-executing, and legislative action is not necessary to make the remedy available.**

In *Kula v. Prososki*, 219 Neb. 626, 365 N.W. 441 (1985), the Nebraska Supreme Court held that a property owner is not required to follow the statutory procedure for filing an inverse condemnation action, as the Court recognizes other ways to petition for the remedy and the Constitutional protection does not need legislative action.

In *City of Kearney v. Consumers Public Power Dist.*, 145 Neb. 4755, 17 N.W.2d 448 (1945), The Nebraska Supreme Court discussed the nature of the power of eminent domain:

> "It is an attribute of sovereignty, inherent in a sovereign state whether or not reference is made to it in the Constitution of the state. In other words, the power of a sovereign state to take property, or to authorize its taking for a public use, rests upon necessity because there can be no effective government without it. The power exists independent of the Constitution, the provision of the Constitution with reference thereto being a limitation on the exercise of the power, and in no sense a grant of power. In former times the right of a sovereign state to take for a public purpose was absolute, the property could be taken without just compensation being paid and without requiring the intervention of a court to afford effective use of the power."

**2. Who can take our property? Who is the Supreme Lord?**

The Federal government and its agencies.
The State and its agencies. Neb. Rev. Stat. § 76-725

Department of Roads, Department of Corrections, etc, in the name of the State
Political subdivisions of the State
Municipalities. § 14-366; § 15-229; § 19-709.
Counties. § 23-325.
Public education
University of Nebraska and State Colleges. § 85-133; § 85-319.
Public Schools. § 85-319; § 79-1095.
Special purpose political subdivisions
Irrigation Districts. § 46-125.
Library Boards. § 51-210.
Airport Authorities. (Agencies of municipalities) § 3-503; § 3-601.
County Fair Boards. § 2-262.
Natural Resources Districts. § 2-3234.
Sanitary Improvement Districts. § 31-736.
Joint Public Agencies created two or more public agencies. § 13-2505.
Public Cemetery Associations & Churches owning Cemeteries. § 12-201.
Public Housing Agencies. § 71-15, 113.
Rural Water Districts § 46-1008.
Public Irrigation Districts. § 46-125
Public Utilities. § 70-667; § 86-302.
Some private, for profit entities
Pipelines. § 57-1101.
Railroads. § 74-308.

### 3. What can be taken? What is Property?

**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.

**Reasonable vehicular/pedestrian access** to a parcel of real estate from an abutting public road is a property right in the nature of an easement, and even the loss of **temporary access** can be a taking of this property right. See *Balog v. State, Dept. of Roads*, 177 Neb. 826, 131 N.W.2d 402 (1964) (reasonable access); Maloley v. City of Lexington, 3 Neb. App. 976, 536 N.W.2d 976 (1995) (temporary loss of access during construction).

Perhaps a sports franchise can be condemned, at least in California. See *City of Oakland v. The Superior Court of Monterey County*, 150 Cal. App.3d 267, 197 Cal. Rptr. 729 (1983), wherein the California court ruled that the City of Oakland could

operate a sporting franchise and could condemn even **intangible property** for any valid municipal purpose, although the condemnation was ultimately unsuccessful.

Withholding pay from a public employee, such as a fired football coach, is not A taking, as enforcing a **contractual right** is not enforcement of a sovereign right. See *Leach v. Texas Tech University*, 335 Tex. App. 386 (2011).

The order of the State Engineer curtailing **water usage** by irrigation well owners was not a taking, even though it rendered the affected farmland useless for farming. The engineer was simply using the state's regulatory power to enforce the prior appropriation rights of senior water rights owners. See *Kobobel v. State Dept. of Natural Resources*, 249 P. 3d 1127 (2011).

**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 has 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) with *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).

## 4. What is Public Use? What about Public Benefit?

Public use traditionally means ownership of some interest in real estate combined with some occupancy for some public facility, such as roads, sewers, libraries, etc. It can also include real estate damaged by a public use, such as flooding caused by public projects.

It has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation, unless it will be used by the public. Land taken for a public street is for public use. Land taken for a railroad track is taken for use by the public. See *Kelo v. City of New London, below.*

**Taking for Redevelopment of blighted and substandard areas.**

*Berman v. Parker*, 348 U.S. 26 (1954). The United States Supreme Court upheld a redevelopment plan targeting a blighted residential area of Washington, D.C., in

which most of the houses in the area were uninhabitable and were beyond repair. It was a true slum. The City's plan called for acquisition of the area by the City, clearance and construction of new streets and utilities by the City, with residential redevelopment by private developers and public agencies. District of Columbia Statutes allowed condemnation for redevelopment of substandard and blighted areas. The owner of a retail store in the area challenged condemnation of his property, claiming it was not itself blighted. The Court deferred to the legislative and local agency judgment that the entire area needed to be redeveloped of the public welfare, stating: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Id., at 33.

Taking for clearance and redevelopment of "blighted and substandard" areas quickly spread across America, with cities and counties acquiring more tools from their state legislatures, such as selling the recently cleared properties at far below market value, and tax increment financing (TIF). Developers and redevelopment authorities became more creative their efforts, seeking statutory authority to redevelop areas that could not be called blighted or substandard, in order to increase the economic well being of the community.

**Taking for Economic Development. The Power of a Little Pink House.**

*Kelo v. City of New London*, 545 U.S. 469 (2005). The City of New London, Connecticut, worked with Pfizer to clear acquire and clear an older residential area for a new pharmaceutical research plant, combined with hotels, retail shopping and restaurants, projected to bring in over 1,000 new jobs and a greatly improved tax base. State law allowed condemnation for economic development, without declaring the area substandard and blighted, and the New London City Council authorized acquisition by purchase or condemnation. Suzette Kelo owned a little pink house and refused to sell. She challenged condemnation of her home on the basis that economic development is not a public use and is thus unconstitutional. The Court ruled that it is for the legislature to determine what qualifies as a public purpose, and promoting economic development is a traditional and long accepted function of government. Once it was determined that a taking of property was in furtherance of a legitimate public purpose, it satisfies the public use requirement.

*Kelo* was a 5-4 decision. Justice O'Connor authored a severely critical dissent, stating that the Court had eliminated any limit on what could be declared a public purpose to justify bare transfers of property from one private owner to another, She argued that the court was effectively abdicating the very role for which it was created, and giving license to transfer property from those with fewer resources to those with more. Justice Thomas joined in the dissent, stating that the Court had just made the public use provision in the Takings clause a virtual nullity.

But see, for example, *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784

(1967): "It is essential that a use under the power of eminent domain must be a public use, and whether or not the use is public or private is a judicial question and not a legislative one."

The reaction to *Kelo* was remarkable. Within a few months, forty-four state legislatures and nine state courts had adopted restrictions on taking property for economic development.

In 2006, 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.

**Aftermath of *Kelo* in New London**

The homes were acquired by the city and the land was cleared and prepared for redevelopment, at a cost of $78 million. Pfizer merged with Wyeth and decided to move all research to an existing facility. Pfizer moved all existing facilities from New London, with a loss of some 1,500 jobs. Without Pfizer as the anchor, the waterfront commercial developer was unable to obtain financing, and nobody stepped forward to develop the urban village. Today, the area remains vacant and owned by the city, generating no jobs and no taxes. Its latest use was as a dump for hurricane debris.

## 5. The Condemnation Proceedings:

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

**Prior to Commencement of Condemnation.**

Uniform pre-condemnation procedures are found at § 25-2501, et seq. The uniform

procedures include a pre-condemnation public hearing, location selection information, and landowner notification. Uniformity is an illusion, as many condemners were able to obtain exceptions. 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. Mahloch*, 174 Neb. 190, 116 N.W.2d 305 (1962). The elements 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).
> An appraisal of the before and after values of the property may be required.

However, good faith negotiation has been said to require only "an offer made in good faith and an attempt to induce the owner to accept it." *State Dept. of Roads v. Mahloch.*

In *Krupicka v. Village of Dorchester*, 19 Neb. App. 242, 804 N.W.2d 37 (2011), the failure of the village to meet any of the known elements of good faith negotiations, or to even determine the amount and description of the property to be taken until after the County Court award of compensation had been entered, was approved, as the engineers and Village Board had tried to work with the owner in selecting a site. Contrast this with *Camden v. Papio-Missouri River NRD*, 22 Neb. App. 308 (August 26, 2014), wherein it was determined that the NRD had failed to negotiate in good faith because it did not respond to a counteroffer that legal counsel thought to be frivolous. The court concluded that all the NRD had to do to avoid the situation was to communicate to the property owner that the NRD was adhering to its original offer. This requirement of a final communication has never before been required.

**The Appraisal**.

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.

Should the appraisal be shared with the owner? Of course!
--Put yourself in the owner's shoes.
--How can you negotiate in good faith in a forced sale without doing so?
--Acquisition guidelines of The Nebraska Department of Roads, as lead agency for Nebraska, state that the appraisal should be shared with the property owner.
--Sharing the appraisal with the owner will build trust and reduce the number of condemnation proceedings.

**The Federal Relocation Assistance and Real Property Acquisition Act (1970).**

It does not relate only to relocation. It applies to all public projects that involve any property acquisition and any federal money in any phase of the project. Failure to follow it when required can result in ineligibility for federal funding. Certification that the Act has been followed is required. False certification is fraudulent. The Act requires:

-Obtain an appraise the property before negotiations.
-Obtain a review appraisal before negotiations.
-Invite the owner to accompany the appraiser.
-Provide the owner with a written offer of just compensation and a summary of what is being acquired.
-Offer to pay for any uneconomic remnant.
-Pay for the property before possession.
-Pay for title transfer and recording fees.
-Do not attempt to obtain donation of property without first offering to compensate, based on the review.
-Provide relocation services and payments where applicable.
-If condemnation is needed, institute proceedings before taking possession
-Do not make it necessary for the owner to institute inverse proceeding.
-Certify compliance.

## 6. The Condemnation 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 ten days notice of the hearing. There is no opportunity for discovery. The three member board of appraisers consists of a real estate appraiser if available in the county and two 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. 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. *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 191 (2008).

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 erros of law or the verdict of the jury may be appealed to the Nebraska Court of Appeals the same as any other civil action. It is not a rehearing of the evidence. The appeal court will not interfere with a Jury determination s based on proper evidence within the range of evidence.

**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.

## 7. Procedure to Challenge a Condemnation:

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).

**Appeal.**

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 empanelling 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).

**8. 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*.

**Regulatory Takings.**

A regulatory taking is a form of inverse condemnation/due process violation encountered when a government regulation "goes too far". It is the inevitable result of the growth of government regulations and exactions in the areas of zoning, land use and development. It is the judicial recognition that private property should not be subjected to regulations which deny all economically viable use or which substantially affect fair market value without rational basis. The point to remember is that government must not try to obtain what it desires from a property or its owner

simply because government has the power to regulate.

*Penn Central v. New York City*, 438 U.S. 104 (1978). Airspace use restrictions above a railroad terminal did not prevent realization of a reasonable return on the owner's investment or interfere with distinct investment-backed expectations. The Supreme Court did not specifically identify a cause of action for just compensation based on a regulatory taking, but the Court's opinion did open the door.

*First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). A church camp was destroyed by a flood. The County adopted regulations prohibiting building within the floodplain. The Church sued to declare the regulations excessive and to seek inverse condemnation damages for temporary loss of use of the property. The Court held that where a government has "taken" property by a land use regulation, the owner may recover damages for the time period ending when it is finally determined that the regulation constitutes a 'taking'. The Court limited its holding to situations where the regulation denies all use of the property, and did not deal with the questions that arise in the case of normal delays in obtaining permits, changes in zoning ordinances, variances and the like.

*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Commission required beachfront owners to dedicate public access easements across the ocean frontage as a condition to obtaining building permits. Nollan applied for a building permit for a home on his beachfront property, and refused to grant the easement.

He did not lose all use of his property, but would only have to grant an easement in order to use it as he wished. He challenged the regulation as a 'taking' of part of his property rights. The Supreme Court held that a regulation which exacts something from the property owner in exchange for a government action or permit must have an 'essential nexus' between a legitimate state interest and the permit condition. This means that the condition must address some problem caused by exercising the requested permit. Nollan's permit and his new home were creating no need for a public access easement, so there was no nexus and therefore no legitimate state interest served. The Court found that it was not a valid regulation of land use, but an out and out plan of extortion." A legitimate public need or public benefit is not enough. It is not a matter that can be rectified by a clever play on words by a public agency in exercising its regulatory power. "One of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

*Dolan v. City of Tigard*, 512 U.S. 374, 512 U.S. 374 (1994). The City required dedication and construction of a public bicycle path as a condition to issuing a use permit for a plumbing store, in order to alleviate traffic congestion. The Supreme Court held that the requirement was an unconstitutional taking, and that the essential nexus test required that the permit condition must have nexus to a legitimate state interest and that the degree of the exaction must have a relationship to the impact of

the proposed development. Applied to Tigard's requirement, the plumbing store and traffic control might have a rational nexus, but dedicating and developing a bike path was excessive.

*Del Monte Dunes v. City of Monterey*, 526 U.S. 687 (1999). The owner of a 37 acre tract applied for a permit to develop a 344 unit residential complex. The City rejected the application. The owner then applied 264 265, 224 and 190 units, all of which would have conformed with the City's land use plan and zoning ordinances, but all were successively rejected over a five year period, with the City imposing more stringent requirements each time. The owner sued, claiming an inverse, regulatory taking, and combining it with a Civil Rights claim under the Equal Rights Clause and 42 U.S.C. §1983. A jury agreed, awarding damages of $1,450,000. The Supreme Court affirmed, approving instructions to the jury that it could find for the property owner if it found either that:

1. The owner had been denied all economically viable use of its property, or that

2. The City's decision to reject the final development proposals did not advance a legitimate public interest

*Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005). Chevron challenged a Hawaii statutory rent cap on leased gas stations as a measure to combat the Chevron's control of petroleum refining and marketing on the islands. The Supreme Court held that regulatory takings cases should no longer include the legitimate state purpose test, as it should be seen more as a due process test (a civil rights claim under 42 U.S.C.§1983). Takings claims for regulations that go too far will be heard where the aggrieved party asserts either a total deprivation of all economic beneficial use of the property or that the regulation is an exaction that acts as a taking.

*Whitehead v. City of Lincoln*, 245 Neb. 680 515 N.W.2d 401(1994). A parcel of land had been zoned for 18 years for commercial use that would include a gas station as a permitted use, and it was designated in the Comprehensive Plan for retail use. It abutted a residential zone. After the owner's application for a use permit was recommended for approval, a rezoning application was filed and the parcel was rezoned for residential, on the same day that the City approved use permits for two other gas stations next to residential zones. The Nebraska Supreme Court held that a land use regulation that is an invalid exercise of regulatory power may result in a taking, notwithstanding that not all economically viable use of the land is denied. Regulatory power must not be used to punish enemies or to reward friends. The landowner's compensable interest is the return of the market value that is lost as a result of the regulatory restriction, normally lost rental value during the life of the invalid use restriction. The cost to the City was close to $600,000.

*Strom v. City of Oakland*, 255 Neb. 210, 583 N.W. 311 (1998). The City complained

to the local NRD that excessive sediment runoff was occurring onto the City's property from a neighboring farm. The NRD required the owner to comply with soil conservation measures. The owner filed inverse condemnation, complaining that the City and NRD were taking a property interest without just compensation, The Nebraska Supreme Court stated that there are two categories of land-use regulatory actions that are compensable without a case specific inquiry into the public interest and concomitant regulatory required nexus: one is where the regulation denies a landowner all economically beneficial or productive use of the land, the other is where the owner suffers a physical invasion of his or her property." The court must ask whether the regulatory power is being used merely as an excuse for taking property simply because at that particular moment the landowner is asking the regulatory agency for some license or permit. The court held that excessive sediment runoff is a legitimate state concern, that the land in question was six times the established limit, that not all economically viable use of the land was being denied, and that diminution in property value alone as does not amount to a regulatory taking.

## 9. Just Compensation Valuation Issues: The Trial Evidence

"Just Compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken….The Courts early adopted, and have retained, the concept of market value….or more concisely, fair market value fairly determined….as of the date of taking." *United States v. Miller*, 317 U.S.369 (1943).

The property owner is entitled to just compensation, which is;

1. The fair market value of the property taken, as of the date of taking, and
2. Any decrease in the fair market value of the remaining property, to the extent that the decrease was proximately caused by the taking, and
3. Reasonable abstracting expenses.

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

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. § 76-710.01; NJI 2d 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. NJI 2d 13.02.

Compensation must be measured as of the date of taking, which is the date the condemner files its petition to condemn in county court. NJI 2d 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).

**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 in Nebraska. It has consistently been rejected in other jurisdictions as a tactic to limit the amount of compensation. (An unpublished opinion of the court of the Nebraska Court of Appeals was decided upon other grounds).

**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. § 76-710.01. 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?**

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).

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). This may be different where the trees have an inherent value of their own, such as mature walnut trees, or a fruit orchard.

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 to purchase their property.

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).

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. Papio-Missouri River NRD.*

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).

**Who May Testify as to Value?**

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).

Ordinarily, the owner will testify as to value. The owner is expected by the jury to do so, but the testimony generally receives little credit. The trial is primarily a battle of credentialed real estate appraisers. The appraisal is subject to rather stringent requirements and it may take a year for the appraiser to complete the report.

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

**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.**

Benefits special to the property in question, different in kind from the general benefit of the project to the public, may be shown as an offset against severance damages to the remainder. Any attempt by a court to provide a more concise statement of 'special' benefit fails to add clarity.

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. R*ichardson 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*.

## 10. 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).

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); NJI 2d 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.*

**11. Abandonment.**

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.

**12. 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. Papio 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.

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*.