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LAND CONDEMNATION

by

Charles T. Lane
Poyner & Spruill LLP
Rocky Mount, NC

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I. INTRODUCTION AND OVERVIEW

This paper is a revision and up-date of earlier efforts to examine in detail the substantive law and procedure applicable to condemnation litigation, whether instituted by the condemnor or the landowner. The first nine sections of the paper discuss the constitutional and statutory underpinnings of condemnation proceedings. Sections X - XVIII address how to assign value to condemned land and related issues and Sections XIX and XX deal with inverse condemnation. Discussed in Section XXI are potential ethical pitfalls for the practitioner. In the Appendix, samples are given of language that may be used in a transactional document to minimize disputes from arising should property be condemned.

Eminent domain law and procedure in North Carolina are codified in Chapter 40A, Article 1 (General Provisions), Article 2 (Condemnation by Private Condemnors), Article 3 (Condemnation by Local Public Condemnors), Article 4 (Just Compensation) and Article 9, Chapter 136 (Condemnation by Department of Transportation and Department of Administration). Chapter 40A applies to all private condenmors, i.e., electric power companies, telephone companies, railroads and motor carriers. It also applies to local public condemnors, i.e., cities, counties and local agencies. Chapter 40A does not apply to condemnations authorized to be instituted by the Department of Transportation and other state agencies through the Department of Administration under Article 9, Chapter 136. See N.C. Gen. Stat. § 40A-1.

N.C. Gen. Stat. § 40A-1 defines the scope of Chapter 40A eminent domain procedure:

> It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982.

There are two express exceptions to this broad statutory rule: (1) Chapter 40A does not repeal any provision of a local act enlarging or limiting the purpose for which property may be condemned, and (2) it does not repeal any local act creating any substantive or procedural requirement or limitation on the authority of a local public condemnor to exercise the power of eminent domain beyond its boundaries. N. C. Gen. Stat. § 40A-1. Additionally, N. C. Gen. Stat. § 136-66.3, which authorizes cities to use Chapter 136 quick-take procedure when condemning for a state highway system street, was not repealed. Such a condemnation must be pursuant to an agreement between the Department of Transportation and the municipality, City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983). After this agreement is reached, it appears from the language of N.C. Gen. Stat. § 136-66.3(c) and § 40A-3(b)(1) that the city may elect to condemn under either Chapter 40A or Chapter 136. Thus, when condemning for a highway system street, cities may, by choosing to condemn under either Chapter 40A or Chapter 136,

select the measure of damages that will apply in the condemnation proceeding, depending upon the appraisal witness's opinion of value.

For example, if a partial taking of a larger tract is involved, a condemnor may prefer the "before and after" measure of damages of Chapter 136 rather than the "greater of" rule of damages applicable to all Chapter 40A condemnations. This rule states that compensation shall be the greater of either (1) the difference between the fair market value before and after the taking or (2) the fair market value of the part taken. The reason for this preference is that in Chapter 136 condemnations, off-setting benefits may reduce compensation below the fair market value of the part taken, thus avoiding the effect of the "greater of" rule of Chapter 40A.

The meaning of the word "property" was broadened in Chapter 40A to include not only any right, title or interest in land, including leases, but also options to buy or sell land. N.C. Gen. Stat. § 40A-2(7); see also N.C. Gen. Stat. § 4718; J. Webster, Real Estate Law in North Carolina § 135 (3rd ed. 1988). Even under previous law, however, the better practice was to make known optionees parties to eminent domain proceedings.

Under Chapter 40A procedure, the measure of compensation for the total taking of property is the same as in Chapter 136 condemnations, that of the fair market value of the property taken; however, in partial taking cases in which less than the entire tract is taken, the measure of just compensation under Chapter 40A procedure is the "greater of" either (1) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking or (2) the fair market value of the property taken. N.C. Gen. Stat. § 40A-64.

North Carolina appears to be the only jurisdiction in the nation with two different statutory rules for measuring compensation in partial taking condemnations: One for state government agencies, N.C. Gen. Stat. § 136-112, and another for local government entities and private corporations, N.C. Gen. Stat. § 40A-64.

Prior to January 1, 1982, there existed over fifty different procedures for condemning private property for a public use in North Carolina, especially where local governmental entities were involved as the condemnor. The multiplicity of such local acts and procedures over the years, prior to 1982, was one of the primary reasons Chapter 40A was enacted. One of Chapter 40A's primary effects was to repeal such other condemnation procedures and make Chapter 40A the exclusive condemnation procedures to be used in North Carolina by all private condemnors and all local public condemnors. Chapter 136, Article 9 condemnation procedures used by state agencies was left unaffected by Chapter 40A. Since Chapter 40A's effective date of January 1, 1982, numerous local acts have authorized certain local public condemnors to use the procedure (including the measure of compensation) set forth in Chapter 136, Article 9. Therefore, several local public condemnors are now authorized to condemn private property for a public use pursuant to Chapter 136, Article 9, in addition to Chapter 40A. See § 40A-1&3.

Caution: There are now numerous local acts modifying Article 3 (Condemnation by Public Condemnors) as it applies to certain cities and counties and these local modifications should be examined carefully by counsel.

II. CONSTITUTIONAL LIMITATION ON THE POWER OF EMINENT DOMAIN

A. United States

Neither the North Carolina nor the United States Constitutions authorize the taking of private property. The right to take private property for a public use is an inherent power of the government and exists independently of either Constitution. For that reason, the Fifth Amendment of the United States Constitution was proposed and finally adopted as a limitation on government's sovereign right of eminent domain. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965); Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962); Raleigh and Gaston R.R. v. Davis, 19 N.C. (Dev. & Bat.) 451 (1837).

The first ten amendments to the United States Constitution became effective on December 15, 1791, and the Fifth Amendment, in part, reads as follows:

> . . . nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

Thus, the Fifth Amendment prohibits the taking of private property for public use without just compensation, but the restriction of this amendment applies only to the federal government and not to the states. Shute v. Monroe, 187 N.C. 676, 123 S.E. 71 (1924). However, the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. Hawaii Housing Authority v. Midkiff, 467 U.S. 299, 231 (1984).

B. North Carolina

The North Carolina Constitution is one of the few state constitutions that does not specifically refer to limitations on the right of eminent domain. However, Article I, § 19 provides:

> No person ought to be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land.

N.C. Const. Art. 1, § 19.

The North Carolina Supreme Court has consistently ruled that this language in Art. 1, § 19 places a limitation on the right of the state to take, or authorize others to take, private property. The "law of the land" clause in Article 1, § 19 of the North Carolina Constitution guarantees that just compensation be paid for land taken for a public purpose. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982); see discussion in DeBruhl v. State Highway & Public Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958). This limitation was stated by Chief Justice Mitchell (then Associate Justice) as follows:

> We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the

> fundamental law of the state, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of the 'law of the land' within the meaning of Article I, Section 19 of our State Constitution.

Lea Co. v. N.C. Board of Transp., 308 N.C. 603, 610 (1983), (quoting Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982)); see also Realty Corp. v. Board of Transp., 303 N.C. 424, 436, 279 S.E.2d 826 (1981); Barnes v. Highway Comm., 250 N.C. 378, 387 109 S.E.2d 219 (1959).

Additionally, in Hedrick v. Graham, 245 N.C. 249, 255-56, 96 S.E.2d 129, 134 (1957), the late Chief Justice (then Associate Justice) Parker stated:

> Eminent Domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation.

See also Messer v. Town of Chapel Hill, 59 N.C. App. 692, 297 S.E.2d 632, cert. denied, 307 N.C. 697, 301 S.E.2d 390 (1982).

C. Constitutional Limitations

These constitutional provisions, and the cases interpreting them, have placed two constitutional limitations on the exercise of the power of eminent domain. These limitations are:

(1) **The taking of private property must be for a public use or purpose**. U.S. v. 50 Acres of Land, 469 U.S. 24 (1984); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Foster v. N.C. Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State Hwy. Comm. v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965); and

(2) **Just compensation must be paid the owner of the property taken or damaged**. West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662 (1935); Lea Co. v. N. C. Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983); Town of Mt. Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1965); Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925); Bennett v. Winston-Salem Southbound R.R., 170 N.C. 389, 87 S.E. 133 (1915); Lloyd v. Town of Venable, 168 N.C. 531, 84 S.E. 855 (1915); see Commissioners of Beaufort County v. Bonner, 153 N.C. 66, 68 S.E. 970 (1910); Johnston v. Rankin, 70 N.C. 550 (1874); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 407, 317 S.E.2d 904 (1984).

III. THE GRANT OF THE POWER OF EMINENT DOMAIN AND NATURE OF "PUBLIC USE," "PUBLIC PURPOSE" AND "PUBLIC BENEFIT"

A. Statutory Authorization

Eminent domain law is divided into two categories. One is the statute or granting law which authorizes a particular condemnor to condemn property for a public purpose. The

other is the procedural law which mandates the rules under which a condemnation is instituted and ultimately litigated by the condemnor and condemnee. As the power of eminent domain is an attribute of a sovereign government, the legislature is the exclusive branch of that government, subject to constitutional limitations, which may authorize the taking of private property. Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906). Accordingly, the power of eminent domain is dependent upon statutory authorization and statutes granting such power must be strictly construed and followed. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969); Town of Mt. Olive v. Cowan, 235 N.C. 259, 60 S.E.2d 525 (1952); Crisp v. Nantahala Power & Light Co., 201 N.C. 46, 158 S.E. 845 (1931); Board of Education of Orange County v. Forest, 193 N.C. 519, 137 S.E. 431 (1927); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341 (1920); Carolina & Northwestern R.R. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644,44 S.E. 358 (1903); Durham & Northern R.R. v. Richmond & Danville R.R., 106 N.C. 16, 10 S.E. 1041 (1890); Allen v. Wilmington & Weldon R.R., 102 N.C. 381, 9 S.E. 4 (1889); Centre Development Co. v. Wilson County, 44 N.C. App. 469, 261 S.E.2d 275, pet. denied, 299 N.C. 735, 267 S.E.2d 660 (1980).

B. Public Use

The right of eminent domain is granted by the legislature to a public agency or quasi-public private corporation because the public interest and welfare require that private property shall on occasion be taken for the public use or benefit designated in the statute and in the manner prescribed by the statute. Raleigh, Charlotte & Southern R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914), pet. dismissed, 169 N.C. 156, 85 S.E. 390 (1915); see Berman v. Parker, 348 U.S. 26 (1954) and Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). As stated in State Highway Comm'n v. Batts, 265 N.C. 346, 357-58, 144 S.E.2d 126, 135 (1965):

> 'Public use,' as applied in the exercise of the power of eminent domain, is not capable of precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects forward as being for 'public use.'

It is now the prevailing view that public benefit, not necessarily use by the public, is sufficient to authorize a taking within the meaning of the "public use" limitation of the Fifth Amendment. Berman v. Parker, 348 U.S. 26 (1954). Justice Sandra Day O'Conner reiterated this view in Hawaii Housing Authority v. Midkiff, 467 U.S. at 241, when she stated that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use clause." But see, City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985). In any event, what is a public use, purpose or benefit is a judicial question to be determined by the court as a matter of law, reviewable upon appeal.

IV. EXTENT OF THE POWER OF EMINENT DOMAIN

The extent and limit of the amount of property to be acquired by a condemnor for a public use and the rights or interests in the property to be acquired by the condemnor are primarily and largely left to the discretion of the condemnor, and do not become subject to judicial inquiry except on the allegation of fact tending to show bad faith on the part of the condemnor or an oppressive or manifest abuse of discretion by the condemnor. Raleigh & Gaston R.R. Co. v. Davis, 19 N.C. 451 (1837); U.S. v. 2606.84 Acres, 432 F.2d 1286 (5th Cir. 1970); Redevelopment Comm'n. v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Burlington City Board of Education v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1955); In Re Housing Authority of City of Salisbury, 235 N.C. 463, 70 S.E.2d 500 (1952); City of Charlotte v. Heath, 226 N.C. 750, 40 S.E.2d 600 (1946); Town of Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922); see also Greensboro-High Point Airport Authority v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed and rev. denied, 295 N.C. 548, 248 S.E.2d 726, and 248 S.E.2d 862, cert. denied 440 U.S. 912 (1978); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912). 1A Nichols, The Law of Eminent Domain § 4.11, (Rev. 3d ed. 1990 and Supp. 1992) (hereinafter cited as Nichols), 6 Nichols § 26.1315. For example, a power company's choice of a route for its electric transmission line across private property will not be interfered with when there is neither allegation nor evidence that the company acted either arbitrarily or capriciously or in a manner constituting an abuse of discretion in selection of the route. Duke Power Co. v. Ribet, 25 N.C. App. 87, 212 S.E.2d 182 (1975); see also Carolina Power and Light Company v. Merritt, 50 N.C. App. 269, 273 S.E.2d 727, cert. denied, 302 N.C. 220, 276 S.E.2d 914 (1981).

A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding. Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964); see Barnes v. State Highway Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

This principle of law was reaffirmed by the Supreme Court of North Carolina in the case of City of Charlotte v. Cook, 348 N.C. 222, 498 S.E.2d 605 (1998). The Supreme Court reversed the Court of Appeals (125 N.C. App. 205, 479 S.E.2d 503 (1997)) and ruled that the City of Charlotte could acquire a fee simple title rather than an easement in property for a water pipeline to connect an intake structure at a lake with a water treatment plant. There was conflicting evidence whether the City really needed more than an easement for its water pipeline. The Court stated "The City does not have to show it would be impossible to construct a line using an easement. If the City can show that it needs a fee simple title to construct and operate the line under optimum conditions, this is proof of necessity." Therefore, the Court concluded, the City's decision to condemn a fee rather than an easement was not arbitrary, capricious, or an abuse of discretion. The Court summarized the applicable law as follows:

> In Raleigh & Gaston R.R. Co. v. Davis, 19 N.C. 451 (1837), we dealt with the condemnation of land for the construction of a railroad. Chief Justice Ruffin, writing for the Court, explained the nature of the power of eminent domain. He pointed out that unlike the federal government, which has only those powers delegated to it by the people through the Constitution of the United States, the government of our state has all the power necessary to exercise its sovereignty. Id. at 457. This sovereign power may be restricted

> only by the state or federal Constitution. The right of eminent domain is one of the sovereign powers. Chief Justice Ruffin said it is for the legislature to determine whether private property should be taken and to what extent. Id. at 467.
>
> Following *Rail Road*, we have developed a rule governing the taking by the State of private property. Property may be condemned only for a public purpose, and the Judicial Branch of the government determines whether a taking is for a public purpose. The Legislative Branch decides the political question of the extent of the taking, and the courts cannot disturb such a decision unless the condemnee proves the action is arbitrary, capricious, or an abuse of discretion. City of Charlotte v. McNeely, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972); N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 470, 189 S.E.2d 272, 278 (1972); Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960).

A trial court's conclusion of law that a condemnor did not act in an arbitrary and capricious manner, or abuse its discretion in exercising the power of eminent domain, must be supported by appropriate findings of fact in order for an appellate court to determine whether a landowner's motion to dismiss the action under Rule 41(b) is appropriate. In Dept. of Transportation v. Overton, N.C. App. 857, 433 S.E.2d 471 (1993); 335 N.C. 237 (1993); 336 N.C. 598; 444 S.E.2d 448 (1994), the DOT brought a condemnation to extend a road across the defendant's railroad. The defendant railroad alleged such a road across its tracks would be unsafe and that DOT engaged in arbitrary and capricious conduct and abused its discretion in seeking to condemn the tracks for a crossing. The Court ruled that where the defendant railroad alleged that the DOT's proposed railroad crossing was unsafe, it was error for the trial court to determine that DOT did not act in an arbitrary and capricious manner in choosing the particular route across the railroad *without first making a finding of fact* whether the proposed crossing was unreasonably dangerous.

Although the power to condemn is very broad, the North Carolina Court of Appeals has addressed what must be done if more land is condemned than the condemnor ends up needing. In Ferrell v. Dep't of Transp., 104 N.C. App. 42, 407 S.E.2d 601 (1991), the court determined that the state could not sell land back to the original landowner at current fair market value when land earlier condemned was deemed to be not needed. Rather, the landowner must return the compensation he received from the condemnation, plus interest, and the state must convey the land back to him. The court stated:

> The law of North Carolina is clear that neither the State nor other authorities with the right of eminent domain are allowed to profit from the increase in market value due to condemnation proceedings . . . . To allow the State to sell the land back to the original landowner at current fair market value, in this case nearly ten times the value of the original purchase price, would be to

> allow the State to profit from its own injudicious and excessive taking at the expense of the landowner.

104 N.C. App. at 46-7, 407 S.E.2d at 604-05.

The legislature responded to the Ferrell decision by adopting legislation to clarify the sale of surplus property. This legislation, effective July 20, 1992, amends N.C. Gen. Stat. § 136-19 and makes more specific the law governing the sale of unneeded, previously condemned property. It limits the right of first consideration to the original landowners and not their heirs and assigns. The landowner must pay for any improvements on the property, an issue which neither Ferrell nor the previous version of the statue addressed. Unless an entire block or tract of land was originally acquired, the former owner must own the remainder of the tract from which the property was acquired. The rules of reconveying property to the former owner do not apply to property acquired as an "uneconomic remnant" or "residue" outside the right-of-way.

Likewise, a new section was added to Chapter 40A of the General Statutes, N.C. Gen. Stat. § 40A-70, and dictates principles for the return of property condemned but unused by public condemnors such as cities and counties. The requirements are essentially the same as those discussed above. In both acts the landowner must pay the original condemnation price, and the cost of any improvements, plus the legal rate of interest. In this section, however, the public condemnor must specify a date by which payment must be made but it may not be less than 30 days after written notification to the owner of its availability for return.

V. RIGHT OF CONDEMNOR TO ENTER PROPERTY PRIOR TO CONDEMNATION

A. Entry on Property Not a Trespass or Taking of Property

Statutes granting condemnors the authority to enter private property for the purpose of conducting preliminary surveys and to gather other engineering data to determine the best route or location of its facilities are, even in the absence of provisions for compensating the landowners for such use of the land, constitutional. In Duke Power Co. v. Herndon, 26 N.C. App. 724, 728, 217 S.E.2d 82, 85 (1975), decided under former N.C. Gen. Stat. § 40-3, Chief Judge Brock quotes the following language from an exhaustive survey of court decisions on the subject:

> 'Statutes authorizing bodies having the power of eminent domain to enter onto land for purposes of conducting preliminary surveys and the like, containing no provision for compensation to the landowner for use of the land, have been upheld as not violative of constitutional provisions against the taking of private property for public purposes without prior payment of just compensation.' Annot., Eminent Domain: Right to Enter Land For Preliminary Survey or Examination. 29 A.L.R.3d 1104, § 4[b] (1970).

In the Herndon case, the Court of Appeals upheld the constitutionality of former N.C. Gen. Stat. § 40-3 by affirming the preliminary injunction granted by the trial court against the landowner's interfering with Duke Power's statutory right to enter upon the landowner's lands for the purpose of making a survey of the proposed route of its transmission line.

B. Chapter 40A Right of Entry

N.C. Gen. Stat. § 40A-11 provides:

> Any condemnor without having filed a petition or complaint, depositing any sum or taking any other action provided for in this Chapter, is authorized to enter upon any lands, but not structures, to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Chapter. The condemnor shall give 30 days' notice in writing to the owner at his last known address and the party in possession of the land of the intended entry authorized by this section.
>
> Entry under this section shall not be deemed a trespass or taking within the meaning of this Chapter, however, the condemnor shall make reimbursement for any damage resulting from such activities, and the owner is entitled to bring an action to recover for the damage. If the owner recovers damages of twenty-five percent (25%) over the amount offered by the condemnor for reimbursement for its activities the court, in its discretion, may award reasonable attorney fees to the owner.

C. Chapter 136 Right of Entry

In addition to N.C. Gen. Stat: § 40A-11 (applicable to private and local public condemnors), N.C. Gen. Stat. § 136-120 (applicable to Department of Transportation and other state agencies) provides:

> The Department of Transportation without having filed a complaint and a declaration of taking . . . is authorized to enter upon any lands and structures upon lands to make surveys, borings, soundings or examinations as may be necessary in carrying out and performing its duties under this Chapter, and such entry shall not be deemed a trespass, or taking within the meaning of this Article; provided, however, that the Department of Transportation shall make reimbursement for any damage resulting to such land as a result of such activities and the owner, if necessary, shall be entitled to proceed under the provisions of G.S. 136-111 of this Chapter to recover for such damage.

D. Landowner Entitled to Damages

Under both statutes, the condemnor must pay the landowner for any damage to his property when the condemnor enters property prior to condemnation. If the parties cannot agree on the damages owed, the landowner may institute an action against the condemnor under the statute. See N.C. Gen. Stat. §§ 40A-11 and 136-120. Additionally, a private condemnor and local public condemnors may be required, in the court's discretion, to pay a landowner's reasonable

attorney fees, if the landowner recovers damages of 25% over the amount offered by the condemnor. However, under G.S. § 136-120 a landowner would not be entitled to be reimbursed for attorney fees where his property was damaged (but not "taken") by the Department of Transportation or other state agency. See N.C. Gen. Stat. § 136-119; Kaperonis v. State Highway Commission, 260 N.C. 587, 133 S.E.2d 464 (1963).

VI. PRIOR "GOOD FAITH" NEGOTIATIONS WITH LANDOWNER AND OFFER TO PURCHASE BY CONDEMNOR

A. Not Required Under Chapter 40A Procedure

Under N.C. Gen. Stat. § 40A-4, neither private nor local public condemnors need allege and prove a prior good faith attempt to acquire the property sought to be condemned by negotiations with the landowner. Public condemnors, however, must give each owner not less than 30 days notice of action prior to filing a complaint. N.C. Gen. Stat. § 40A-40.

Before the enactment of Chapter 40A, former Chapter 40, Article 2, required a condemnor to allege in its petition that it had been unable to acquire title to the land, or interest in the land, and the reason. State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968). The condemnor had the burden of proving that a "good faith" effort was made to acquire the property before condemnation and the general practice was for condemnors to mail to each owner a "final letter offer" to establish evidence of such negotiations; see Greensboro-High Point Airport Authority v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978) cert. denied, 440 U.S. 912 (1979).

Even though Chapter 40A does not require "good faith" negotiations with the landowner as a prior condition to instituting a condemnation, local public condemnors may be required to negotiate with the landowner before condemnation under the provisions of the federal Uniform Real Property Acquisition Policy Act if federal funds are involved with the project for which the land is being condemned. See 42 U.S.C. § 4651. Additionally, some resolutions of city and county governing boards authorizing condemnation require good faith negotiations with the landowner before instituting condemnation of property.

B. Required Under Chapter 136 Procedure

Although N.C. Gen. Stat. § 136-103 does not specially state that a complaint must contain an allegation of a prior attempt to acquire the property by negotiation, such requirement has been held to be necessary to state a good cause of action. City of Charlotte v. Robinson, 2 N.C. App. 429, 163 S.E.2d 289 (1968); State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968). However, failure of the condemnee to make timely objection to an omission of such allegation precludes the condemnee from later entering objection to such omission. City of Charlotte v. Robinson, 2 N.C. 429, 434, 163 S.E.2d 289, 294 (1968); see Note, Survey of Recent Developments in the North Carolina Law of Eminent Domain, 48 N.C. L. Rev. 767 (1970).

No attempt need be shown by a condemnor under Chapter 136 to purchase the land sought to be condemned from one who is under a disability or who is unknown. Likewise, inability of the condemnor to acquire title from some of the owners makes it unnecessary to

negotiate with the other owners. If the landowner refuses to negotiate or sell to the condemnor, the law does not require the condemnor to make a "good faith" offer to purchase. See Board of Education v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959); Western Carolina Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926); Abernathy v. South & Western Ry., 150 N.C. 97, 63 S.E. 180 (1908); see also Housing Authority of City of Raleigh v. Montgomery, 55 N.C. App. 422, 286 S.E.2d 114, cert. denied, 305 N.C. 585, 292 S.E.2d 570 (1982).

VII. THREE SEPARATE EMINENT DOMAIN PROCEDURES IN NORTH CAROLINA

There are three basic condemnation procedures utilized by condemnors in North Carolina. They are:

A. Articles 1, 2 and 4 of Chapter 40A, applicable to private condemnors;

B. Articles 1, 3 and 4 of Chapter 40A applicable to local public condemnors; and

C. Article 9, Chapter 136, applicable to the Department of Transportation and other state agencies, and certain cities and towns expressly granted such authority by local legislative acts. See annotations, N.C. Gen. Stat. § 40A-1.

The following is a discussion of the procedural requirements of each.

A. Article 2, Chapter 40A Procedure - Private Condemnors

1. Commencement and Venue

An Article 2, Chapter 40A condemnation (herein sometimes "Article 2") is a special proceeding before the clerk of superior court authorized to be used by private condemnors, i.e., power companies, railroads, motor vehicle carriers, etc. N.C. Gen. Stat. § 40A-19. The Rules of Civil Procedure apply. Virginia Electric and Power Company v. Tillet, 316 N.C. 73, 340 S.E.2d 62 (1986). It is not a "quick-take" procedure and, as in other condemnations, must be instituted in the county where the land lies. N.C. Gen. Stat. § 40A-20. There is no provision in Chapter 40A authorizing a condemnation proceeding in one county where a single tract of land lies in more than one county.

2. Petition

The Article 2 petition is a prayer for the appointment of commissioners of appraisal by the clerk of superior court to determine the amount of damages to be awarded to the owner to compensate him for his loss. In order to establish the jurisdiction of the court, the petition must allege:

(1) A description of the real estate, or interest therein, that is sought to be condemned;

(2) The incorporation of the petitioner condemnor;

(3) Good faith intention of petitioner to conduct and carry on the public business authorized by its charter;

(4) A detailed statement of petitioner's public business;

(5) A statement of the specific use of the land or interest in land sought to be condemned;

(6) A statement that the land, or interest in the land, described in the petition is required to conduct and carry on the public business authorized by the petitioner condemnor's charter;

(7) A statement whether the owner may be permitted to remove all or a specified portion of any buildings, structures, permanent improvements or fixtures situated on or affixed to the land;

(8) The names and places of residence of the respondent landowner parties (if they can be obtained with reasonable diligence) who own or have, or claim to own or have, estates or interests in the land [see N.C. Gen. Stat. § 40A-2(5)];

(9) If applicable, a statement that some of the parties are infants (if that is a fact) along with the ages of the infants;

(10) If applicable, a statement that some of the parties are incompetents, inebriates or are unknown; and

(11) A statement describing any liens and encumbrances on the land.

N.C. Gen. Stat. § 40A-20.

If the condemnation is by a railroad, a map must be filed marking the route and containing a profile that shows cuts and embankments. N.C. Gen. Stat. § 62-192. The near universal practice of all condemnors, however, even when not required, is to attach a plat to the petition showing the land being acquired. If the condemnation involves a-partial taking, then a plat would be prepared from deed descriptions of the larger tract affected by the taking. The petition must be signed and verified. N.C. Gen. Stat. § 40A-20.

Either the private condemnor or condemnee landowner may file a petition under Article 2. If the condemnee files a petition, however, it is commonly referred to as an "inverse condemnation."

3. Service of Process

A special proceedings summons and a copy of the petition and lis pendens must be served on the owners of the property at least ten days before the hearing in the manner

prescribed for special proceedings in N.C. Gen. Stat. §§ 1-394 and 1-395. N.C. Gen. Stat. §§ 40A-22 and 1-116.1. Trustees under deeds of trust and other lienholders should be made parties respondent; however, it is not necessary to name beneficiaries or noteholders under deeds of trust as parties respondent since they have no interest in the property. 2 Nichols § 5.18. It is the better practice to note in the petition that a trustee respondent is a trustee under an identified deed of trust. Optionees must be served. N.C. Gen. Stat. § 40A-2(7). Additionally, in the event of federal tax liens or FHA-type deeds of trust, service must also be made upon the United States Attorney for the district in which the proceeding is brought and copies of the process must be sent by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. 28 U.S.C. § 2410.

N.C. Gen. Stat. § 40A-23 provides for service by publication on unknown persons who may have an interest in the property sought to be condemned or persons who are known but whose residence is unknown and cannot by reasonable diligence be ascertained. N.C. Gen. Stat. § 40A-32 provides for the appointment of a lawyer to represent the interests of such persons. In such cases, the State Treasurer, as custodian of the Escheat Fund, must be served notice of either the public notice or the appointment of the lawyer and may become a party to the action. N.C. Gen. Stat. § 40A-23 & -32. Service of process by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible, impracticable nor unreasonable. In U.S. v. Chatham, 323 F.2d 95, 98 (4th Cir. 1963), decided under former § 40-14, the court stated:

> When condemnation plaintiffs take the easy course, they should not be heard to say that the proceedings had upon published notice addressed to unknown persons foreclosed the rights of interested parties who were readily identifiable and easily served, particularly when the condemnation plaintiff knew, or should have known, that the unidentified persons had a substantial interest in the litigation.

4. Attorney Appointed For Unknown Parties; Guardians Ad Litem For Infants and Unborn Children

Article 2 provides for the appointment of an attorney for unborn persons who may have an interest in the property sought to be condemned or persons who are known but whose residence or whereabouts are unknown and cannot by reasonable diligence be ascertained. Likewise, Article 2 provides for the appointment of a guardian ad litem for minor children, unborn children and others under a disability who may have an interest in the property. N.C. Gen. Stat. §§ 40A-23, 30, 32.

Follow carefully the requirements set forth in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969), which provides that any person for whom a guardian ad litem is proposed must be notified and given an opportunity to be heard if there is objection to the appointment. An appointment made without such notice and opportunity to be heard is void. Thus, when appointing guardians ad litem pursuant to N.C. Gen. Stat. § IA-1, Rule 17(c), serve notice of the proposal to appoint a guardian ad litem for infants and unborn children on the parents, guardians or next of kin and file an affidavit with the court evidencing such service of notice.

5. Notice of Condemnation Proceeding - Lis Pendens

A notice of lis pendens must be filed with the clerk of court in the form and manner provided by N.C. Gen. Stat. § 1-116, and the filing of such notice shall be constructive notice of the condemnation proceeding to all persons. The lis pendens must be served on the parties and it will save time to effect service simultaneously with service of the summons and copy of the petition. N.C. Gen. Stat. §§ 1-116.1,199.

6. Answer to Petition

It is not necessary to file an answer in an Article 2 condemnation if the respondent does not dispute the condemnor's right to condemn, State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930); see also Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981). However, answers are permitted, N.C. Gen. Stat. § 40A-25, and most lawyers for respondents do file answers. The respondents have 10 days to file answer. N.C. Gen. Stat. § 1-394. The court may extend the time for an additional 10 days. N.C. Gen. Stat. § 1-398. In proceedings in which the United States is a party, the United States has 60 days in which to file answer. See 28 U.S.C. § 2410. In the event the state or local government is a party respondent, they have 30 days in which to file answer. N.C. Gen. Stat. § 1-394.

7. Notice to Respondents of Hearing to Appoint Commissioners and Hear Proofs and Allegations of Parties

After the time for answering the petition has expired or answers have been filed, 10 days' written notice must be given to the respondents that a hearing will be held before the clerk of court to appoint commissioners and to hear the proofs and allegations of the parties raised in the pleadings. N.C. Gen. Stat. §§ 40A-25 & -26. Respondents must be given such notice whether or not they have filed answers. See Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966); Collins v. State Highway Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953); IA Nichols § 4.103. Justice Ervin stated in Collins that "[t]he law does not require parties to abandon their ordinary callings, and dance 'continuous or perpetual attendance' to a court simply because they are served with original process in a judicial proceeding pending in it." Collins v. Highway Comm'n, 237 N.C. at 281, 74 S.E.2d at 713.

8. Hearing Before Clerk of Court on Petitioner's Application For Appointment of Commissioners

N.C. Gen. Stat. § 40A-25 specifically provides for the clerk of court to hear the proofs and allegations of the parties and, if no sufficient cause is shown against granting the prayer of the petition, to make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised and to fix the time and place for the first meeting of the commissioners.

The hearing before the clerk is nearly always informal and the respondent's lawyer in most cases does not contest the petitioner's right to condemn.

In a few cases, however, the respondent will dispute the allegations in the petition. In such cases the clerk must conduct a formal hearing on the issues of law and fact and then rule

upon the respondent's challenge to the petition. See Madison County R.R. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912). Neither party has a right to appeal and have these issues tried by a jury. State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930); American Union Tel. Co. v. Wilmington, Columbia & Augusta R.R., 83 N.C. 420 (1880). In Abernathy v. South & Western Ry., 150 N.C. 97, 103, 63 S.E. 180, 183 (1908), the North Carolina Supreme Court held that "while in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil docket for trial, in condemnation the questions of law and fact are passed upon by the Clerk." If either party wishes to appeal from the clerk's ruling, he may formally except to the clerk's ruling and appeal to the superior court judge after the clerk's confirmation of the commissioners' report.

If respondent contemplates raising the issue of the quantity of land taken or the terms of the easement sought to be acquired, he must allege in his answer facts tending to show abuse of discretion or bad faith by the condemnor. The respondent would carry the burden of proving such allegations. In Re Housing Authority of Salisbury, 235 N.C. 463, 70 S.E.2d 500 (1952); see also Carolina & Northwestern Railway Co. v. Pennearden Lumber Co., 132 N.C. 644, 44 S.E. 358 (1903). A simple denial by the respondent of the petitioner's "good faith allegation" of what petitioner proposes to use the land for is not sufficient to raise an issue of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Greensboro-High Point Airport Authority v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912 (1979).

As mentioned earlier, for petitions filed by both private and local public condemnors, it is no longer necessary to allege a prior good faith attempt to acquire, by negotiations with the owner, the property sought to be condemned. N.C. Gen. Stat. § 40A-4. Such prior good faith negotiations with the owner are still required, however, under Article 9, Chapter 136, condemnations and the federal Uniform Real Property Acquisition Policy Act where federal funds are involved. See 42 U.S.C. § 4651. Even though it is no longer necessary to allege and prove good faith negotiations with the landowners prior to condemnation under Chapter 40A, good faith negotiations should in fact be a part of every condemnor's land acquisition policy.

If the clerk of court determines that the petitioner has proven its right to condemn the respondent's land, then the clerk appoints the three commissioners. The commissioners will file their report and then the parties have 20 days to file exceptions to the report. The clerk may modify or confirm the report or order a new appraisal. N.C. Gen. Stat. § 40A-28. Any party may then "file exceptions to the clerk's final determination on any exceptions to the report" and appeal to the superior court. Id. In other words, an appeal is taken based on exceptions duly taken within 10 days after the clerk's confirmation of the report. N.C. Gen. Stat. § 40A-28; Holly Shelter R. Co. v. Newton, 133 N.C. 132, 45 S.E. 549 (1903). Either party may protect his rights by filing exceptions to the clerk's rulings and orders to preserve them for later determination by the superior court judge. An appealing party must file timely exceptions to the commissioners' report to preserve his or her right to appeal. City of Raleigh v. Martin, 59 N.C. App. 627, 297 S.E.2d 916 (1980). Without exceptions, the matters in controversy on appeal will be significantly limited. Upon appeal from the clerk's confirmation of the commissioner's report, the entire record is carried up for review by the trial judge upon questions of fact and law and the trial judge has original jurisdiction to hear and determine all matters in controversy. Redevelopment

Comm'n. v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); see State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); Cape Fear and Yadkin Valley R.R. v. King, 125 N.C. 454, 34 S.E. 541 (1899).

9. Hearings Before Commissioners; Burden of Proof on Landowner Respondent

The better practice is for the clerk of court to preside at the commissioners' hearings. The first duty of the clerk is to take the oath of the commissioners. The oath is signed by the commissioners and filed with the record. In most cases, one of the commissioners is elected chairman, usually for the purpose of completing the written report and filing it with the clerk.

In hearings before the commissioners, as in the superior court before a jury, the burden of proof is on the respondent landowner. Board of Education v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959); City of Statesville v. Anderson, 245 N.C. 208, 95 S.E.2d 591 (1956). The respondent offers his evidence to the commissioners first and is entitled to opening and closing arguments. N.C. Gen. Stat. § 40A-12 sets forth the rules of procedure applicable to Chapter 40A proceedings. Where rules of procedure are not otherwise expressly set forth in Chapter 40A or the statutes governing civil procedures, the judge of superior court before whom such proceeding may be pending, has the power to make all necessary orders and rules of procedure. See Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936). The Rules of Civil Procedure are applicable when there is not a procedure specified in Chapter 40A. Virginia Electric and Power Co. v. Tillet, 316 N.C. 73, 340 S.E.2d 62 (1986).

N.C. Gen. Stat. § 40A-26 provides that the commissioners shall "view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing." The practice is for the commissioners to hear the evidence and arguments of the parties, but not to reduce them to writing. The commissioners may adjourn hearings to a definite time and place. Otherwise 10 days' notice of such meeting must be given to the parties or their attorney.

10. Report of Commissioners

(1) Form of Report

The form of commissioners' report set out in N.C. Gen. Stat. § 40A-27 should be followed and it should be filed with the court by a majority of the commissioners within 10 days following the last hearing. N.C. Gen. Stat. § 40A-26. The statutory form of commissioners' report does not contain a description of the land or interests in land sought to be condemned. Thus, it is important that the clerk of court's order of confirmation or final judgment be carefully drawn to describe the land and easement condemned.

(2) Recorded in Register of Deed's Office

N.C. Gen. Stat. § 40A-28(b) requires the judgment to be recorded in the county where the land is situated. The better practice is to provide in the judgment or order confirming the report of commissioners that the report of commissioners, judgment or order

confirming the report, and plat appended, be certified to the Register of Deeds for recording as in the case of deeds.

11. Exceptions to Report of Commissioners

The clerk of superior court must mail copies of the commissioners' report "forthwith" to the parties or their attorneys when the report of commissioners is filed. N.C. Gen. Stat. § 40A-28(a); see Collins v. State Highway Comm'n., 237 N.C. 277, 74 S.E.2d 709 (1953). Either party has 20 days from the filing of the report in which to file exceptions to it. N.C. Gen. Stat. § 40A-28(a); City of Raleigh v. Martin, 59 N.C. App. 627, 297 S.E.2d 916 (1982).

12. Hearing on Confirmation of Report of Commissioners; Appeal; Trial De Novo; Jury Trial

(1) Hearing on Exceptions; Notice

If exceptions to the report are filed by either party within 20 days of its filing, the clerk must hold a hearing and give the parties an opportunity to appear and present evidence to support their contentions that the award is either too small or too large or is otherwise improper. N.C. Gen. Stat. § 40A-28(a). Notice to those parties who did not file exceptions to the report of commissioners may not be necessary, but the better practice is to give notice to all parties or their attorneys. See Collins v. State Highway Comm'n., 237 N.C. 277, 74 S.E.2d 709 (1953).

(2) Trial De Novo in Superior Court

"An appeal to the Superior Court from a condemnation proceeding puts the issue of compensation for damages resulting from the taking before the court de novo." Metropolitan Sewerage Dist. of Buncombe County, v. Trueblood, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1983). Because the parties have a trial de novo, the clerk nearly always confirms the report of commissioners and either party may then appeal to the superior court within 10 days after the confirmation order. N.C. Gen. Stat. § 40A-28(c). It is important to note again, however, that in an Article 2 condemnation, the parties cannot appeal until the report of commissioners is confirmed by the clerk of superior court. Cape Fear and Northern R.R. Co. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903); McIntosh, North Carolina Practice and Procedure § 2371(6) (2d ed. 1956).

Upon appeal, the clerk transfers the condemnation proceeding to the civil issue docket of the superior court. "A judge in session shall hear and determine all matters in controversy and, subject to G.S. § 40A-29 regarding trial by jury, shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 [Just Compensation] of this Chapter." N.C. Gen. Stat. § 40A-28(c).

(3) No Constitutional Guarantee of Jury Trial

In North Carolina, as in the federal courts, there is no constitutional guarantee of a jury trial in eminent domain cases. Such right is statutory. See Kaperonis v. State Highway Comm'n., 260 N.C. 587, 133 S.E.2d 464 (1963); N.C. Gen. Stat. § 40A-29.

13. Deposit of Award of Commissioners and Taking of Possession by Condemnor

Although title to the property in an Article 2 condemnation does not "vest" in the condemnor until a final judgment is entered after any appeal, the condemnor may enter and take possession of the property automatically without an order upon payment into court of the sum awarded by the commissioners. N.C. Gen. Stat. § 40A-28(d); Topping v. N.C. State Board of Education, 249 N.C. 291, 106 S.E.2d 502 (1959); see Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225, cert. denied, 298 N.C. 204 (1979). Although there is no statute in Article 2 authorizing disbursement of the award made by the commissioners, the cases of Public Service Co. v. Lovin, 9 N.C. App. 709, 177 S.E.2d 448 (1970), and Redevelopment Comm'n of Winston-Salem v. Weatherman, 23 N.C. App. 136, 208 S.E.2d 412 (1974), authorize the funds to be withdrawn upon order of superior court judge after a hearing. Upon final judgment the money deposited, along with any other sums exceeding the deposit awarded by jury, passes to the property owner and, if the condemnor took possession of the property, the property owner is entitled to interest from the date of the deposit of the sum of money awarded. See Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Seaboard Air Line Railway v. U.S., 261 U.S. 299 (1923); see also N.C. Gen. Stat. § 24-1; Note, Eminent Domain - Interest as an Element of Just Compensation, 38 N.C. L. Rev. 89 (1959).

14. Final Judgment; Vesting of Title in Condemnor

When a final judgment is entered in favor of the petitioner and upon payment by the petitioner of the award of the commissioners or, on appeal, the verdict of the jury, the court costs and attorney fees allowed by the court, then all persons who are parties to the proceeding are divested of title and interest in the property. See N.C. Gen. Stat. § 40A-28(d); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); Greensboro-High Point Airport Auth. v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968); see Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225, cert. denied, 298 N.C. 204 (1979), decided under former § 40-19.

15. Court Costs

(1) Attorney Fees

N.C. Gen. Stat. § 40A-32(a) provides for court costs (paid by condemnor) to include counsel fees for attorneys who are appointed by the court for unknown parties or for parties whose residences are unknown. The clerk of court also has the authority to set reasonable attorney fees for respondent's attorney when a condemnor abandons a condemnation proceeding (N. C. Gen. Stat. § 1-209.1) and in urban redevelopment condemnations (N.C. Gen. Stat. § 160A-503(10)(h)(3)); see City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Housing Auth. of City of High Point v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984).

(2) Reimbursement of Owner for Charges Paid for Appraisers, Engineers, and Plats

The court, in its discretion, may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided the appraisers and engineers testify in the case and the plats are received into evidence as exhibits by order of the court. N.C. Gen. Stat. § 40A-8(a).

B. Article 3, Chapter 40A Procedure - Local Public Condemnors

1. General

An Article 3, Chapter 40A condemnation is a civil action in superior court and it is the sole method for condemnation of property by local public condemnors, i.e., municipalities, counties and other local agencies or boards, in the absence of a local act authorizing the use of Chapter 136 highway procedure. N.C. Gen. Stat. § 40A-1. It is a "quick-take" procedure that varies depending upon the purpose for which the property is being condemned. See N.C. Gen. Stat. § 40A-42. It tracks some of the Article 9, Chapter 136 procedures currently used by the Departments of Transportation and Administration. As examined below, however, there exist major differences between the two procedures.

2. Consent of Board of County Commissioners Necessary in Certain Counties

Counsel should examine carefully the provisions of N.C. Gen. Stat. § 153A-15, which requires the consent of the board of commissioners of certain counties before land may be condemned or acquired by exchange, purchase or lease by a county or town, special district, or other unit of local government located outside the county.

3. Notice of Action

Under Article 3, Chapter 40A, local public condemnors must provide each owner (whose name and address can be ascertained by reasonable diligence) of an interest in the land sought to be condemned at least 30 days notice prior to the filing of a complaint. The notice must contain:

(1) a statement of condemnor's intent to condemn property;

(2) a general description of the property to be condemned;

(3) the amount estimated by the condemnor to be just compensation for the property to be condemned;

(4) the purpose for which the property is being condemned;

(5) the date the condemnor intends to take possession.

N.C. Gen. Stat. § 40A-40.

The notice of action must be sent to each owner (whose name and address can be ascertained by reasonable diligence) by certified mail, return receipt requested. The providing of notice shall be complete upon deposit of the notice of action enclosed in a postpaid, properly addressed envelope in a post office (or official depository) under the exclusive care and custody of the United States Postal Service). Notice by publication is not required. Notice to an owner whose name and/or address cannot be ascertained by reasonable diligence is not required in any manner. As noted earlier, the court shall appoint an attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and such attorney's services shall be noted as part of the Court costs to be paid by the condemnor. N.C. Gen. Stat § 40A-32.

This statutory "notice of action" is made applicable to local public condemnors but not to private condemnors under Article 2 procedure. An allegation that notice of action was given may be necessary to state a good cause of action. See City of Charlotte v. Robinson, 2 N.C. App. 429, 163 S.E.2d 289 (1968).

4. Commencement and Venue

An Article 3 proceeding is a civil action instituted by filing a complaint with a declaration of taking in the superior court in the county where the property is located. N. C. Gen. Stat. § 40A-41.

5. Complaint and Declaration of Taking

Under Article 3, a local public condemnor files a complaint containing a declaration of taking. N.C. Gen. Stat. § 40A-41.

A complaint filed by local public condemnors under Article 3, Chapter 40A procedure must contain:

> (1) A statement of the authority under which and the public use for which the property is taken;
>
> (2) A description of the entire tract or tracts of land affected by the taking sufficient for the identification thereof;
>
> (3) A statement of the property taken and a description of the area taken sufficient for the identification thereof;
>
> (4) The names and addresses of those persons who the condemnor is informed and believes may be, or claim to be, owners of the property so far as the same can by reasonable diligence be ascertained, and if any such persons are infants,

incompetents, inebriates, or under any other disability, or their whereabouts or names unknown, it must be so stated;

(5) A statement of the sum of money estimated by the condemnor to be just compensation for the taking; and

(6) A statement as to whether the owner will be permitted to remove all or a specified portion of any timber, buildings, structures, permanent improvements or fixtures situated on or affixed to the property.

(7) A statement as to such liens or other encumbrances as the condemnor is informed and believes are encumbrances upon the property and can by reasonable diligence be ascertained.

(8) A prayer that there be a determination of just compensation.

N.C. Gen. Stat. § 40A-41.

6. Deposit of Estimated Compensation

The filing of the complaint must be accompanied by the deposit to the use of the owner of the sum of money estimated by the condemnor to be just compensation for the taking. The owner has the right to withdraw the deposit N.C. Gen. Stat. § 40A-41; see N.C. Gen. Stat. § 40A-44.

7. Summons

Upon the filing of the complaint and the deposit of the sum estimated by the condemnor to be just compensation, the 120-day summons, together with a copy of the complaint and notice of the deposit shall be served in the manner provided for the service of process. N.C. Gen. Stat. § 40A-41; see N.C. Gen. Stat. § lA-1, Rule 4.

8. Memorandum of Action

At the time of the filing of the complaint containing the declaration of taking and deposit of estimated compensation, the condemnor must record a memorandum of action with the register of deeds in the county in which the land involved is located. The memorandum of action must contain:

(1) The names of those persons whom condemnor is informed and believes to be or claim to be owners of the property and who are parties to the action;

(2) A description of the entire tract or tracts affected by the taking sufficient for the identification thereof;

(3) A statement of the property taken for public use;

(4) The date of institution of [the] action, the county in which [the] action is pending, and such other reference thereto as may be necessary for the identification of [the] action.

N.C. Gen. Stat. § 40A-43.

9. Vesting of Title and Public Condemnor's Right of Possession

As discussed earlier, under Article 2 a private condemnor gains possession of the land condemned upon deposit with the clerk of court of the sum awarded the landowners by the commissioners; however, actual title vests in the private condemnor only upon entry of final judgment. See N.C. Gen. Stat. § 40A-28(b) and (d).

Under Article 3, however, the time at which a public condemnor acquires title to and immediate possession of the property is dependent upon the type of public condemnor and the purpose for which the property is condemned. A detailed analysis of N.C. G. Stat. § 40A-42 (and any local modifications) should be made in order to determine those instances in which a "quick-take" occurs. N.C. Gen. Stat. § 40A-42. This statute is confusing, but it essentially means the following:

Except where an owner institutes an action for injunctive relief, title to the property sought to be condemned and the right to immediate possession vests in the condemnor upon the filing of the complaint and depositing with the clerk of court the sum estimated as just compensation, when the property is condemned,

(a) by local public condemnors for the purpose of

(1) opening, widening, extending, or improving roads, streets, alleys and sidewalks [not applicable to counties]; or

(2) establishing, extending, enlarging, or improving storm sewer and drainage systems and works; or

(3) establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities; or

(b) by a city for the purpose of

(1) electric power generation, transmission and distribution systems; or

(2) water supply and distribution systems; or

(3) sewerage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems; or

(4) gas production, storage, transmission and distribution systems, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the state or without; or

(5) solid waste collection and disposal systems and facilities; or

(6) cable television systems [N.C. Gen. Stat. §§ 40A-42(a) and 160A-311(1), (3), (4), (6) and (7)]; or

(c) by a county for the purpose of

(1) water supply and distribution systems; or

(2) sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems; or

(3) solid waste collection and disposal systems and facilities [N.C. Gen. Stat. §§ 40A-42(a) and 153-274(1), (2) and (3)]; or

(d) by certain authorities or districts created pursuant to N.C. Gen. Stat. § 162(a)

(1) water and sewer authorities created pursuant to Article 1 of § 162(a) for the purposes set forth in that Article;

(2) metropolitan water districts created pursuant to Article 4 of § 162(a) for the purposes set forth in that Article;

(3) metropolitan sewage districts created pursuant to Article 5 of § 162(a) for the purposes set forth in that Article; and

(4) County water and sewer districts created pursuant to Article 6 of § 162(a) for the purposes set forth in that Article [N.C. Gen. Stat. §§ 40A-42(a) and 162A-1 et. seq.]

Unless injunctive relief is initiated by the landowner, when a local public condemnor is acquiring property by condemnation for purposes other than those purposes

identified above, title to the property and immediate possession vests in the local public condemnor:

> (1) upon the filing of an answer by the owner requesting only that there be a determination of just compensation and not challenging the authority of the condemnor to condemn the property; or
>
> (2) upon the failure of the owner to file an answer within the 120-day time period established by N.C. Gen. Stat. § 40A-46; or
>
> (3) upon the disbursement of the deposit to the owner of the property in accordance with N.C. Gen. Stat. § 40A-44.

N.C. Gen. Stat. § 40A-42(b).

If the property sought to be condemned is owned by a private condemnor, the vesting of title in the condemning condemnor and the right to immediate possession of the property does not become effective until the superior court has rendered a final judgment that the property is not in actual public use or is not necessary to the operation of the business of the owner. N.C. Gen. Stat. §§ 40A-42(c) and 40A-5(b).

All issues raised in the answer regarding vesting of title and possession of the property sought to be condemned by the condemnor are determined before a superior court judge, either in or out of session, upon 10 days notice by either party. N.C. Gen. Stat. §§ 40A-42(d) and (e) and 40A-47.

10. Disbursement of Deposit to Property Owner

If there is no dispute as to the title to the property, the person(s) named in the complaint may apply to the court for disbursement of the money deposited in the court by the condemnor, as full compensation, or as a credit against just compensation, without prejudice to further proceedings to determine just compensation. Upon such application, the judge shall order the money deposited to be paid to the owner and he may make "such orders with respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable." N.C. Gen. Stat. § 40A-44. No notice to the condemnor of the hearing upon such application for disbursement of deposit is necessary.

11. Answer, Reply and Plat

Any person whose property has been taken by a local public condemnor by the filing of a complaint (containing a declaration of taking) may file an answer within 120 days from the date of service. N.C. Gen. Stat. §§ 40A-45(a) and 46. The answer must contain the following:

> (1) Such admissions or denials of the allegations of the complaint as are appropriate;

(2) The names and addresses of the persons filing answer, together with a statement as to their interest in the property taken;

(3) Such affirmative defenses or matters as are pertinent to the action; and

(4) A request that there be a determination of just compensation.

N.C. Gen. Stat. § 40A-45(a).

A copy of the answer must be served on the condemnor, but failure to serve the answer does not make it invalid. The affirmative allegations of the answer will be deemed denied by the condemnor; however, the condemnor may file a reply within 30 days of the receipt of the answer. N.C. Gen. Stat. § 40A-45(b). No answer shall be filed by the owner to the declaration of taking and notice of deposit or action. N.C. Gen. Stat. § 40A-45(a).

12. Filing of the Plat of Land Taken and Land Affected by the Taking

The condemnor, within 90 days from the receipt of the answer, shall file a plat of the property taken and such additional area as may be necessary to properly determine compensation, and a copy shall be mailed to the parties or to their attorney; provided, however, the condemnor is not required to file a map or plat in less than six months from the date of the filing of the complaint. N.C. Gen. Stat. § 40A-45(c).

13. Time for Filing Answer; Failure to Answer; Extensions

Any person named in and served with a complaint has 120 days from the date of service to file an answer Failure to answer within 120 days constitutes an admission that the amount deposited is just compensation, and is a waiver of any further proceeding to determine just compensation; provided, at anytime prior to the entry of the final judgment the judge may, for good cause shown and after notice to the condemnor, extend the time for filing the answer thirty days. N.C. Gen. Stat. § 40A-46.

14. Determination of Issues Other Than Damages; Right of Immediate Appeal

Upon motion and 10 days notice by either the condemnor or the owner, the judge, either in or out of session, shall hear and determine all issues raised by the pleadings other than the issue of compensation. N.C. Gen. Stat. § 40A-47.

All questions preliminary to the determination of the amount to be paid defendant landowners are questions of fact to be determined by the superior court judge and not by a jury. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); Kaperonis v. State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963); see Lautenschlager v. Board of Transp., 25 N.C. App. 228, 212 S.E.2d 551 (1975), cert. denied, 287 N.C. 260, 214 S.E.2d 431 (1975); see also N.C. Gen. Stat. § 136-108.

N.C. Gen. Stat. § 40A-13 provides that "Either party shall have a right of appeal to the appellate division for errors of law committed in any proceeding . . . in the same manner as in any other civil actions and it shall not be necessary that an appeal bond be posted."

In State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967), decided under similar language as in N.C. Gen. Stat. § 136-1, the court states:

> Appeals in civil actions are governed by G.S. 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right. Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgement is appealable. (citation omitted) '(A) decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation' is final in nature and is immediately appealable.

271 N.C. at 13, 155 S.E.2d at 783. (Citation omitted) (emphasis added).

In Nuckles, the trial judge on a motion by the defendants under G.S. 136-108 (identical in pertinent parts to § 40A-47) made a determination of the exact land the plaintiff Highway Commission was taking in the action. The plaintiff excepted to the order but did not appeal. Instead, plaintiff proceeded to trial upon the issue of damages and docketed its appeal with that of the defendants after trial on the issue of just compensation. In ruling that the trial judge's adjudication on the defendants' motion became the law of the case unless immediately appealed, the court states:

> One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal error. G.S. 1-277.

Id. at 14, 155 S.E.2d at 784.

15. Use Of Commissioners in Article 3 Proceedings

N.C. Gen. Stat. § 40A-48 sets forth the procedure for the clerk of court to appoint three commissioners to determine the just compensation due the property owners. A request to the clerk of court for the appointment of three commissioners to determine compensation for the taking must be made in the answer, or made by motion of either party within 60 days of the filing of the answer. If no request for the appointment of commissioners is included in the answer and no motion for such appointment is made within 60 days thereafter, the case is transferred to the civil issue docket for trial on the issue of just compensation. N.C. Gen. Stat. § 40A-49.

If a request for appointment of commissioners is made by either party, after the determination of all other issues raised in the pleadings, the clerk shall appoint three competent,

disinterested persons residing in the county to serve as commissioners. See N.C. Gen. Stat. § 40A-48(a).

The commissioners themselves shall be sworn and they shall have the power to inspect the property, hold hearings, swear witnesses, and take evidence as they may, in their discretion, deem necessary, and they shall file with the court a report of their determination of the damages sustained. See N.C. Gen. Stat. § 40A-48(b). The commissioners must determine such damages or compensation in accordance with Article 4 (Just Compensation). See N.C. Gen. Stat. § 40A-52.

The report of commissioners shall be in writing and in form substantially as set forth in N.C. Gen. Stat. § 40A-48(c). Upon filing of the report by the commissioners, the clerk of court mails a copy to each party or their counsel.

16. Exception to Report of Commissioners; Trial De Novo

Within 30 days after the mailing of the commissioners report, either the condemnor or the owner may file exceptions to the report and demand a trial de novo by a jury on the issue of just compensation. See Metropolitan Sewerage District of Buncombe County v. Trueblood, 64 N.C. App. 690, 308 S.E.2d 340, 311 N.C. 402, 319 S.E.2d 272 (1983). Upon the agreement of both parties, however, the trial by jury may be waived and the issue of compensation determined by the judge. Neither the report of the commissioners nor the amount of the deposit by the condemnor shall be competent as evidence upon the trial of the issue of just compensation. See N.C. Gen. Stat. § 40A-48(d).

17. No Exception to Report of Commissioners

In the event no exception is filed to the report of the commissioners within 30 days after the mailing of the report by the clerk to the parties, final judgment shall be entered by the judge "upon a determination and finding by him that the report of commissioners plus interest computed in accordance with G.S. 40A-53 [6% per annum] . . . awards to the property owners just compensation." N.C. Gen. Stat. § 40A-48(d). Accordingly, if the judge determines that the award does not provide just compensation, he shall set aside the award and order the case placed on the civil issue docket for determination of the issue of compensation by a jury. N.C. Gen. Stat. § 40A-48(d).

18. Attorney Appointed for Unknown Parties; Guardians Ad Litem for Minors, Incompetents and Others Under Disability; Additional Parties

The judge shall appoint a competent attorney for parties unknown or whose residence is unknown and, additionally, appoint guardians ad litem for minors, incompetents, or other parties under a disability and without general guardians. The State Treasurer, as custodian of the Escheat Fund, must be notified of the appointment of such an attorney. N.C. Gen. Stat. § 40A-50. I caution you again to follow the "notice and opportunity to be heard" requirements set forth in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). The judge has authority to make additional parties to the action as may be necessary. N.C. Gen. Stat. § 40A-50.

19. Continuance of Case Until Project Completed

N.C. Gen. Stat. § 40A-50 further provides: "Upon his own motion, or upon motion of any of the parties the judge may, in his discretion, continue the cause until the project is completed or until such earlier time as, in the opinion of the judge, the effect of the condemnation upon said property may be determined." Such a motion by any of the parties will be granted upon a proper showing that the effect of condemnation upon the subject property cannot presently be determined. See also N.C. Gen. Stat. § 136-110.

20. Refund of Excess Deposit to Condemnor

In the event the landowner receives less money, as evidenced by the final judgment, than the amount deposited by the condemnor with the clerk of court as an estimate of just compensation, the condemnor is entitled to recover from the landowner such excess and court costs "incident thereto." In the event there are no funds left on deposit to cover such excess due the condemnor, the condemnor is entitled to a judgment for the excess sum against the person(s) having drawn down the deposit. N.C. Gen. Stat. § 40A-56. The statute does not expressly grant the condemnor a lien on the remaining or other lands of the condemnee-owner to secure the repayment, but it appears that the court would have authority to enter such judgment in favor of the condemnor at the time of the entry of the final judgment in the action. And upon proper filing, the judgment would constitute a lien.

21. Court Costs

(1) Attorney Fees

The condemnor pays all costs taxed by the court, including attorney fees when an attorney is appointed for unknown parties or for parties whose whereabouts are unknown. N.C. Gen. Stat. § 40A-32(a).

(2) Reimbursement of Owner for Charges Paid Appraisers, Engineers, Etc.

Additionally, under N.C. Gen. Stat. § 40A-8, the court, in its discretion, in both Article 2 (private condemnors) and Article 3 (local public condemnors) may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided the appraisers and engineers testify in the case and the plats are received into evidence as exhibits by order of the court. In the event the condemnor is not authorized to condemn the property or abandons the condemnation, the court shall, after making appropriate findings of fact, award each owner of the property sought to be condemned a sum that, in the opinion of the court based upon its findings of fact, will reimburse the owner for his (1) reasonable costs, (2) disbursements, (3) expenses, including reasonable attorney fees, appraisal and engineering fees, and (4) any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of a complaint by a local public condemnor under the quick-take procedure of N.C. Gen. Stat. § 40A-42.

C. Article 9, Chapter 136 Procedure - Department of Transportation and Department of Administration (State Agencies)

1. General

Since July 1, 1960, Article 9, Chapter 136 "quick-take" procedure has been the exclusive method by which the Department of Transportation, and its predecessors, have acquired property by condemnation for the public highway system in North Carolina. All other state agencies acquire property by condemnation through the Department of Administration, using the procedures of Chapter 136. Effective January 1, 1982, all municipalities and other local agencies were no longer authorized to use the procedure of Chapter 136 and local acts authorizing the use of its procedure were repealed on that date. One exception is when a municipality condemns for a street under agreement with the Department of Transportation. N.C. Gen. Stat. § 40-3(b)(1); see City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983). Other exceptions have been authorized by the General Assembly since 1983 for several cities and towns. See N.C. Stat. § 40A-1.

2. Commencement and Venue

Under Chapter 136 procedure, a condemnation is instituted as a civil action in the superior court in the county where the property is located and either the condemnor or the property owner may institute the action. N.C. Gen. Stat. § 136-103 & -111.

3. Complaint and Declaration of Taking

A complaint and declaration of taking must be filed under Chapter 136 procedure to condemn property. The declaration shall contain or have attached to it:

> (1) Statement of the authority under which and the public use for which the land is taken;
>
> (2) Description of the entire tract or tracts affected by the taking; see State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984);
>
> (3) Statement of the estate or interest in the land taken for public use and description of the area taken;
>
> (4) Names and addresses of those persons who the condemnor believes may have or claim to have an interest in the lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, or under any disability, or their whereabouts or names unknown, it must be so stated;
>
> (5) A statement of the sum of money estimated to be just compensation for the taking.

N.C. Gen. Stat. § 136-103.

In addition, the statute provides that the complaint shall contain or have attached thereto:

> (1) A statement of the authority under which and the public use for which the land is taken;
>
> (2) A description of the entire tract or tracts affected by the taking sufficient for their identification;
>
> (3) A statement of the estate or interest in the land taken for public use and a description of the area taken sufficient for the identification thereof;
>
> (4) The names and addresses of those persons who the condemnor is informed and believes may have or claim to have an interest in the land, so far as the same can by reasonable diligence be ascertained, and if any such persons are infants, or under any disability, or their whereabouts or names are unknown, it must be stated;
>
> (5) Statement as to liens and such other encumbrances as the condemnor is informed and believes are encumbrances upon the real estate and can by reasonable diligence be ascertained; and
>
> (6) Prayer that there be a determination of just compensation pursuant to Article 9, Chapter 136.

N.C. Gen. Stat. § 136-103.

As noted, N.C. Gen. Stat. § 136-103 does not state specifically that a complaint or declaration must contain an allegation of a prior good faith attempt by the condemnor to acquire the property by negotiation; however, such an allegation has been held necessary to state a good cause of action. Thus, the complaint or declaration should contain, in addition to the allegations listed above from the statute, a specific allegation that the condemnor and the owner are unable to agree on the price of the lands sought to be condemned. State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968); City of Charlotte v. Robinson, 2 N.C. App. 429, 163 S.E.2d 289 (1968). Of course, no attempt need be made nor alleged to have been made to purchase the land from one unknown or under a disability, or when it is necessary to condemn in order for the condemnor to acquire good title. Board of Education v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959); Western Carolina Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926); Abernathy v. South & Western Railway, 150 N.C. 97, 63 S.E. 180 (1908).

4. Deposit of Estimated Compensation

The filing of the complaint and declaration of taking must be accompanied by the deposit of the sum of money estimated by the condemnor to be just compensation for the taking. N.C. Gen. Stat. § 136-103.

5. Memorandum of Action

At the time of the filing of the complaint, declaration of taking and deposit of estimated compensation, the condemnor must record a memorandum of action with the register of deeds. The memorandum of action must contain:

> (1) Names of those persons who the condemnor is informed and believes may have or claim to have an interest in the lands and who are parties to the action;
>
> (2) Description of the entire tract or tracts affected by the taking;
>
> (3) Statement of the estate or interest in the land taken for public use;
>
> (4) Date of institution of the action, county in which action is pending, and such other reference thereto as may be necessary for the identification of the action.

N.C. Gen. Stat. § 136-104.

6. Vesting of Title and Condemnor's Immediate Right of Possession

Upon filing the complaint and declaration of taking and deposit in court of the amount of estimated compensation, title to the land or interest in the land sought to be condemned, and immediate possession thereof, vests in the condemnor. N.C. Gen. Stat. § 136-104; State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984). But in State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965), a judge issued a restraining order enjoining the State Highway Commission from possession of the right of way and construction of the proposed highway until a final hearing on appeal. In Batts, the court ruled the taking was not for a public purpose and the right of way area revested with the original owner. But the court did not allow the property owner to recover from the state the value of the trees cut by the Highway Commission. The court referred to the cutting of the trees as "merely an unauthorized trespass by employees of the Commission." It is possible a cause of action may be stated for trespass against such employees who committed the "unauthorized" trespass. See 52 Am. Jur. Trespass § 41.

7. Disbursement of Deposit to Property Owner

The persons named in the complaint and declaration of taking may apply to the court for disbursement of the money deposited in the court by the condemnor, as full compensation, or as a credit against just compensation, without prejudice to further proceedings to determine just compensation. N.C. Gen. Stat. § 136-105.

There can be no disbursement of any portion of the money deposited as a credit against just compensation for any purpose unless specifically authorized by order of a superior court judge entered after hearing pursuant to notice to all interested parties except the

condemnor. N.C. Gen. Stat. § 136-105; State Highway Comm'n v. Myers, 270 N.C. 258., 154 S.E.2d 87 (1967); see City of Durham v. Bates, 273 N.C. 336, 160 S.E.2d 60 (1968); State Highway Comm'n v. Fry, 6 N.C. App. 370, 170 S.E.2d 91 (1969).

8. Answer; 12 Month Summons (Department of Transportation); 120 Days Summons (Department of Administration)

The defendant property owner has twelve (12) months (in actions filed by the Department of Transportation) and 120 days (in actions filed by the Department of Administration) from the date of service of the complaint and declaration of taking to file answer. The court may, for good cause shown and after notice to the plaintiff condemnor, extend the time for filing answer for an additional 30 days. Failure of the defendant to file answer within the time allowed constitutes an admission that the amount deposited with the court is just compensation and waives any further proceedings to determine just compensation. N.C. Gen. Stat. §§ 136-106 & -107.

N.C. Gen. Stat. § 136-106 provides that the answer shall pray for a determination of just compensation and, in addition, set forth:

> (1) Such admissions or denials of the allegations of the complaint as are appropriate;
>
> (2) Names and addresses of persons filing answer, together with a statement as to their interest in the property taken; and
>
> (3) Such affirmative defenses or matters as are pertinent to the action. State Highway Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967); State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

9. Filing of Plat of Land Taken and Land Affected by the Taking

The condemnor, within ninety (90) days of the receipt of defendant's answer or six (6) months from the date of filing the complaint, whichever is later, shall file with the court a plat of the land taken and such additional area as may be necessary to properly determine damages, and a copy shall be mailed to the parties or their attorney. N.C. Gen. Stat. § 136-106.

10. Determination by Judge of Issues Other Than Damages

After the filing of the plat with the court, the judge shall, in or out of term (session), hear and determine all issues raised by the pleadings other than the issue of damages, including but not limited to questions of necessary and proper parties, title to land, interest taken and area taken. N.C. Gen. Stat. § 136-108; Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983); see generally, State v. Forehand, 67 N.C. App. 148, 153, 312 S.E.2d 247, 250, cert. denied, 311 N.C. 307, 317 S.E.2d 904(1984). If the motion is heard in chambers, ten days' notice must be given by the moving party. N.C. Gen. Stat. § 136-108; State Highway Comm'n v. Stokes, 3 N.C. App. 541, 165 S.E.2d 550 (1969).

All questions preliminary to the determination of the amount to be paid defendant landowners are questions of fact to be determined by the superior court judge and not by a jury. Lautenschlanger v. Board of Transp., 25 N.C. App. 228, 212 S.E.2d 551, cert. denied, 287 N.C. 260, 214 S.E.2d 431 (1975); see State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); Kaperonis v. State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

11. Immediate Appeal From Judge's Determination of Issues Other Than Damages

N.C. Gen. Stat. § 136-119 provides that when the state condemns property under Chapter 136, either party "shall have a right of appeal to the Supreme Court for errors of law committed in any proceedings provided for in this Article in the same manner as in any other civil actions." No appeal bond is required. N.C. Gen. Stat. § 136-119.

As noted earlier, in State Highway Comm'n v. Nuckles, 271 N.C. 1, 13, 155 S.E.2d 772, 783 (1967), our court stated:

> Appeals in civil actions are governed by G.S. 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right. Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before the final judgment is appealable. (Citation Omitted) '(A) decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation' is final in nature and is immediately appealable.

(Citation omitted) (Emphasis added)

In Nuckles, the trial judge on a motion by the defendants under G.S. 136-108 made a determination of the exact land the plaintiff Highway Commission was taking in the action. The plaintiff excepted to the order but did not appeal. Instead, plaintiff proceeded to trial upon the issue of damages and docketed its appeal with that of the defendants after trial on the issue of just compensation. In ruling that the trial judge's adjudication on the defendants' motion became the law of the case unless immediately appealed, the court stated:

> One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-277.

271 N.C. at 14, 155 S.E.2d at 784.

12. Use of Commissioners in Chapter 136 Cases

N.C. Gen. Stat. § 136-109 sets forth the procedure for the clerk of court to appoint three commissioners to determine the just compensation due the property owners. The owner may make such a request in his answer or either the condemnor or the owner may make such request within 60 days after the answer is filed. The form of the report of commissioners is set forth in the statute-and within 30 days after the filing of the report, either party may except and demand a trial de novo by a jury as to the issue of damages.

When no request is made for the appointment of commissioners within the time permitted, the case is transferred to the civil issue docket for trial as to the issue of just compensation. .C. Gen. Stat. § 136-109(a).

13. Attorney Appointed for Unknown Parties, Guardians Ad Litem for Minors, Incompetents and Others Under Disability

N.C. Gen. Stat. § 136-110 provides for the judge to appoint a competent attorney to appear for parties unknown or whose residence is unknown, and to appoint guardians ad litem for minors, incompetents, or other parties under a disability and without general guardians. Again, I caution you to follow the "notice and opportunity to be heard" requirements set forth in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 163 S.E.2d 490 (1969), discussed earlier.

14. Continuance of Case Until Project Completed

N.C. Gen. Stat. § 136-110 further provides:

> Upon the coming on of the cause for hearing pursuant to G.S. 136-108 or upon the coming on of the cause for trial, the judge, in order that the material ends of justice may be served, upon his own motion, or upon motion of any of the parties thereto and upon proper showing that the effect of condemnation upon the subject property cannot presently be determined, may, in his discretion, continue the cause until the highway project under which the appropriation occurred is open to traffic, or until such earlier time as, in the opinion of the judge, the effect of condemnation upon said property may be determined.

A parallel provision is in N.C. Gen. Stat. § 40A-50.

15. Refund of Excess Deposit

In the event the landowner receives less money, as evidenced by the final judgment, than the amount deposited by the condemnor with the court as an estimate of just compensation, the condemnor is entitled to recover from the landowner such excess and court costs incident thereto. In the event there are no funds left on deposit to cover such excess due the condemnor, the condemnor is entitled to a judgment for the excess sums against the persons having received the deposit. N.C. Gen. Stat. § 136-121; see N.C. Gen. Stat. § 40A-56 for a similar provision.

16. Court Costs and Attorney Fees

The condemnor shall pay all costs taxed by the court. N.C. Gen. Stat. § 136-119. In the event the condemnation is abandoned by the condemnor or it is ruled that the condemnor cannot acquire the property by condemnation, then the court shall award the owner such sum as will reimburse him for reasonable cost, disbursements and expenses, including reasonable attorney fees and engineering fees actually incurred. Additionally, when the landowner institutes a proceeding under G.S. 136-111 (inverse condemnation) and receives an award for the taking, the court shall reimburse the owner-plaintiff for the same costs. N.C. Gen. Stat. § 136-119; Department of Transportation v. Winston Container Co., 45 N.C. App. 638, 263 S.E.2d 83 (1980). In Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d -17, cert. denied, 313 N.C. 596, 330 S.E.2d 605 (1985), the court ruled that plaintiffs' attorneys were entitled to the reasonable value of their services and that they were not limited to an amount provided in their contingent fee contract.

VIII. DISPUTE AS TO THOSE ENTITLED TO PAYMENT OF JUST COMPENSATION

The general rule is that if there are adverse and conflicting claimants to the deposit or final award of compensation, the condemnor is not affected thereby and payment of the amount of the award into court releases the condemnor from further involvement with the adverse claimants. The trial judge may direct that the sum awarded to the owners be paid into court by the condemnor and the court may retain the cause for determination of who is entitled to the moneys deposited or awarded and may order a reference to ascertain the facts. N.C. Gen. Stat. §§ 40A-55 and 136-117; see City of Charlotte v. Charlotte Park and Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

IX. FEDERAL EMINENT DOMAIN PROCEDURE

The present rule governing the procedure in the federal courts for the condemnation of real and personal property is set forth in Rule 71A of the Rules of Civil Procedure. Under this rule, the Rules of Civil Procedure for the United States District Courts are made applicable to the procedure for the condemnation of property under the power of eminent domain, except as specifically otherwise provided in Rule 71A. See Fed. R. Civ. P. 71A; see also 6A Nichols § 27.02[2].

VALUATION

JUST COMPENSATION IN CONDEMNATION

X. CONSTITUTIONAL REQUIREMENT OF "JUST COMPENSATION"

We reviewed earlier, in some detail, the constitutional mandate of the Fifth Amendment to the U.S. Constitution that just compensation be paid for the taking of private property for public use, and Article I § 19 of the North Carolina Constitution that "no person ought to be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land."

These constitutional provisions do not define "just compensation" or otherwise set forth any rule for measuring compensation that may be due a person whose property has been condemned for public use. In modern times, however, statutes have been enacted that prescribe how to determine what constitutes "just compensation." The pertinent provisions can be found in Article 4, Chapter 40A, applicable to private and local public condemnors, and Article 9, Chapter 136, applicable to the Department of Transportation and the Department of Administration and certain cities and towns authorized by local acts of the Legislature. N.C. Gen. Stat. § 40A-1.

XI. RULES FOR DETERMINING JUST COMPENSATION

A. Statutory Measure of Compensation Under Chapter 40A

N.C. Gen. Stat. § 40A-64, applicable to private and local public condemnors, provides:

> (a) Except as provided in subsection (b), the measure of compensation for a taking of property is its fair market value.
>
> (b) If there is a taking of less than the entire tract, the measure of compensation is the greater of either
>
> (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or
>
> (ii) the fair market value of the property taken.

N.C. Gen. Stat. § 40A-64 (emphasis added).

B. Statutory Measure of Compensation Under Chapter 136

N.C. Gen. Stat. § 136-112, applicable to the Department of Transportation, the Department of Administration, and to those cities and towns authorized to use Chapter 136:

> (1) Where only a part of a tract is taken, the measure of damages . . . shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.
>
> (2) Where the entire tract is taken, the measure of damages for said taking shall be the fair market value of the property at the time of taking.

N.C. Gen. Stat. § 136-112; see State Highway Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967); City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

C. "Total Taking" - Rule for Measuring Damages

Thus, in a "total taking" of property the measure of damages is the same under both Chapter 136 and Chapter 40A, i.e., the fair market value of the entire tract on the date of taking. N.C. Gen. Stat. §§ 136-112 and 40A-64(a); DeBruhl v. State Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

D. "Partial Taking" - Rules for Measuring Damages

1. Chapter 136 Condemnations

In a Chapter 136 condemnation, the measure of damages in a partial taking is determined solely under the "before and after" rule. This is the difference between the fair market value of the property immediately before the taking and the fair market value of the remainder immediately after the taking, off-set by any general or special benefits. N.C. Gen. Stat. § 136-112(1); Department of Transportation v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983).

2. Chapter 40A Condemnations

In Chapter 40A condemnations, the measure of compensation in a partial taking is the "greater of" (1) the difference between the fair market value immediately before and after the taking, i.e., the "before and after" rule, or (2) the fair market value of the property taken, i.e., same rule as in a total taking. N.C. Gen. Stat. § 40A-64.

Thus, where there is a partial taking in a Chapter 40A condemnation, G.S. 40A-64(b) qualifies the basic "before and after" rule by authorizing a greater (but not a smaller) recovery, if greater compensation is warranted after comparing the respective market values of what the owner possessed before and after the taking.

The principal difference between the "greater of" rules expressed in G.S. 40A-64(b) and the conventional "before and after" rule expressed in G.S. 136-112(1) is that the latter can sometimes result in a zero award (if the remainder after the taking is more valuable than the entire tract before the taking, because of off-setting benefits), while under G.S. 40A-64(b), the award cannot be less than the value of the property taken.

E. Time of Valuation - Date of Taking

The point in time when property is "valued" in a condemnation action is the "date of taking." Metropolitan Sewerage Dist. of Buncombe County v. Trueblood, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1983). Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. Id. at 694, 308 S.E.2d at 342. (where pictures of damages occurring after the actual taking held inadmissible). The general rule is that the date of taking is the date of filing of the condemnation petition or complaint, unless an actual taking occurs

earlier. City of Charlotte v. Charlotte Park and Recreation Comm., 278 N.C. 26, 178 S.E.2d 601 (1971). Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. Department of Transp. v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983); see also Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927); Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977), aff'd per curiam, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

F. Just Compensation - Market Value - Factors to be Considered

1. Market Value

As noted earlier, neither the constitution nor statutes (such as G.S. 136-112 and 40A-64) contain provisions defining the factors to be considered by the jury in determining just compensation or fair market value. State Highway Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967); State Highway Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966); see also Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984). Nichols, in his treatise on the law of eminent domain, states:

> The 'just compensation' to which (an) owner is entitled has been held to be the value of the property at the time it is acquired ... It has been held to be equivalent to the full value of the property. All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element, standing alone, is decisive .. . No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.
>
> . . . The criteria for determination of compensation and the elements which command consideration have not become unalterably fixed, and consideration must be given to the nature of the property affected and the extent of the interest acquired. 'Value' is a term which is relative in character. The difficulty experienced in fixing a norm has been occasioned by the almost infinite variety of circumstance to which it has been sought to apply it.
>
> In one form or another, the value of property taken by eminent domain has been declared to be its 'market value.' (Citations omitted)

4 Nichols § 12.0.

In U.S. v. Cors, 337 U.S. 325, 332 (1948), the Supreme Court of the United States said:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of 'just compensation' is to be determined. (Citations omitted) The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. (citations omitted) But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases.

Nevertheless, market value is usually equated with just compensation, as in G.S. 136-112 and 40A-64.

2. Factors Considered in Determining Market Value

Nichols, in his treatise, concisely states the major factors to be considered in determining market value of real estate. They are:

> (a) A view of the premises and their surroundings.
>
> (b) A description of the physical characteristics of the property and its situation in relation to points of importance in the neighborhood.
>
> (c) The price at which the land was bought, if sufficiently recent to throw light on present value.
>
> (d) The price at which similar neighboring land has sold at or about the time of taking.
>
> (e) The opinion of competent experts.
>
> (f) A consideration of the uses for which the land is adapted and for which it is available.
>
> (g) The cost of the improvements, if they are such as to increase the value of the land.
>
> (h) The net income from the land, if the property is devoted to one of the uses to which it could be most advantageously and profitably applied.

4 Nichols § 12B.03 [2].

3. Fair Market Value Vis-A-Vis Cost of Replacement

For an interesting U.S. Supreme Court case holding that the fair market value, not the cost of replacement, is "just compensation" for land condemned for a public purpose, see U.S. v. 564.54 Acres of Land, 441 U.S. 506 (1979).

G. Appraisal Techniques

In condemnation actions there are three recognized approaches to the valuation of property. These approaches were stated by the North Carolina Supreme Court in Redevelopment Comm'n v. Denny Roll and Panel Co., 273 N.C. 368, 370-71, 159 S.E.2d 861, 863 (1968), in which the court said:

> There was evidence that, in the appraisal of property, there are three standard approaches, namely (1) the cost approach, (2) the income approach, and (3) the market comparison approach; that the cost approach involves a determination of the fair market value of the (vacant) land, the cost of reproduction of the buildings or replacement thereof by new buildings of modern design and materials less depreciation; and that the income and market approaches include a consideration of the rentals and prices obtained from the lease or sale of comparable properties reasonably related in respect of location and time.

H. Appraisal Witness Not Restricted to Particular Appraisal Method

In Board of Transp. v. Jones, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-12, the court ruled that the statute speaks only to the exclusive measure of damages to be employed by the commissioners, judge or jury and in no way attempts to restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." See generally State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); see Department of Transp. v. Burnham, 61 N.C. App. 629, 301 S.E.2d 535 (1983); Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1972); In Re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984) (where expert was allowed to base his opinion as to value on hearsay information); See Department of Transportation v. Fleming, 112 N.C. App. 580, 436 S.E.2d 407 (1993), where expert witness was not allowed to give opinion regarding the value of land when the expert's opinion was based entirely on the net income of defendant's plumbing business, since loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. But see, City of Statesville v. Cloaniger, 106 N.C. App. 10, 415 S.E.2d 111 (1992), where the Court allowed an expert to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The court stated in Dept. of Transportation v. Fleming, 112 N.C. App. at 584: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." By analogy, the rental value of property is competent upon the question of the fair market value of property on the date of taking. Raleigh-

Durham Airport Authority v. King, 75 N.C. App. 121, 330 S.E.2d 618 (1985); and Raleigh-Durham Airport Authority v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

Of course, the trial court is required to instruct the jury only on the before-and-after-value rule set forth in G.S. 136-112(1) or the "greater of" rule set forth in N.C. Gen. Stat. § 40A-64. Board of Transp. v. Jones, 297 N.C. 436, 439, 255 S.E.2d 185, 187 (1972).

I. Partial Taking - Land Affected: Single Tract vis-a-vis Several Tracts - Practice Tips

1. What Constitutes Larger Tract Affected by Condemnation

As a practical matter, before proceeding to appraise a tract of land in a partial-taking case, the parties to the condemnation action must determine the boundaries of the larger tract affected by the taking. This determination is important to both the condemnor and the owner because (1) the condemnor may be able to show an off-set of benefits, or (2) the owner may want to reduce the size of the larger tract to avoid the condemnor claiming off-set of benefits to the remaining acreage, or (3) if there is no claim of off-set of benefits by the condemnor, the owner may desire to include other land owned by him in the area in the larger tract in order to show damages caused by the taking to such remaining lands.

Under North Carolina law and the law of most jurisdictions, when the whole or a part of a particular tract of land is taken under eminent domain; the owner is not entitled to compensation for injury to other separate and independent parcels of land belonging to him which may result in the taking. But the owner is entitled to all damages to the unit of land affected by the taking. Furthermore, the condemnor is not entitled to the general or special benefits which accrue to other separate and independent parcels owned by the condemnee, but the condemnor is entitled to benefits, if any, that accrue to the unit of land affected by the taking. Department of Transp. v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983). To recover under § 136-112(1), the area affected and the area taken must constitute a single tract. Id.

Therefore, the first thing one should do after employment to represent an owner or condemnor is to visit the land. You should thoroughly inspect the land. Determine whether the owner has other land in the area, especially land used in the same business, such as a farming operation involving several tracts even though separated by roads or other natural boundaries. Determine the exact location of these other tracts in relation to the tract sought to be condemned. Establish that the condemnee owns the several tracts, and determine whether the tracts were acquired by the owner at the same time. After gathering this information, you may then be in a position to decide, with the assistance of your appraisal witnesses, whether it is in your client's interest to attempt to enlarge or decrease the size of the larger tract or tracts affected by the taking.

In too many cases the condemnor's attorney decides by default what land area is affected by the taking. This is accomplished simply by the fact that the condemnor has the first opportunity to appraise the larger tracts. In some instances the condemnor may appraise only one of several adjoining tracts owned by the condemnee simply to reduce the cost of appraisal. In other instances, however, the condemnor may include or exclude from the land affected by the

taking, adjoining tracts owned by the condemnee in order to show off-set of benefits or reduce the remaining land area to eliminate the owner's claim of damage to the remainder. Again, the owner's lawyer should carefully review his options as to the land owned by his client that may be affected by the taking, carefully reading Barnes v. State Highway Comm'n, 250 N.C. 378, 384-86, 109 S.E.2d 219, 224-26 (1959). The court in Barnes states:

> 'It is well settled that when the whole or a part of a particular tract of land is taken for the public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him which results from the taking.' Nichols on Eminent Domain (3rd Edition), sec. 14.3, p. 426; Sharp v. United States, 191 U.S. 341, 48 L. Ed. 211, 24 S. Ct. 114, affirming 50 C.C.A. 597, 112 F. 893, 56 L.R.A. 932. The North Carolina statute provides that 'in all instances (where a portion of a tract of land is taken for highway purposes) the general and special benefits shall be assessed as offsets against damages.' (Parentheses ours) G.S. 136-19. It follows that, when the State takes a part or all of a tract of land for highway purposes, it is not entitled to offset against damages the benefits to other separate and independent parcel or parcels belonging to the landowner whose land was taken.
>
> Ordinarily the question, whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken or offsetting benefits against damages, is one of law for the court. . . .
>
> * * *
>
> There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis. . . .
>
> * * *
>
> The general rule is that parcels of land must be contiguous in order to constitute them a single tract for severance damages and benefits. But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit. It is generally held that parcels of land separated by an established city street, in use by the public, are separate and

> independent as a matter of law. Todd v. Kankakee & I. Railroad Co., 78 Ill. 530 (1875); Wellington v. Railroad Co., (Mass. 1895), 41 N.E. 652. 'When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated.' Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines, and undeveloped streets and alleys are not sufficient alone to destroy the unity of land. 'If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract.' 6 A.L.R. 2d 1200, sec. 2. . . .
>
> If the uses of two or more sections of land are different and inconsistent, no claim of unity can be maintained. But the mere possibility of adaptability to different uses will not render segments of land separate and independent. If a map of a proposed subdivision is made and the lots shown thereon are actually a compact body of land, used and occupied as an entirety, they are to be treated as one tract notwithstanding the division into imaginary lots. It has been held that where suburban lots acquired under separate titles are divided by an established highway, they will be considered as one tract where the owner uses them together for tillage and cultivation in connection with his residence on one of them. Welch v. Milwaukee & St. Paul Railway Co., (1890), 27 Wis. 108. '. . . (I)f a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by highway, railroad, or canal.' 18 Am. Jur., Eminent Domain, sec. 270, p. 190.

See also State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 407, 317 S.E.2d 904 (1984); City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C.2d 214, 299 S.E.2d 214 (1982).

2. Larger Tract Affected - Chapter 40A Rule Applicable to Private and Local Public Condemnors

Under Chapter 40A in partial-taking condemnations, for the purpose of determining compensation due the owner, "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67 (emphasis added); see City of Winston-Salem v. Tickle, 53 N.C. App. 516, 281 S.E.2d 667 (1981); see generally U.S. v. 2.33 Acres of Land, More or Less, 704 F.2d 728 (4th Cir. 1983).

J. "Before and After" Rule in Partial-Taking Condemnations

When the entire property is taken in condemnation, the just compensation required is the fair market value of the property taken on the date of taking and this is arrived at by fairly standard appraising techniques. The comparative sales approach is primarily used, then the capitalization of income approach and, last, the reproduction cost less depreciation. The last method is used if there are not enough sales to make a market or the property is not income-producing. Sometimes a combination of these techniques is used. It should be noted that the capitalization of income approach is not favored by the federal courts, U.S. v. 69.1 Acres of Land, 942 F.2d 290 (4th Cir. 1991), although it is approved by the state courts when no other method is available or where income is directly attributable to the land itself, i.e., farming, parking lot, etc. Raleigh-Durham Airport Authority v. King, 75 N.C. App. 121, 330 S.E.2d 618 (1985). City of Statesville v. Cloaniger, 106 N.C. App. 10, 4415 S.E.2d 111 (1992). But the valuation problem most unique to condemnation litigation is the partial taking where the condemnor takes part of an entire tract and the owner must be compensated for the part taken and the loss of value to the property that remains or the damage to the remaining portion as a result of the severance, off-set by special or general benefits, if any. The measure of damages, as expressed in the "before and after" rule, is stated in Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959), as follows:

> . . . the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking and the fair market value of what is left immediately after the taking. Proctor v. Highway Commission, 230 N.C. 687, 791, 55 S.E.2d 479. 'In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses?' Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 186 N.C. 179, 183-184, 119 S.E. 213, quoting from Boom Co. v. Patterson, 98 U.S. 403, 25 L.Ed. 206. The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or which it was adapted, which affected

its value in the market at the time of the taking and not merely the condition it was in and the use to which it was then applied by the owner. But compensation should not exceed just compensation, and value should not exceed fair market value. The application of the concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so. Gallimore v. State Highway and Public Works Commission, supra.

But the fair market value of the lands of petitioners immediately before the taking was not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It was the fair market value of the lands as a whole in its then state according to the purpose or purposes for which it was then best adapted and in accordance with its best and highest capabilities.

Petitioners' lands at the time of the taking consisted of fields and woodlands. They are situated within the city limits of Winston-Salem and surrounded by high-type residential properties and valuable business areas. It would be manifestly unfair to appraise them merely as agricultural lands and forests. In valuing property taken for public use, the jury is to take into consideration 'not merely the condition it is in at the time and the use to which it is then applied by the owner,' but must consider 'all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market.' Nantahala Power Light Co. v. Moss, supra, 220 N.C. at page 205, 17 S.E.2d at page 13, and cases cited. 'The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account.' Carolina & Y. R.R. v. Armfield, 167 N.C. 464, 466, 83 S.E. 809, 810 quoting from Pierce on Railroads, p. 217.

But the value to be placed on land taken under the right of eminent domain must not be speculative or based on imaginary situations. The uncontradicted testimony in the instant case is that the best and highest capabilities of petitioners' land was for subdivision into lots, a small part for business, the greater part for residences. 'It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land,

> laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed.' Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), pp. 107-109. It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative .. . . (Citations Omitted)
>
> * * *
>
> In estimating the fair market value of land before and after the appropriation of a portion thereof for public use, all the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted, which affects its value in the market are to be considered. . . .

250 N.C. at 387-389, 109 S.E.2d at 227-28.

It is important to understand that "fair market value" is really based on assumptions, not facts - and the most "believable" appraisal witness, whether expert MAI or lay landowner, will have the most impact upon a jury's verdict.

K. General and Special Benefits to Remainder of Larger Tract Affected by the Taking

1. Definition

"Special benefits" are benefits that accrue only to the landowner whose land is condemned and not to surrounding landowners. "General benefits" are benefits common to the land being condemned and to all neighboring landowners. See Department of Transp. v. McDarris, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

2. Burden of Proof

Although the landowner carries the burden of proof in establishing the damage to his property in a condemnation action, the condemnor carries the burden of proving any off-setting benefits. Kirkman v. State Highway Comm'n, 257 N.C. 428, 126 S.E.2d 107 (1962).

3. Off-Setting Benefits In Chapter 136 Condemnations

The distinction between special and general benefits is no longer important in Chapter 136 condemnations, since N.C. Gen. Stat. § 136-112(1) provides that consideration shall

be given to both special or general benefits. Board of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980); N.C. Gen. Stat. § 136-112(1); see also State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 940 (1984); State v. Thrift Lease, 75 N.C. App. 152, 330 S.E.2d 28 (1985), in which landowner was denied compensation because of the increase in his remaining property due to the condemnation.

4. Off-Setting Benefits in Chapter 40A Condemnations

(1) Compensation to Reflect Project as Planned

Article 4 (Just Compensation) of Chapter 40A provides that the amount of compensation due the owner shall not reflect an increase or decrease in the value of the property due to the condemnation, except as provided in Article 4. See N.C. Gen. Stat. § 40A-63. There is one pertinent provision in Article 4, which is taken from Section 1006 of the Uniform Eminent Domain Code ("Uniform Code") which, in effect, provides for off-setting both special and general benefits, except that the award cannot be less than the fair market value of the property taken. But see Town of Hillsborough v. Bartow, 38 N.C. App. 623; 248 S.E.2d 364 (1978), holding that under former Chapter 40, the benefits that can be offset are limited to special benefits. N.C. Gen. Stat. §§ 40A-66 & - 64(b)(ii); see 10 Nichols App. D-3 for a reprint of the Uniform Act, approved by the National Conference of Commissioners on Uniform State Laws in August, 1974. N.C. Gen. Stat. § 40A-66, captioned "Compensation to Reflect Project as Planned," provides:

> (a) If there is a taking of less than the entire tract, the value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.
>
> (b) The value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized.

N.C. Gen. Stat. § 40A-66 (emphasis added).

The "comment" under Section 1006 of the Uniform Code offers some clarification of N.C. Gen. Stat. § 40A-66(a) and (b). The comment states that subsection (a)

> [M]akes it clear that in partial taking cases the 'after' value must reflect changes in value caused by the project as planned, including any work to be done pursuant to pretrial order or agreement of the parties . . . .
>
> The rule set out in Subsection (a) is intended to provide an inducement to condemnors to develop project designs that will mitigate damages to or confer benefits upon remainder properties so far as possible, ... If the condemnor has no specific proposal for the design and construction of the project, the court may properly assess the "after" value of the remainder on the basis of

> the most injurious plan that is reasonably probable. See People v. Schult Co., 123 Cal. App. 2d 925, 268 P.2d 117 (1954) . . . .

The comment under subsection (b) states:

> Under Subsection (b), the determination of fair market value of the remainder is not based on the often unrealistic view that the improvement has already been completed on the valuation date, but must be computed in a manner that will take into account any anticipated delay before the benefit or damage to the remainder is actually realized.
>
> See 10 Nichols App. D-3-84.

(2) Compensation Cannot Be Less Than Value of "Take"

In partial takings under Chapter 40A, if the value of the remainder is more valuable than the entire property before the taking (because of off-set of benefits), compensation to the owner cannot be less than "the fair market value of the property taken" under the "greater of" rule. N.C. Gen. Stat. § 40A-64(b)(ii). Thus, unlike a Chapter 136 condemnation, under Chapter 40A there can be no zero awards irrespective of the amount of the off-setting benefits since the measure of damages in partial takings is the greater of (1) the difference between the before-and-after fair market values of the property taken, or (2) the fair market value of the property taken.

L. Interest as Part of Just Compensation

In an Article 2, Chapter 40A condemnation, if the private condemnor pays into court the sum appraised by the commissioners and enters into possession of the land sought to be condemned and the condemnation case is then appealed, the condemnee is entitled to interest on the principal sum set by the commissioners (or the amount set by a jury on appeal if it is a larger sum) from the date of possession of the property by the condemnor. Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); City of Winston-Salem v. Wells, 249 N.C. 148, 105 S.E.2d 435 (1958); DeBruhl v. State Highway Comm'n, 247 N.C. 671, 10 S.E.2d 229 (1958).

In Article 3, Chapter 40A and Chapter 136 condemnations, the landowner may withdraw the amount deposited with the court as an estimate of just compensation. Thus, the superior court judge is required to add interest on the amount awarded to the landowner above the sum so deposited from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest is required for the amount deposited because the landowner has the right to use that money. N.C. Gen. Stat. §§ 136-113 (applicable to Departments of Transportation and Administration) and 40A-53 (applicable to local public condemnors) provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment.

The basis for the payment of interest is the constitutionally required payment of just compensation. Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1922). Interest must be paid

because the landowner has been deprived of the use of his land and is also deprived of the use of his money during the time between the condemnor's taking of possession (as in Article 2) or filing of the complaint (as in Article 3 and Chapter 136) and the final judgment. Thus, the landowner has a constitutional right to interest on the amount of damage awarded, less any sum previously withdrawn, from the date of possession (Article 2) or "date of taking," i.e., filing of petition (Article 3 and Chapter 136) to the date of judgment.

In a landmark decision, the North Carolina Supreme Court declared that because interest on the value of the property from the date of taking is part of "just compensation" it was not subject to a statutory cap if that cap did not justly compensate the landowner. Lea Co. v. Board of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986). The opinion discusses authority from other jurisdictions before declaring that the amount of interest awarded should be based on a "prudent investor" standard instead of the statutory rate. The court adopted the guidelines for determining interest set out in Matter of City of New York, 58 N.Y.2d 532, 462 N.Y.S.2d 619,449 N.E.2d 399 (1983).

> The statutory rate is presumptively reasonable, but the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates. The landowner must demonstrate that a higher interest rate for the delay in payment is required as an integral part of just compensation. The statutory rate will constitute a floor for the interest rate to be used in awarding additional compensation when the State delays its payment to the landowner.

Lea Co. v. Board of Transp., 317 N.C. at 261, 345 S.E.2d at 359. A "prudent investor" is not to be determined using hindsight, and the court advised trial courts to calculate the proper rate of interest based on the rates paid on investments of varying length and risk. Id. at 263, 345 S.E.2d at 360.

As the determination for calculating the correct interest rate is a judicial function effectively voiding the statutory scheme, the court invoked its "rarely used general supervisory powers" to address two issues not raised by the parties. Id. First, the court held that the trial judge, instead of the jury, was to determine the correct rate of interest. On the second issue, the court declared that whether interest should be compounded was to be determined on a case-by-case basis by applying the "prudent investor" standard to determine if a "prudent investor" could have obtained compound interest in the marketplace during the period at issue.

In practice, the judge adds the interest to the sum awarded by the jury and there is no duty to instruct the jury regarding interest, although the practice is to explain to the jury that interest will be added by the court to their verdict and that they should not concern themselves with awarding interest. See State Highway Comm'n v. Yarborough, 6 N.C. App. 294,170 S.E.2d 159 (1969).

XII. PRORATION OF PROPERTY TAXES; REIMBURSEMENT FOR TAXES PAID ON CONDEMNED PROPERTY

A property owner whose property is totally taken in fee simple by any condemnor shall be entitled to reimbursement of the pro rata portion of real property taxes paid "which are allocable to a period subsequent to vesting of title in the condemnor, or the effective date of possession of such real property, whichever is earlier." On or after August 1, 1997, owners who have property condemned, or who deed property in lieu of condemnation, may be entitled to reimbursement from the condemnor for all deferred taxes paid by the owner pursuant to G.S. §§ 105-277.4(c). N.C. Gen. Stat. §§ 40A-6 and 136-121.1.

XIII. CONDEMNATION OF PROPERTY SUBJECT TO LIEN

N.C. Gen. Stat. § 40A-68 (applicable to private and local public condemnors), provides:

> Notwithstanding the provisions of an agreement, if any, relating to a lien encumbering the property:
>
> (1) If there is a partial taking, the lienholder may share in the amount of compensation awarded only to the extent determined by the commissioners or by the jury or by the judge to be necessary to prevent an impairment of his security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness until it is paid; and
>
> (2) Neither the condemnor nor the owner is liable to the lienholder for any penalty for prepayment of the debt secured by the lien, and the amount awarded by the judgment to the lienholder shall not include any penalty therefor.

Thus, section (1) changed prior law in North Carolina under which a lienholder, upon a partial taking, was entitled to all of the condemnation award or a full discharge of his lien from the award. See 27 Am. Jur. 2d § 257. Under section (2) prepayment penalties in notes or other obligations secured by the lien of a deed of trust on the property sought to be condemned are declared unenforceable.

Since the right to mortgage one's property is within the constitutional guaranty of freedom of contract, the law in force at the time the mortgage or deed of trust or other indenture was executed is held to be the law which determines the force and effect of the mortgage agreement. See Brine v. Hartford Fire Ins. Co., 96 U.S. 627 (1878); 55 Am. Jur. 2d § 5. Thus, the restrictions of N.C. Gen. Stat. § 40A-68 would apply only to liens that were executed or became effective on January 1, 1982, and thereafter.

XIV. CONDEMNATION OF PROPERTY SUBJECT TO LIFE TENANCY

When property is condemned the question often arises whether or not the award should be distributed proportionately between the life tenant and the remainderman. In the absence of a statute to the contrary, the great majority of courts considering the issue have ruled that the

award stands in the place of the realty and must be maintained as a whole, with the life tenant receiving the income produced by investing the award and the corpus being reserved for ultimate distribution to the remaindermen. See Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); 29A C.J.S. Eminent Domain § 199; 27 Am. Jur. 2d § 252.

The court in a Chapter 136 condemnation has authority to enter an appropriate order ascertaining the life tenant's interest in the award and authorizing payment of the amount to the life tenant. N.C. Gen. Stat. § 136-104.

Likewise, Chapter 40A grants wide latitude to trial courts to apportion the award among life tenants and remaindermen or authorize any other equitable arrangement. N.C. Gen. Stat. § 40A-69.

XV. RULES OF EVIDENCE IN CONDEMNATION LITIGATION

A. Leading Condemnation Decisions

If I were limited to recommending to you one court decision to read and analyze before the trial of a condemnation case, it would be Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959). The late Justice Clifton L. Moore authored a rather definitive treatment of many of the rules of evidence applicable to condemnation trials. Justice Moore also wrote the Supreme Court's opinion in State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965), which should be read by you in connection with the Barnes decision, especially as it relates to the handling of the testimony of expert appraisal witnesses in court. And, neither of these decisions should be followed blindly without a careful analysis of State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972), which contains a lengthy and interesting opinion written by then Justice Sharpe. See also Duke Power Co. v. Winebarger, 300 N.C. 57, 226 S.E.2d 227 (1980). For two "cutting edge" decisions concerning the admissibility of evidence of the valuation of condemned property that was used as a parking lot on the date of taking, see Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985) and Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 121, 330 S.E.2d 618 (1985).

B. Summary of Significant Rules of Evidence

The following is a summary of some of the rules of evidence applicable to the trial of condemnation cases.

1. Witnesses - One familiar with the property involved may testify as to his opinion of its value even though he is not an expert on market value generally. Responsible Citizens In Opposition to Flood Plain Ordinance v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983); Harrellson v. Gooden, 229 N.C. 654, 50 S.E.2d 901 (1948); Knott v. Washington Housing Authority, 70 N.C. App. 95, 318 S.E.2d 861 (1984). A witness may give his opinion as to the value of the land if his opinion is based upon knowledge, observation and experience. Durham & Northern R.R. v. Bullock Church, 104 N.C. 525, 10 S.E. 761 (1889). An expert witness can, according to the discretion of the trial court, be required to relate the underlying facts upon which his opinion is based. Lea Co. v. North

Carolina Board of Transportation, 308 N.C. 603, 304 S.E.2d 164 (1983). But where an expert witness first visited the site three years after the taking and after the highway was constructed, objection made to his opinion of the "before" value of the property was properly sustained. State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968). An appraisal made 18 months prior to taking was held admissible when the evidence showed no substantial changes had taken place. Wilson Redevelopment Comm. v. Stewart, 3 N.C. App. 271, 164 S.E.2d 495 (1968). The opinion of appraisal expert based upon opinion of another expert is incompetent. State Highway Comm'n v. Hamilton, 5 N.C. App. 360, 168 S.E.2d 419 (1969). Thus an expert may not give an opinion of highest and best use of property when his opinion is based in part on opinion evidence given in trial by other witnesses. State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968). However, an expert is allowed to base his opinion of value upon hearsay information and data gathered by others. In Re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984). An appraisal witness is not restricted to any particular appraisal method or technique in determining value of property. Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979); see State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965).

2. Evidence of the highest and best use and of all the potential uses to which the condemned property is adaptable is admissible on the question of compensation. Williams v. State Highway Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960); Gallimore v. State Highway Comm'n, 241 N.C. 350, 85 S.E.2d 392 (1955); Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 121, 330 S.E.2d 622 (1985); Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985). This often is one of the chief points of controversy between the condemnor and condemnee in a trial to determine just compensation. But, as earlier noted, it is not competent to develop in detail the per unit or per lot value of undeveloped land. State Highway Comm' v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968); State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965); Barnes v. Highway Commission, 250 N.C. 378, 109 S.E.2d 419 (1959). 4 Nichols § 12B.14[3].

3. Commissioners as Witnesses - The value testimony of a commissioner (who earlier served to assess just compensation) is admissible on a trial de novo; however, the fact the commissioner served and the amount of the award are inadmissible even on cross-examination. 30 C.J.S. Eminent Domain § 372(6). Neither the commissioners' report nor the amount deposited is competent evidence on the issue of compensation. See N.C. Gen. Stat. §§ 40A-48(d) and 136-109(d).

4. Maps, photographs, video pictures and aerial photographs are admissible to illustrate testimony of a witness. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); State Highway Comm'n v. Conrad, 263 N.C. 394, 139

S.E.2d 553 (1965); Barnes v. Highway Comm., 250 N.C. 378, 109 S.E.2d 219 (1959); Annot., 57 A.L.R. 2d 1351. But see Metropolitan Sewage Dist. of Buncombe County v. Trueblood, 64 N.C. App. 390, 308, S.E.2d 340, cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1983), where pictures of damages occurring after the actual taking were held inadmissible.

5. Map of Proposed Subdivision - "Under proper circumstances a map of a proposed subdivision of undeveloped land is admissible to illustrate and explain the testimony of witnesses as to the highest and best available use of the property and that it is capable of subdivision .. . But where such map is admitted in evidence, the inclusion of a price per lot noted thereon or by testimony of witnesses is incompetent and should be excluded ... Such map should not be admitted where it is calculated to mislead the jury into allowing damages for improvements not in existence ... The trial court is clothed with discretion to admit or exclude such evidence in accordance with the particular circumstances presented." State Highway Comm'n v. Conrad, 263 N.C. 394, 397-98, 139 S.E.2d 553, 556 (1965) (emphasis added) (citations omitted); Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959). But see State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972), in which the court limited the language of Barnes and Conrad, as follows:

In Barnes, the Highway Commission took 12.19 acres of the petitioners' 46.86-acre tract for a limited access highway (expressway), and the petitioners brought a proceeding to obtain compensation. After the taking they had a civil engineer to make two maps of the property. One, made without reference to the expressway, showed a residential subdivision containing streets and 86 building lots. The other showed the expressway, streets, and 62 lots. At the trial, the petitioners (owners) offered the maps as substantive evidence that the land was capable of being subdivided into residential lots (Underline added). The Commission's objection was sustained.

Later, after an expert realtor had testified that the property both before and after the taking, was adaptable to practical residential subdivision, the judge admitted the maps to illustrate and explain the testimony of the witness. He excluded testimony as to the value of the property based on the number of lots before and after taking and the value per lot, less estimated cost of subdividing and developing. Disappointed in the verdict, the petitioners appealed, assigning as error the judge's refusal to admit the two maps as substantive evidence and to permit the undeveloped property to be valued on a per-lot basis. This Court held that the maps were properly excluded as substantive evidence and that the property could not be valued on a per-lot basis. (Underline added)

Although the Highway Commission had not appealed and no assignment of error challenged the use of the maps of the two "supposed

subdivisions" for the purpose of illustrating the testimony of the witnesses, there appears in the opinion 'a remark by the way' that 'the maps showing subdivisions were relevant and competent to illustrate and explain the testimony as to the possibility and manner of subdividing . . .,' Id., at 390, 109 S.E.2d at 229, and that 'petitioners had the full benefit of the maps upon those phases of the case to which they properly pertained.' Id. at 391, 109 S.E.2d at 229. Clearly this remark was dictum.

In Highway Commission v. Conrad, supra, the landowner offered in evidence a map showing a proposed subdivision of condemned property upon which no improvements had been made and no lots laid out. The map was offered for the purpose of illustrating testimony that the highest and best available use of the land was for a residential subdivision. The trial judge excluded the map. On appeal his ruling was affirmed because (1) there was no showing that the map was prepared by an engineer from an actual survey; (2) there was no contest as to the best and highest capability of the property; and (3) the jury had viewed the premises. Justice Moore, again writing the Court's opinion, said that 'under proper circumstances' a map of a proposed subdivision is admissible to illustrate and explain the testimony of witnesses as to the highest and best use of the property and to show that it is capable of subdivision; that the trial judge, in his discretion, may admit or exclude such evidence in accordance with the particular circumstances presented. He was careful to point out, however, that 'such map should not be admitted where it is calculated to mislead the jury into allowing damages for improvements not in existence' and that where such a map is admitted in evidence testimony placing a price per lot should be excluded. Id. at 398, 139 S.E.2d at 556.

Because '[e]xceptional circumstances will modify the most carefully guarded rule,' 4 Nichols § 12.314, we make no attempt here to define the 'proper circumstances' which will render a map of a proposed subdivision of undeveloped land admissible to explain the testimony of a witness. The opinion in Conrad suggests that when the highest and best use of the property is in dispute a subdivision map made by an expert engineer from an actual survey would be competent to illustrate his testimony that a subdivision was possible and practical, See Campbell v. City of New Haven, 101 Conn. 173, 125 A. 650 (1924), where the court in admitting such a map carefully limited it to that purpose and instructed the jury that it was not evidence of the use which the owner intended to make of the property at some future time. Certainly the admission of a map showing a subdivision which was not an accomplished fact would be an invitation to the jury to value improvements not in existence. In the absence of most positive instructions that the jury could not value the land on a per-lot basis, and an explanation of the reasons why it would be improper to do so, prejudice may be assumed.

> On their facts, Barnes and Conrad cannot be regarded as authorizing the admission of either Exhibit B or C in evidence in this case. We hold that the admission of these maps constituted prejudicial error.

Id. at 15-17, 191 S.E.2d at 651-53.

6. Imaginary Subdivision of Undeveloped Land - Evidence as to the value on a per lot or unit basis of an undeveloped tract is not admissible. "It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof." Barnes v. State Highway Comm'n, 250 N.C. 378, 389, 109 S.E.2d 219, 228 (1959); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); see State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965). The jury should not speculate on imaginary residential subdivisions and sales of lots, even when all the evidence may show that to be the highest and best use of the land. Department of Transp. v. Burnham, 61 N.C. App. 629,301 S.E.2d 535 (1983).

7. Purchase price of the property sought to be condemned is admissible on question of value if the sale was voluntary, not too remote in time and there are no physical changes or changes in uses of property in vicinity. City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982); Northgate Shopping Center v. State Highway Comm'n, 265 N.C. 209, 143 S.E.2d 244 (1965); Redevelopment Comm'n v. Hinkle, 260 N.C. 423, 132 S.E.2d 761 (1963); Palmer v. State Highway Comm'n, 195 N.C. 1, 141 S.E.2d 338 (1928); State Highway Comm'n v. Coggins, 262 N.C. 25, 136 S.E.2d 263 (1924). Testimony of price paid for property condemned four years prior to condemnation is admissible under the above rule. See State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 722 (1967); Board of Transp. v. Revis, 40 N.C. App. 182, 252 S.E.2d 262, cert. denied, 297 N.C. 452, 256 S.E.2d 805 (1979). To determine if the purchase price is admissible, ask if under all circumstances, the purchase price points to the value of the property at the time of taking. Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 99, 310 S.E.2d 338, 342 (1984).

8. Offers to sell or purchase property involved in condemnation are inadmissible to show market value. See Canton v. Harris, 177 N.C. 10, 97 S.E.2d 748 (1919). But offers to sell by condemnee at about the time of taking are admissible in evidence against him if he contends at trial that the property is worth more than the amount at which he offered to sell it, but only to contradict his contention, not to prove value. See 5 Nichols § 21.4[2]. An offer to purchase land at a certain price made by the condemnor who subsequently took it by eminent domain is inadmissible to show market value. 4 Nichols § 12B.04[2]; Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

9. Sales of Similar Lands (Comparable Sales) - "It is held in most jurisdictions that the price paid at voluntary sales of land similar to condemnee's land at or about the time of the taking is admissible as independent evidence of the value of the land taken. But the land must be similar to the land taken, else the evidence is not admissible on direct examination. Actually no two parcels of land are exactly alike. Only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities. See generally Belding v. Archer, 131 N.C. 287, 315, 42 S.E. 800 (1902); 4 Nichols § 12B.04[3]. It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the sale admissible. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986); City of Winston-Salem v. Hege, 61 N.C. App. 339, 300 S.E.2d 589 (1983); Duke Power Co. v. Smith, 54 N.C. App. 214, 282 S.E.2d 564 (1981). It is the better practice for the judge to hear evidence in the absence of the jury as a basis for determining admissibility. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986); State Highway Comm'n v. Helderman, 285 N.C. 645, 207 S.E.2d 720 (1974); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); City of Winston-Salem v. Davis, 59 N.C. App. 172, 196 S.E.2d 21, disc. rev. denied, 307 N.C. 269, 299 S.E.2d 214 (1982). In Duke Power Co. v. Winebarger, 300 N.C. 57, 263 S.E.2d 227 (1980), principles are set forth for handling cross-examination on the value and price of noncomparable properties.

10. Rezoning (Up-Zoning) Probability - A witness may testify that there is a reasonable probability that land involved would be rezoned from "residential" to "business" property in the near future. Likewise, a zoning ordinance currently in effect restricting the use of property is proper evidence for determining market value of land being condemned. Barnes v. Highway Comm.'n, 250 N.C. 378, 391-92, 109 S.E.2d 219, 229-30 (1959).

11. Options to purchase property involved or other property are inadmissible. Market value is determined by actual sales, and not by the asking price and mere offers to buy or sell either land or personal property is not competent. State Highway Comm'n v. Coggins, 262 N.C. 25, 136 S.E.2d 265 (1964); Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); Canton v. Harris, 177 N.C. 10, 97 S.E. 748 (1919); Lloyd v. Town of Venable, 168 N.C. 531, 84 S.E. 855 (1915).

12. Sales made under threat of condemnation are not admissible. Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964); Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 419 (1959); Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

13. Evidence of settlement amounts in condemnation actions and in consent judgments is not admissible on question of market value. State v. Johnson,

282 N.C. 1, 191 S.E.2d 241 (1972); Barnes v. Highway Comm'n, 250 N.C. 378, 109 S.E.2d 419 (1959); Nantahala Power & Light Co. v. Sloan, 227 N.C. 151, 41 S.E.2d 361 (1947).

14. Assessed value of land for ad valorem tax purposes is not competent on question of value. Bunn v. Harris, 216 N.C. 366, 5 S.E.2d 149 (1939).

15. Loss of Future Profits - The loss of future profits to a business caused by condemnation of its property is not admissible. Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960). See Department of Transportation v. Fleming, 112 N.C. App. 580; 436 S.E.2d 407 (1993), where an expert witness was not allowed to give an opinion regarding the value of land when the expert's opinion was based entirely on the net income of the defendant's plumbing business, since loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. But see, City of Statesville v. Cloaniger, 106 N.C. App. 10; 415 S.E.2d 111 (1992), where the court allowed an expert to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The court stated in Dept. of Transportation v. Fleming, 112 N.C. App. At 584, "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." By analogy, as stated earlier, the rental value of property is competent upon the question of the fair market value of property on the date of taking. Raleigh-Durham Airport Authority v. King, 75 N.C. App. 121, 330 S.E.2d 618 (1985); and Raleigh-Durham Airport Authority v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985). Unless sanctioned by statute, loss of profits from a business conducted on the property or in connection therewith is not admissible and may not be included in the award for the taking. Mitchell v. U.S., 267 U.S. 341 (1924); Pemberton v. City of Greensboro, 208 N.C. 466, 181 S.E. 258 (1935); Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932); State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930); Riverside Milling Co. v. State Highway Comm'n, 190 N.C. 692, 130 S.E. 724 (1925); 4 Nichols § 12B.09[1].

16. Loss of Past Profits - Lost profits are not admissible in condemnation proceedings to determine the amount of compensation which an owner of land shall receive. 4 Nichols § 12B.09[l]. "However, evidence of the character and amount of the business conducted upon the land may be admitted as tending to show one of the uses for which the land is available. Thus, it has been held that although an owner should not be compensated for loss of a business operating on appropriated property, the fact that the business operated on the land may be relevant to establish market value." 4 Nichols § 12B.09[1]. (For an excellent analysis and argument in favor of admissibility of lost profits in North Carolina see

Robert Phay, The Eminent Domain Procedure in North Carolina: The Need For Legislative Action, 45 N.C. L. Rev. 587 (1967)).

17. Value of Land to Condemnor - Such evidence is not admissible. Nantahala Power & Light Co. v. Moss, 220 N.C. 200, 17 S.E.2d 10 (1941). Evidence of condemnor's intended use of the property is not admissible. Carolina Power and Light Co. v. Merritt, 50 N.C. App. 269, 273 S.E.2d 727, cert. denied, 302 N.C. 220, 276 S.E.2d 914 (1981).

18. Evidence of a Loss of or Injury to the Good Will of a Business - Such evidence is not admissible on the question of compensation to owner. Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960).

19. Capitalization of hypothetical income to arrive at compensation due the owner is generally inadmissible. United States v. 69.1 Acres of Land, 942 F.2d 290 (4th Cir. 1991); 4 Nichols § 12.3121[3]; but see City of Statesville v. Cloaniger, 106 N.C. App. 10, 415 S.E.2d 111 (1992) (testimony based on capitalization of income from a dairy operated on the property is admissible.)

20. Evidence of the rent received on the property is admissible. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 121, 330 S.E.2d 618 (1985). "When rental property is condemned, the owner may not recover for lost rents, but rental value of the property is competent upon the question of fair market value of the property at time of taking." Kirkman v. State Highway Comm'n, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962). As to condemnation of leaseholds, see City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 S.E.2d 231 (1967).

21. Evidence of the reproduction cost of an improvement with proper allowance for depreciation is competent as a circumstance to be considered in valuing the whole property, provided the improvement adds value to the land in reasonable proportion to cost. Proctor v. State Highway Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949); State Highway Comm'n v. Privett, 249 N.C. 501, 99 S.E.2d 61 (1957); see 4 Nichols § 12.313[1].

22. Evidence of owner's intended use of property condemned and the frustration of owner's plans by the taking is generally inadmissible. State v. Johnson, 282 N.C. 1,191 S.E.2d 641 (1972); Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 503, 78 S.E. 299 (1913); 4 Nichols § 12.3142[3].

23. Cost of removing fixtures and appliances incurred by reason of the condemnation of the leasehold is not competent on the question of compensation. See Williams v. Highway Comm'n, 252 N.C. 141, 113

S.E.2d 263 (1960). But see "relocation assistance" in Article 2, Chapter 133 of the General Statutes of North Carolina.

24. Damage to personal property is not competent on the issue of compensation. See Lea Co. v. North Carolina Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983); Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963); Williams v. Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960); but see Redevelopment Commission v. Denny Roll and Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

25. Cross-examination as to knowledge of values and sales prices of properties not comparable to land condemned allowed for the limited purpose of impeachment, see City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986); but it is improper for cross-examiner to refer to specific values or prices of noncomparable properties in questions to the witness; and if the witness responds that he does not know the value or price of the noncomparable property, the impeachment purpose is satisfied and the inquiry as to that property is exhausted; however, if the witness asserts his knowledge on cross-examination of value or sales price of particular noncomparable property, he may be asked to state that value or price only when the trial judge determines that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues, and in such a rare case the cross-examiner must be prepared to take the witness' answer as given. Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

26. Handling testimony of expert witness is discussed in State Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965); Barnes v. Highway Comm'n, and State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

27. Scope of cross-examination in condemnation case is stated in City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1985); State v. Johnson, 282 N.C. App. 1, 191 S.E.2d 641 (1972); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

28. Character of Parties and Witnesses in Condemnation Cases - "The character of an owner (in a condemnation) is clearly irrelevant to his right to receive just compensation when his land is taken by the State. Evidence of good or bad character of a party to a civil action is generally inadmissible. Such evidence, inter alia, offers 'a temptation to the jury to reward a good life or punish a bad man instead of deciding the issues before them.' Stansbury, North Carolina Evidence § 103 (2d ed. 1963). Until the credibility of a party who has testified in his own behalf has been impeached by imputations of bias, inconsistencies in his statements, or otherwise, his good character may not be proved to corroborate his testimony. Id. § 50." State v. Johnson, 282 N.C. 1, 26, 191 S.E.2d 641,

658 (1972). As to the admissibility of character evidence of witnesses, see State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897) and discussion in Stansbury's North Carolina Evidence (Brandis Revision 1973) §§ 107 and 114.

29. Evidence of owner's stress, anxiety, fear, annoyance and loss of sleep and denial of owners' quiet use, possession and enjoyment of their property is admissible to prove cause and extent of diminution in value of their property. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

30. Punitive damages may not be recovered in a condemnation proceeding. Id.

31. Jury View - The trial judge in a condemnation case may, in his or her discretion, permit the jury to view the property sought to be condemned. N.C. Gen. Stat. § 1-181.1; State Highway Comm'n v. Hartley, 218 N.C. 438, 11 S.E.2d 314 (1940); State Highway Comm'n v. Rose, 31 N.C. App. 28, 228 S.E.2d 664, cert. denied, 291 N.C. 448, 230 S.E.2d 766 (1976).

32. Certified Copies of Public Records - "Copies of all official bonds, writings, papers or documents, recorded or filed as records in any court, or public office, . . . shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand where there is no such seal, unless the court shall order the production of the original." See N.C. Gen. Stat. § 8-34; see Kaperonis v. Highway Commission, 260 N.C. 587, 133 S.E.2d 464 (1973).

XVI. ENVIRONMENTAL CONCERNS

Immediately after your employment by the landowner and after you have visited the property sought to be condemned, move to get a copy of any environmental document that may have been prepared pursuant to the North Carolina Environmental Policy Act, N.C. Gen. Stat. § 113A-1 et seq. If an Environmental Impact Statement has been prepared, you may find it useful for appraisal, settlement negotiations and trial purposes. Additionally, any failure to comply with the Environmental Policy Act should be asserted as a defense in a condemnee's responsive pleading as required by N.C. Gen. Stat. IA-1, Rule 12(b) and failure to do so will constitute a waiver. See State v. Williams and Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

In addition, before a condemnation action is undertaken by a condemnor, environmental regulations should be reviewed for applicability so that the condemnor does not seek to obtain through condemnation a tract with significant clean-up costs. The pervasive reach of environmental regulations and the potential liability for clean-up costs clearly must be considered by any attorney handling an eminent domain matter.

One area of concern is the potential liability for clean-up under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"). 42 U.S.C. § 9601 et seq. The current owner and operator of contaminated property are among the various "potentially responsible parties" CERCLA holds jointly and severally liable for clean-up

regardless of fault, although there is specific protection under CERCLA for a "government entity" which acquires property through the exercise of eminent domain.

One of the limited defenses available under CERCLA permits a landowner to show that the contamination was caused by the act of a third party. See 42 U.S.C. § 9607(b)(3). However, this third party defense is not available to a landowner with a "contractual relationship" to the third party who caused the contamination. "Contractual relationship" is defined to include "land contracts, deeds or other instruments transferring title or possession" unless the property was acquired after the disposal or placement of the hazardous substance thereon and one or more of the additionally listed conditions in 42 U.S.C. § 9601(35) are met. One of the listed conditions which would exclude the transfer of the property from the definition of "contractual relationship" is that "the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or though the exercise of eminent domain authority by purchase or condemnation." 42 U.S.C.A. § 9601(35)(A)(ii). The term "government entity" is not defined in CERCLA, and may not apply to private parties which are vested with the power of eminent domain.

However, like any landowner, a private condemnor who took title to contaminated property would be entitled to utilize the "innocent landowner" defense available under 42 U.S.C. § 9601(35)(A)(i) if it can show that it acquired the property after the contamination occurred and did not know or have reason to know that the contamination had occurred. A landowner is required to take "all appropriate inquiry" prior to acquiring the property in order to be entitled to claim that it did not know or have reason to know of the environmental problem. 42 U.S.C.A. § 9601(35)(B).

Regardless of CERCLA liability, because of the inevitable problems and other potential liability that face an owner of contaminated property, all parties with condemnation authority should be advised to undertake an adequate "due diligence" environmental investigation prior to condemnation in order to help minimize the likelihood they will become an owner of property with significant environmental problems.

The North Carolina statutes imposing liability for the clean-up costs of hazardous waste sites also provide protection to innocent landowners. N.C. Gen. Stat. § 130-310.7(a) provides that "an innocent landowner who is a bona fide purchaser of the inactive substance or waste disposal site without knowledge or without reasonable basis for knowing that hazardous substance or waste disposal had occurred" shall not be considered a responsible party. While the North Carolina statutes provide no special protection for governmental entities as CERCLA does, a governmental entity which otherwise met the definition of a liable party under N.C. Gen. Stat. § 130A-310.7 would be able to raise the innocent landowner defense to the extent it applied.

Although the author has been able to find no cases on point, it appears that the owner of an easement subject to being named as a "potentially responsible party" in any claim for recovery of response costs under CERCLA. The holder of an easement could qualify as an "owner" because it has an interest in the property, or, depending on the scope of the easement, as an "operator" of the facility. For example, if a utility's easement lies across property upon which

a farmer has dumped leftover pesticides, that utility would clearly be subject to being named as a party to a clean-up action, although the defenses discussed above and others might apply.

Liability under CERCLA is the subject of numerous treatises; therefore, this work does not attempt to consider all the potential issues raised concerning apportioning and assigning liability under CERCLA. It is hoped that the above discussion will provide a brief sketch of potential problems which may confront a lawyer handling a condemnation matter.

XVII. RELOCATION PAYMENTS AND ASSISTANCE

The Uniform Relocation Assistance and Real Property Acquisition Policies Act became effective January 1, 1972, and is set forth in Article 2, Chapter 133 of the General Statutes. N.C. Gen. Stat. § 133-6 states the purpose of the Act is

> to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of public works programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to insure continuing eligibility for federal aid funds to the State and its agencies and subdivisions.

The Act provides that public condemnors pay for moving and related expenses (N.C. Gen. Stat. § 133-8), replacement housing for homeowners and tenants (N.C. Gen. Stat. § 133-9), relocation assistance advisory services (N.C. Gen. Stat. § 133-11), and expenses incidental to property transfer (N.C. Gen. Stat. § 133-12) to "displaced persons" (N.C. Gen. Stat. § 133-7[3]). A "displaced person" is defined as "any person who moves from real property or moves his personal property from real property", as a result of the acquisition of the real property or notice of the intent to acquire the property ..." N.C. Gen. Stat. § 133-7.

The Act specifically provides that it is not to be interpreted as creating a new element of damages in a condemnation case. N.C. Gen. Stat. § 133-17. They are administrative payments in addition to "just compensation as provided by the law of eminent domain." Id. As far as the Act is concerned, the rights given displaced persons to receive money and assistance are permissive and not mandatory on the condemning agency; however, this Act was obviously passed to set up state authorization to comply with the federal "Uniform Real Property Acquisition Policy Act," discussed earlier, where federal funds are used in connection with a local or state project and failure of the condemning agency to comply with the federal act can cause a termination of federal funding or a renegotiation with property owners, even in those instances where the property has already been acquired and the owners paid.

XVIII. INCOME TAX IMPLICATIONS OF CONDEMNATION

One of the more important aspects of your representation of a landowner in a condemnation is to assure that he understands fully the tax aspects of a settlement or jury award. As in business generally, you must be mindful of possible tax implications in condemnation cases where tax planning and analysis of a condemnee's tax situation may result in considerable tax economy. Your advice continues even beyond settlement or trial on the issue of compensation.

The taxpayer condemnee may defer (or even escape) taxation on condemnation awards. IRS Code Section 1033 covers "involuntary conversions" and generally what the law provides in § 1033 is an option to the condemnee to elect to defer the recognition of any gain to a later date. In some instance, however, this may result in there never being any recognition of gain, and thus no tax liability, as, for example, where the property is subsequently sold at a loss, or where the condemnee dies and his heirs take the property at a stepped-up basis.

If the involuntary conversion results in a loss, the loss is either recognized or not, without regard to § 1033.

Nonrecognition of taxable gain depends upon replacement of the property with property "similar or related in service or use" to the property condemned. But certain types of real property need only be replaced with property of a "like kind." The replacement period begins to run on the date of the involuntary conversion and ends (1) in the case of real property held for personal use, two years after the close of the first year in which the gain was realized, or (2) in the case of most condemnation of real property held for productive use in a trade or business for investment, the replacement period ends three years after the close of the first year in which any part of the gain upon the conversion is realized. Many difficulties exist in this area and I simply call it to your attention without any attempt to cover the regulations and case law. For more discussion refer to 7A Nichols § 10.01 et seq.

INVERSE CONDEMNATIONS

XIX. INTRODUCTION AND BACKGROUND

A. Constitutional Limitations

There is no area of law more difficult to analyze and reduce to "workable rules" than the vexing questions of law raised by the "intrusion" of one who has the power to condemn upon private "property" with no intention to compensate the owner. There is one exception: Where there is an actual physical entry by government onto privately owned land. This is a situation that everyone should readily recognize as a "taking" for which the owner should receive "just compensation." See Atlantic Coast Line RR. v. State Highway Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966).

One of the fundamental rights expressed in the Bill of Rights is that no person shall have his or her private property taken for public use without just compensation. The Fifth Amendment to the U.S. Constitution, providing that private property shall not be taken for public use without just compensation, requires the federal government to compensate the owner for property which has actually been taken. Bothwell v. U.S., 254 U.S. 231 (1920). In all states except North Carolina, the state constitutions expressly forbid the taking of property for public use without just compensation; and if for any reason the state constitutional provision is not applicable, a taking without compensation would be unconstitutional as a taking without due process of law under the Fourteenth Amendment. Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897); McGovern v. New York, 229 U.S. 363 (1912); Sale v. Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

In North Carolina, however, the Court has consistently ruled that "when private property is taken for public use, just compensation must be paid . . While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' within the meaning of Art. 1, Sec. 17 [now Art. 1, Sec. 19]." Eller v. Board of Education, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. App. 307, 317 S.E.2d 904 (1984); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

B. Definition of Inverse Condemnation

Inverse condemnation is a legal action whereby a property owner seeks to recover damages, i.e., "just compensation," for a "taking" of his or her "property." In City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965), Justice Bobbitt referred to authorities defining "inverse condemnation" and concluded:

> The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction. Where private property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor.

263 N.C. at 663, 140 S.E.2d at 346 (emphasis original).

> Nichols, in his treatise on eminent domain, correctly states:
>
> Basic to a consideration of the question of inverse condemnation is the concept that an owner of property is constitutionally protected against any taking of, interference with, impact upon, or damage to his property or his freedom to dispose of the property. These constitutional provisions are self-executing, constitute a waiver of sovereign immunity, and thus provide a basis for the bringing of an action by the affected owner, to recover for his or her loss. Such action has been variously characterized as a suit in 'inverse condemnation' or 'reverse condemnation' or as an action based on a 'de facto' or 'common law' taking.

3 Nichols § 8.01[4] (emphasis added). Thus, the owner of property may maintain an action in inverse condemnation against any agency having the power of eminent domain where his or her property has been taken by such agency without payment of just compensation. U.S. v. Clark, 445 U.S. 253 (1980); see Dunlap v. Light Co., 212 N.C. 814, 195 S.E. 43 (1938); see also Richard v. Washington Terminal Co., 233 U.S. 546 (1914) (private corporation chartered by Congress was held liable in inverse condemnation). "[A] plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental . . . ." Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101

(1982), quoted in Century Communication v. Housing Auth., 313 N.C. 143, 149, n.1, 326 S.E.2d 261, 265, n.1 (1985).

C. Against Whom Remedy of Inverse Condemnation is Available

The remedy of inverse condemnation, by its very nature, is available only against entities, public or private, which possess the power of eminent domain. Galloway v. Pace Oil Co., Inc., 62 N.C. App. 213, 302 S.E.2d 472 (1983); Ossman v. Mountain States Tel. & Tel. Co., 511 P.2d 517 (Colo.); see City of Atlanta v. Donald, 111 Ga. App. 339, 141 S.E.2d 560 (1965); see Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The Constitution appears to measure a taking of property, however, not by whether the state agency has the power of eminent domain, but by whether there is in fact a "taking." See San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981).

D. Lack of Intent by Condemnor to "Take"

The lack of intent to take does not render a physical appropriation any less a taking. Thus in Sioux Tribe of Indians, 315 F.2d 378, 379 (1963), the court stated that "[a]lthough it might be said that there was not intentional appropriation of these lands, there was, nevertheless, a taking under the Fifth Amendment. . . . It is the taking and the failure to pay just compensation "that gives rise to the cause of action."

E. Burden of Proof

The burden of establishing a taking in an inverse condemnation action is on the landowner. See Penn Central Transp. Co. v. City of New York, 377 N.Y.S.2d 20 at 27 (1975). The landowner must show an actual reduction in the value of his land. See generally Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

F. Statute of Limitation - Inverse Condemnation Proceedings

N.C. Gen. Stat. §§ 136-111 and 40A-51 provide for an action by a landowner whose land is taken by a state, local or other public condemnor without the filing of a complaint and a declaration of taking. Under these statutes the landowner must institute an action within 24 months of the date of the taking or the date the "project" is completed, whichever occurs later. N.C. Gen. Stat. §§ 136-111 and 40A-51; see Frink v. Board of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975); Wilcox v. State Highway Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971); Ledford v. State Highway Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971); Ivester v. Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1938).

A landowner has a 24 month statute of limitations period to institute an inverse condemnation action. This 24 month statutory period does not begin to run until the project alleged to have resulted in a taking is completed. This has been held to include a maintenance period agreed to by a road contractor. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Prior to the enactment of N.C. Gen. Stat. § 40A-51, there was not an express statutory scheme for the bringing of an inverse condemnation action against a public condemnor

other than the State Highway Commission. The North Carolina Supreme Court held that because there was no statutory scheme permitting inverse condemnation, a landowner was entitled to pursue an action for inverse condemnation until such time as a municipality acquired title by adverse possession. Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970). The Hoyle decision was in keeping with an earlier opinion holding that the constitutional entitlement to just compensation was self-executing. Midgett v. Highway Commission, 260 N.C. 241 (1963). In an opinion by Chief Judge Dupree of the Eastern District, Hoyle was relied upon for the proposition that "[i]f plaintiff's property has been taken by defendants, plaintiff is entitled to just compensation under the constitution regardless of when the taking occurred. The time of the taking is relevant only for purposes of valuing the 'just' compensation due." Ocean Acres Ltd. v. Dare County Board of Health, 514 F. Supp. 1117, 1123 (E.D.N.C. 1981), aff'd, 707 F.2d 103 (4th Cir. 1983). The language used by Judge Dupree is overly broad and could give the mistaken impression that any statute of limitations on a claim for just compensation is constitutionally invalid. It is well established that so long as the period is "reasonable," a claim may be barred by a limitations period. Soriano v. United States, 352 U.S. 270 (1957); Ledford v. Highway Commission, 279 N.C. 188, 181 S.E.2d 466 (1971); Smith v. City of Charlotte, 79 N.C. App. 524, 339 S.E.2d 844 (1986); see generally 1A Nichols § 4.102[1].

The opinion of the Court of Appeals in Smith v. City of Charlotte focused on the intent of the legislature, set out in § 40A-1, to make Chapter 40A the exclusive procedure for the condemnation of property. The court concluded that the legislature intended to limit condemnors and landowners to the procedures set out in § 40A. The court reasoned that because an inverse condemnation proceeding is an action to force a condemnor to exercise its condemnation authority, and a condemnation may only be pursued under § 40A, that an inverse condemnation against a public condemnor could only proceed within the two year period established under § 40A-5 1. Relying on Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982), the court went on to hold that the only remedy against the City of Charlotte was an action for inverse condemnation.

Except for N.C. Gen. Stat. § 1-52(17), no analogous statute dealing with taking by private condemnors has been enacted. The lack of a statutory remedy means that a landowner must look to the common law for compensation for his property.

N.C. Gen. Stat. §§ 1-46 provides:

> The periods prescribed for the commencement of actions, other than for the recovery of real property, are set forth in this Article.
>
> …
>
> §§ 1-52. Three Years.
>
> …
>
> Within three years an action
>
> …

> (17) Against a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed or by October 1, 1984, whichever is later.

While the result in Hoyle would no longer apply to a municipality due to the adoption of § 40A-5 1, the reasoning used in Hoyle and echoed in Ocean Acres would apply to an inverse condemnation claim brought against a private condemnor in fact situations where G.S. 1-52(17) is not applicable. Logically, if there is no statutory provision expressly addressing the issue, then the limitations period for an inverse condemnation claim brought against a private condemnor would be determined by the general limitations periods. Carolina Northwestern Railway v. Piedmont Wagon, 229 N.C. 695, 51 S.E.2d 301 (1949) (absent condemnation railroad subject to suit until running of prescription period). Accordingly, a private condemnor would be subject to a claim for just compensation until it acquired title by adverse possession, unless the landowner's claim is barred by the three year statute set forth in G.S. § 1-52(17).

XX. TAKING OF PROPERTY

A. Physical Taking of Property

1. De Facto Condemnation

It is universally recognized that an actual physical entry by government (or any entity having the power of eminent domain) onto private property constitutes a "taking" for which the owner may recover "just compensation" in an action in inverse condemnation. See Board of Transp. v. Terminal Warehouse Corp., 300 N.C. 700, 268 S.E.2d 180 (1980); Atlantic Coast Line R. R. Co. v. State Highway Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966); Sale v. State Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); Investor v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Schloss Outdoor Advertising Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980); 2 Nichols § 6.2. Also, it is well established by statute (N.C. Gen. Stat. §§ 136-108 & -112) and case law that when all direct access to property has been eliminated there has been pro tanto a taking. Frander v. Board of Transp., 66 N.C. App. 344, 311 S.E.2d 308 (1984).

2. Action by Landowner Under Statutory Inverse Condemnation Procedure

(1) Statutory Remedy Exclusive

As has been noted above, where private property is taken without the condemnor filing a petition or complaint, the affected landowner may institute a proceeding seeking just compensation for the taking. See N.C. Gen. Stat. §§ 136-111, 40A-8, -20 & -51; Century Communications v. Housing Authority of Wilson, 313 N.C. 143, 326 S.E.2d 261 (1984); Ledford v. State Highway Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971); Wilcox v. State Highway Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971); Midgett v. State Highway Comm'n, 269 N.C. 241, 132 S.E.2d 599 (1963); Frink v. Board of Transp., 27 N.C. App. 207, 218 S.E.2d

713 (1975). Although a property owner is entitled to just compensation when his land is taken for a public purpose, he must pursue the prescribed statutory remedy (if it is adequate) and within the time specified. Ledford v. State Highway Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971). It has been held that there is no common law right to bring an action for nuisance or trespass against a city, at least as to overflights by airplanes. The remedy, if any, is inverse condemnation. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Private condemnors would not appear as likely to be protected from claims for trespass or nuisance as public condemnors in light of the express reservation of all common law rights for the recovery of tort damages. N.C. Gen. Stat. § 40A-20. However, a landowner may not wait until after a private condemnor has expended money and has converted the land into a public use, or he will be limited to damages for the taking of the land. Carolina & Northwestern Railway v. Piedmont Wagon, 229 N.C. 695, 51 S.E.2d 301 (1949). As the Piedmont Wagon decision reflects the common law, a landowner will be limited to an action for inverse condemnation after public improvements are constructed rather than an action for nuisance, trespass or ejectment under the common law. While the remedy of inverse condemnation against a private condemnor may not be exclusive pursuant to Chapter 40A, as a practical matter it frequently will be the only available remedy and is the only remedy where the private condemnor has expended money and converted the land to public use.

(2) Attorney Fees, Appraisal and Engineering Costs

In the event the landowner is successful and recovers damages for the taking of his property, the court may (upon appropriate findings of fact) award reasonable attorney fees and appraisal and engineering costs. See N.C. Gen. Stat. §§ 40A-8 and 136-119; see also Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17, cert. denied, 313 N.C. 596, 330 S.E.2d 605 (1985); Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983).

3. Inverse Condemnation in North Carolina - Examples of "Taking" of "Property"

In North Carolina the doctrine of inverse condemnation has been applied in numerous cases and in Bynum v. Onslow County, 1 N.C. App. 351, 161 S.E.2d 607 (1968), the Court of Appeals set forth the following partial list:

> Examples of 'inverse condemnation' actions in which the property owner was held to be entitled to compensation for the taking of his property may be found in Portsmouth Harbor Land and Hotel Co. v. United States, 260 U.S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (erection and maintenance of a United States fort and a battery thereon and firing guns over petitioner's land); United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (frequent low level flights over plaintiffs land of U.S. government planes engaged in landing at and leaving a government airport); McKinney v. High Point, 237 N.C. 66, 74 S.E.2d 440 (erection and maintenance of a City water storage tank on property nearby to plaintiffs residence); Eller v. Board of Education, 242 N.C. 584, 89

> S.E.2d 144 (construction and maintenance on school property of a septic tank which caused sewage to seep onto plaintiffs adjacent land); Insurance Co. v. Blythe Brothers Co., 260 N.C. 69, 131 S.E.2d 900 (discharge of numerous explosions upon rock stratum in close proximity to plaintiffs dwelling house incident to construction of a City sewerage system).
>
> In all of these cases the acts of the sovereign in exercise of its governmental powers resulted in the imposing of some more or less permanent servitude upon plaintiff(s) property sufficient for the court to find that there had been a taking of a property interest from the citizen by the sovereign. The acquisition by the sovereign of such an interest, and not the mere incidental damage to the citizen's property by the tortious acts of sovereign's agents, is required before there is a compensable taking of property. Admittedly the line between the two types of situations may not always be precise. As was said by the court in Harris v. United States, 205 F.2d 765:
>
> 'A compensable taking under the federal constitution, like the phrase 'just compensation' is not capable of precise definition. And the adjudicated cases have steered a rather uneven course between a tortious act for which the sovereign is immune except insofar as it has expressly consented to be liable, and those acts amounting to an imposition of a servitude for which the constitution implies a promise to justly compensate. Generally it is held that a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious and within the rule of immunity.'

Id. at 354-55, 161 S.E.2d at 609 (emphasis added).

In the Bynum case, the plaintiff claimed damage to his corn crop resulting from the operation in the streets of a chemical fogging machine by the defendant county. The court held there was "no taking" where the defendant county did not "physically" enter on the land of the plaintiff and take control of his land. Apparently, the court did not feel that a single act of spraying the chemical on plaintiffs land constituted a physical entry on the land or in the event it did constitute an entry, it was for a temporary purpose and thus there was no taking. See generally Lea Co. v. North Carolina Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

4. Nonregulator Taking of Property

The following is a list of nonregulatory circumstances where a "taking" of "property" occurred and the doctrine of inverse condemnation was applied:

(1) City discharged foul matter from its sewage disposal plant on plaintiff's land. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); see Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965); Eller v. Board of Education, 242 N.C. 584, 89 S.E.2d 144 (1955); Varjobedian v. City of Madera, 20 Cal.3d 285, 142 Cal. Rpts. 429, 572 P.2d 43 (1977) (holding that severe odor from the city sewage facility constituted both a taking and a nuisance, with recovery permitted under either theory).

(2) City cut trees on plaintiff's land. Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E.2d 40 (1959); but see State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965). See also N.C. Gen. Stat. §§ 40A-11 and 136-120.

(3) City created nuisance resulting in property damage to plaintiff by filling hole in "unimportant street" with garbage and trash. Hines v. City of Rocky Mount, 162 N.C. 409, 78 S.E. 510 (1913).

(4) City discharged improperly treated sewage into stream upon which plaintiff resided. Moser v. Burlington, 162 N.C. 141, 78 S.E. 74 (1913).

(5) City maintained filthy drain on lot adjoining plaintiff, causing pollution. Downs v. City of High Point, 115 N.C. 182, 20 S.E. 385 (1894).

(6) City erected a silver-painted water tank across street from plaintiff's house that caused a reflection of the sun's rays onto plaintiff's property. McKinney v. High Point, 237 N.C. 66, 74 S.E.2d 440 (1953), second appeal, 239 N.C. 232, 79 S.E.2d 730 (1953); see City of Raleigh v. Edwards, 235 N.C. 671, 71 S.E.3d 396 (1952).

(7) City maintained a road at such a grade that a storm caused water to become impounded on plaintiffs property. Midgett v. State Highway Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

(8) City incinerator spewed smoke and cinders. Dayton v. City of Asheville, 185 N.C. 12, 115 S.E. 827 (1923); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939).

(9) Frequent flights of aircraft over property at low altitudes. U.S. v. Causby, 328 U.S. 256 (1946); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982) (where court held evidence of the plaintiff's allegations of stress, anxiety, fear, annoyance, and loss of sleep caused by frequent aircraft flights over their property

to be admissible); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965).

(10) Severe air pollution peculiarly affected a particular property. See Richard v. Washington Terminal Co., 233 U.S. 546 (1914), where smoke discharged from a tunnel ventilator onto property constituted a "taking."

(11) Government required a lagoon owner to admit members of the public onto his property. Kaiser Aetna v. U.S., 444 U.S. 164 (1979).

(12) Foreseeable increase in propensity for flooding on plaintiff's property held enough to require compensation. Lea Co. v. North Carolina Board of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

(13) However, there is no "right to be seen" vested in the owner of billboards; and inverse condemnation is not proper where the Department of Transportation blocks the view of billboards by planting trees on its road right-of-way. Adams Outdoor Advertising v. N.C. Dept. of Transportation, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

5. Temporary Entry to Survey, Etc. Not a Taking

Entry upon private property to survey take borings, etc. for some public purpose does not constitute a taking or a trespass even in the absence of an authorizing statute, but there may be liability for any damages inflicted. No action in inverse condemnation is available to the owner. Penn v. Carolina Va. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950); Abernathy v. South & Western R.R., 150 N.C. 97, 63 S.E. 180 (1908); Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975); see N.C. Gen. Stat. §§ 40A-11 and 136-111.

B. Non-Physical or Regulatory Taking of Property

1. Overview

In addition to the actual physical taking of property for public use, government can directly affect private property ownership by exercising the police power. The exercise of the police power of the state must promote the health, safety, morals or general welfare of the community. Examples of regulation under the police power include zoning and land use regulations enacted by local governments.

In the early developing stage of inverse condemnation, in the absence of a physical taking no compensation was due the owner. See Pumpelly v. Green Bay, 13 Wall. 166 (1872). However, in recognition of the legal concept that "'property' consists of the so-called 'bundle of rights' - the intangible rights of possession, use and enjoyment, as well as the right to

dispose of the property - the courts came to the conclusion that interference with or impairment or destruction of these intangible rights inherent in our concept of property could constitute a taking." 3 Nichols § 8.1[4]; see Kaiser Aetna v. U.S., 444 U.S. 164, 177 (1979); U.S. v. General Motors Corp., 323 U.S. 373 at 377-378 (1945). Until recent years, however, in order to invoke the constitutional requirement of "just compensation" there must have been an actual physical "taking" and for that reason many courts, even today, treat zoning regulations as invoking only the "police power," not eminent domain power for which compensation must be paid in an action in inverse condemnation. See Furey v. City of Sacramento, 598 P.2d 844 (Cal. 1979). In zoning matters inverse liability, if any, is usually predicated on the fact that the government is attempting to do indirectly under the police power what should be done directly under the eminent domain power.

When applying zoning regulations or other use restrictions to private property, two questions arise. First, is the regulation a reasonable exercise of the police power or does it unreasonably encroach upon the use of private property and thus constitute a taking? Can the property owner sue in inverse condemnation or must he seek to declare the offending regulation unconstitutional, or both?

2. Inverse Condemnation and the Police Power

(1) Early Development

It was inevitable that in a modern, urban society the police power of the state would run, head-on, into the right of private ownership of property and the federal and state constitutional limitations on the taking of property without just compensation. Early in our judicial history, the U.S. Supreme Court ruled that the police power may be used to prohibit "noxious use" of private property to protect the general community, without compensating the property owner. Mugler v. Kansas, 123 U.S. 623 (1887), is an early example of a case construing the application of the police power to a landowner's right to use his property. In Mugler, the State of Kansas enacted statewide prohibition laws and Mugler, owner of a brewery, was criminally prosecuted for failing to terminate his manufacture of intoxicating liquors. Mugler's defense, among other things, was that the effect of the prohibition laws was to transform his legally constructed brewery into a useless and worthless piece of property - without payment of just compensation.

The court did not accept Mugler's argument because it reasoned that "the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot,. .. be deemed a taking ... for the public benefit." Id. at 668-69. Thus, the court in Mugler made a distinction between the exercise of the police power and the power of eminent domain, and established the principle followed in later cases that exercise of the police power did not invoke an obligation on government to compensate the affected owner. The court, quoting from earlier cases, held:

> '[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these

> consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action.

Id. at 668.

The court in Mugler concluded that when the police power is used by government,

> 'prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not - and, consistently with the existence and safety of organized society, cannot be - burdened with the condition that the State must compensate such owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.'

Id. at 669 (emphasis added).

The court held that when the police power is exercised "a nuisance only is abated," but where the power of eminent domain is exercised "unoffending property is taken away from an innocent owner." Id. at 669.

Accordingly, with noxious or nuisance-like activities on private property left unprotected by the limitation of the Fifth Amendment, the court upheld ordinances prohibiting brickmaking in residential areas, Hadacheck v. Sebastian, 239 U.S. 394 (1915), authorizing the felling and destruction of trees capable of spreading an infectious tree disease, Miller v. Schoene, 276 U.S. 272 (1928), and banning horse stables in urban areas, Reinman v. City of Little Rock, 237 U.S. 171 (1915), all without paying compensation to the owners.

(2) Zoning Regulations and Inverse Condemnation - Limits of Police Power

In Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the U. S. Supreme Court considered for the first time the constitutionality of a comprehensive, city-wide zoning plan restricting the location of trades, industries, houses, apartments and the size and height of buildings, etc. The court upheld its validity by extending the "noxious use" doctrine and analogizing incompatible land use to a nuisance. See id. at 387-88. Thus the court stated:

> The ordinance(s) now under review ... must find their justification in some aspect of the police power . . . . The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.
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> * * *

> . . . [T]he law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance is, to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.
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> '. . . A nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard.'

Id. at 388 (emphasis added).

Following the principle that there is no protected property right in noxious or nuisance-like activities, the North Carolina Supreme Court had no difficulty upholding similar ordinances and laws without requiring compensation. See In Re Parker, 214 N.C. 51, 197 S.E. 706, appeal dismissed, 305 U.S. 568 (1938) (requiring owner to remove solid brick wall on alley at rear of lot more than five feet high and 60% solid); Schloss v. Jamison, 262 N.C. 108, 136 S.E.2d 691 (1964) (banning plaintiffs billboard business in business district); see also City of Fayetteville v. Span Distributing Co., 216 N.C. 596, 5 S.E.2d 838 (1939) (prohibiting storage of gasoline in fire district); and Turner v. City of New Bern, 187 N.C. 541, 122 S.E. 469 (1923) (prohibiting maintenance of lumber yards and loading wharves or docks in residential area).

Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946) was an action to restrain the violation of a town ordinance that prohibited the operation of tobacco sales warehouses in certain sections of town. The court refused to grant the town equitable relief. The issues of defendant's criminal liability (if the ordinance provided for such) and payment of compensation for a "taking" were not before the court. Presumably, if the court had enjoined the violation of the ordinance by the defendant and thereby required the defendant's tobacco warehouse to terminate business, the defendant could have brought an action against the town for inverse condemnation. In any event, the court ruled that a tobacco sales warehouse is not a public or private nuisance and stated:

> [t]o justify an interference with an enjoyment of private property, two facts must be established: first, that the property, either per se or in the manner of using it, is a nuisance; and, second, that the interference does not extend beyond what is necessary to correct the evil.

Id. at 690. The court in Town of Clinton v. Ross ruled, in effect, that a tobacco sales warehouse was "a right thing in the right place," since it adjoined property owned by the plaintiff town upon which it operated a municipal cotton platform and vegetable and fruit auction market. The court said that the location and surrounding conditions may render objectionable that which is otherwise lawful. By analogy, therefore, a tobacco sales warehouse in a thickly populated residential section may be lawfully prohibited under the police power – without invoking the

constitutional limitations upon the taking of property without payment of just compensation to the owner. In another decision, the court ruled that a city ordinance setting forth land use regulations on property designated a flood hazard area constituted a valid exercise of the police power and did not constitute a "taking" of property without just compensation. Responsible Citizens v. City of Asheville, 308 N.C. 255,302 S.E.2d 204 (1983).

But governmental regulation of the use of land can result in a situation where substantially nothing of value is left and the land thus becomes worthless. Nectow v. Cambridge, 277 U.S. 183 (1928). In Nectow, the Court reversed a lower court's decision denying a mandatory injunction to issue plaintiff a building permit to erect any lawful buildings within an area restricted to residences. The land had been zoned residential even though it was near a Ford Motor Company auto assembly plant, a soap factory and the tracks of the Boston & Albany Railroad. The court ruled that under the zoning plan "no practical use can be made of the land for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property" and the zoning plan so limiting the land's use to residential "comes within the ban of the 14th amendment and cannot be sustained." 277 U.S. at 187-89. The court stated:

> The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited, and other questions aside, such regulation cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

277 U.S. 188 (emphasis added).

Had the landowner sought relief by an action in inverse condemnation (rather than a mandatory injunction) the high court could have found a "taking" of land for which the owner would have been entitled to just compensation.

In deciding the issue in Responsible Citizens v. City of Asheville, 308 N.C. 255, 263, 302 S.E.2d 204, 209-10 (1983), the court quoted Helms v. City of Charlotte, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961), where it had stated:

> It is a general rule that zoning cannot render private property valueless. The burdens of government must be equal. In other words, if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use that it is reasonably adapted, the ordinance is invalid . . . A zoning of land for residential purposes is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for residential purposes.

In order to constitute a taking, a land use restriction must either not effectuate a necessary and substantial purpose or have an unduly harsh impact upon the owner's use of the land. Ocean Acres Ltd. v. Dare County Board of Health, 707 F.2d 103 (4th Cir. 1983). A mere

decrease in property value is not enough to invalidate a land use restriction. Schmidt v. City of Fayetteville, 568 F. Supp. 217, affd, 738 F.2d 431 (4th Cir. 1983), cert. denied, 469 U.S. 1215 (1984).

In most of the cases involving an "over-reaching" zoning regulation, however, the state courts appear to show a preference for a declaration of unconstitutionality of the regulation, or restraining its enforcement, if at all possible, rather than forcing the regulating authority to purchase the affected property where there was no clear intent to physically acquire the property. This appears to be true even though, conceptually, under established equitable principles, a remedy provided by an action at law (i.e., damages) is preferable. See Frink v. Board of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975). Until recently, most of the litigation involving land use regulations did not commence as an inverse condemnation, but rather as an action by owners to restrain the enforcement of the offending regulation. But, land values have skyrocketed in many areas and inverse condemnations have become the remedy or preference sought by affected landowners.

A few courts do not recognize inverse liability in zoning cases, even when the zoning constitutes a "taking." The sole remedy in such cases is either by way of a declaration of unconstitutionality or by way of injunctive relief. See Furey v. City of Sacramento, 598 P.2d 844 (Cal. 1979).

In any event, it may be stated generally that so long as the activity sought to be regulated on private property is clearly "'noxious" (i.e., manufacturer of intoxicating liquor during prohibition) or constitutes a nuisance-like activity, the regulating ordinance will be sustained under the police power and the diminution in value of the property, if any, will not constitute a "taking" for which "just compensation" must be paid. On the other hand, where the regulating ordinance seeks to proscribe activity on property not because it is harmful per se, but rather because the regulating entity wants such activity conducted in another section of the community, or even worse, permits only uses on the property that may not be economically or physically possible, then serious constitutional problems arise.

Such problems confronted the U. S. Supreme Court for the first time in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Pennsylvania Coal, like so many of the cases analyzed, did not arise as an action by the landowner in inverse condemnation. It was a suit for an injunction by the owner of the land's surface to enjoin Pennsylvania Coal Company from the mining of coal under Mahon's house and lot, pursuant to a state law prohibiting such mining within the limits of a city in order to avoid the destruction of houses and other buildings. The coal company, a predecessor in title to the property, had expressly reserved in the deed conveying the surface the right to remove all the subsurface coal. But Mahon, the surface owner, relied upon the state law (enacted under the police power) taking away the coal company's right to mine the coal. While the court could have based its ruling on this point, it chose to confront the constitutional limits of the police power vis-a-vis private property. The court established the principle that the police power, as it is applied to private property rights, is itself limited:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are

> enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

260 U.S. at 413 (emphasis added).

Based on the facts before it, the court ruled that the state statute (prohibiting the subsurface owner from mining the coal) "does not disclose a public interest sufficient to warrant so extensive a destruction of the (coal company's) constitutionally protected rights." 260 U.S. at 414. Therefore, the statute could not be upheld, because to do so would constitute a taking. Therefore, the surface owner was not entitled to enjoin the mining of coal under his land. The court further concludes:

> The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. [Citations omitted.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished this way under the Constitution of the United States.
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> * * *
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> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 415-16.

In an interesting and enlightening dissent, Justice Louis Brandeis concluded that a restriction imposed on private property to protect the public health and safety from threatened danger is not a "taking." He argued that "[t]he restriction here in question is merely the prohibition of a noxious use", 260 U.S. at 417, and prevents the owner from making a use of the land which interferes with paramount rights of the public. He further argued, "If, by mining anthracite coal, the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep, or

excavating so near the surface, as to expose the community to like dangers. In the latter case, as in the former, carrying on the business would be a public nuisance." 260 U.S. at 418.

What is really involved here, as in other similar cases, is an exercise in "judicial values." The courts speak generally in terms of "proper" exercise of the police power, thus begging the question whether a regulation of property rights effectively deprives the owner of the use and value of his property under the Fifth and Fourteenth Amendments. See HFH, Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975). It must be remembered, however, that while the police power is an inherent attribute of sovereignty, the Constitution is the supreme law of the land and, therefore, constitutes a limitation on all powers of government, including the police power. See Panhandle & Pipe Line Co. v. S.H.C., 294 U.S. 613, 619 (1935).

Close examination of the cases, including the Pennsylvania Coal case, supra, reveals that in most of them there was not an actual "taking" under the eminent domain power, despite the use of the terms "taking" and "appropriation." Instead, in nearly all the cases the point of the constitutional challenge to the regulating ordinance or statute was that it was an invalid exercise of the police power under the due process clause, and the cases were decided on that ground. In the Pennsylvania Coal case the subsurface owner could not have received "just compensation" as a remedy because neither the state nor any other entity, with the power of eminent domain, was a party to the action. See Western International Hotels v. Tahoe Regional Planning Agency, 387 F. Supp. 429, 439 (1975), modified, 440 U.S. 391 (1977).

(3) What Regulation Constitutes a "Taking"

The U.S. Supreme Court has stated that it is "well-established" that governmental regulations can effect a taking. San Diego Gas and Electric v. San Diego, 450 U.S. 621 (1981). The most significant recent decision dealing with takings was decided by the United States Supreme Court in a split decision. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. at 2886 (1992), the Court held that the state must compensate a landowner when its regulations deprives him of "all economically feasible beneficial uses" of the property.

The facts of the case were that David Lucas paid $975,000 in 1986 for two residential lots on the Isle of Palms in Charleston County, South Carolina. In 1988, the South Carolina Legislature passed the Beachfront Management Act, which barred petitioner from erecting any permanent habitable structures on his lots. A state trial court found this rendered the lots "valueless," and awarded "just compensation" of $1,232,387.50. The South Carolina Supreme Court reversed, holding that when a regulation governing the use of property is intended "to prevent serious public harm" no compensation is owed under the Takings Clause despite the effect of the regulations on property value.

The United States Supreme Court, in an opinion by Justice Scalia, reversed and remanded. The Court rejected the "harmful or noxious use" analysis used by the South Carolina Supreme Court as a basis for "departing from our categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026, 112 S.Ct. at 2899. Confiscatory regulations "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029, 112 S.Ct. at 2900. In other words, the regulation must

do no more than could be duplicated in the courts by the state using nuisance laws or by adjacent landowners asserting rights such as riparian rights.

Justice Kennedy concurred in the judgment, discussing points he believed must be considered on remand. He believed that the Court's opinion did not decide the permanent taking claim, but did not foreclose the South Carolina Supreme Court from considering the claim or requiring the petitioner to pursue the administrative remedy of a special permit which was not available when first heard by the South Carolina Supreme Court.

Justice Blackmun dissented, stating, "Today the Court launches a missile to kill a mouse.... [I]t ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). . . . My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests - not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage." 505 U.S. at 1037, 112 S.Ct. at 2904.

Justice Stevens also dissented, arguing "the premature adjudication of an important constitutional question" and "an illogical expansion of the concept of 'regulatory takings"' should be avoided. 505 U.S. at 1061, 112 S.Ct. at 2917.

Justice Souter issued a "Statement" in which he said the case should be dismissed because review was granted on the "unreviewable assumption" that the owner had been deprived of his entire economic interest in the property. 505 U.S. at 1076, 112 S.Ct. at 2925.

In sum, a seriously fractured Court issued a collection of views that are very difficult to decipher and provide no real guidance to the bench and bar. Commentators have reached opposite conclusions on whether the Lucas case is a significant change in the law. See, e.g., J. Paul, After Dust Settles, Not Much Change in Property Rights, Legal Times at 17 (July 13, 1992); D. Pofseo & P. Kamenar, For Regulators Court's Ruling Spells Trouble, Legal Times at 17 (July 13, 1992).

Other cases in this area which may still be apt include Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Long v. City of Charlotte, 306 N.C. 148, 301 S.E.2d 64 (1983); and Responsible Citizens v. Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983). In Penn Central Transp. Co. v. City of New York, 438 U.S. at 124-25, Justice Brennan stated:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that 'Fifth Amendment's guarantee . . . [is] designed 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,' this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the

> government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'

(Citations omitted.)

Justice Brennan acknowledged that while engaging in case-by-case factual inquiries, the court's decisions have identified several factors that have particular significance in determining when a governmental regulation constitutes a "taking." First, what is the economic impact on the landowner. The more detrimental the impact economically, the more likely the regulation will constitute a taking. Second, the extent to which the government encroaches on the owner's use of his land. A "taking" may be more readily found when there is a physical invasion of the property rather than mere interference with the use of the land to promote the common good. Third, the extent to which the regulation promotes "the health, safety, morals, or general welfare" by prohibiting particular uses of the land, i.e., zoning laws. In other words, a taking will not occur if the regulation is a valid exercise of the police power. [See dissent of Justice Brendeis in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416-422.] Fourth, what the regulated land is being used for compared to the use of the surrounding land and neighborhood. Fifth, does the regulation have an unduly harsh impact upon the owner's use of his property. The regulation may be so burdensome or so frustrate the owner's use of the property as to constitute a taking. And sixth, governmental actions that in effect use a part of the owner's property solely for public functions are a "taking." Id. at 125-128.

In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the U.S. Supreme Court held that the California Coastal Commission's requirements that the Nollans give the public an access easement across a portion of their beachfront property, as a condition of granting a permit to build a house on the property, was a taking of property without just compensation in violation of the Fifth Amendment. The Court's opinion, written by Justice Scalia, made the following observation regarding a state-imposed "exaction" as a pre-condition for approval of a developer's plans:

> The access required as a condition of this [building] permit is part of a comprehensive program to provide continuous public access along [the beach] . . . the Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

483 U.S. 825 at 841, 842.

In Nollan Justice Brennan, with whom Justice Marshall joined, dissented.

Even though reversed on appeal, it would be enlightening to one interested in these issues to read Judge Arnold's analysis of Nollan in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989), rev'd 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S.Ct. 2631 (1990).

In Long v. City of Charlotte, 306 N.C. 187, 198-200, 293 S.E.2d 101, 109-10, (1983), Justice Meyer examined in some detail the constitutional limitation of the state's power of eminent domain and held that the remedy of inverse condemnation is the sole remedy for harm to property alleged to be caused by aircraft overflights. The court stated:

> Modern construction of the "taking" requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of property.
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> * * *
>
> The individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern progressive society. Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964). The balance of interests is established by the requirement that in order to recover for the interference with one's property, the owner must establish not merely an occasional trespass or nuisance, but. an interference substantial enough to reduce the market value of his property.

Finally, in Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983), the court pointed out several principles that must be kept in mind when considering a due process challenge to the government's regulation of private property on the grounds that it is an invalid exercise of police powers. The court first determines if the ends sought, i.e., the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. In determining if the means are reasonable, the court asks (1) is the regulation in its application reasonably necessary to promote the accomplishment of the public good and (2) is the interference with the owner's right to use his property reasonable in degree? In Responsible Citizens a city ordinance established land-use regulations on property designated a flood hazard district and required new construction and substantial improvements to be built to minimize flood damage. The court held the ordinance a valid exercise of the police power and that the ordinance did not constitute a "taking" of property without just compensation.

In summary, after Lucas and the other cases discussed, it appears that what is a non-physical "taking" of property for which compensation must be paid is determined on a case-by-case basis. Although one finds some assistance in a review of Lucas and Justice Brennan's opinion in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124-28 (1978), there simply are no "workable rules" and we are left to the facts in each case. (For discussion of the exercise of the police power and eminent domain with respect to the state highway system, see Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983)).

(4) Remedies

In the event a zoning, land-use or other offending regulation constitutes a "taking" of private property, what remedies are available to the landowner? Is a regulation or ordinance that constitutes a taking of property a violation of the due process clause or the constitutional limitation on taking of property without just compensation? If the offending regulation violates the due process clause only, the landowner's remedy may be limited to seeking a declaratory judgment that the regulation is unconstitutional. On the other hand, if a regulation violates the constitutional limitation against taking property without just compensation, the remedy is one for damages (inverse condemnation). See Haley, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation, 54 Wash. L. Rev. 315 (1979).

Although the U.S. Supreme Court had an opportunity in 1981 to decide the issue of remedies available to the owner of private property whose use of the property is adversely affected by an overly-broad zoning regulation, it failed to do so. In San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), the utility purchased land for industrial use and the city later rezoned it for open space, agricultural and light industrial use. The utility brought an action for inverse condemnation and the jury awarded over three million dollars in damages. The judgment was reversed on the grounds that inverse condemnation was not available to the utility to challenge the zoning ordinance. Additionally, the appeals court refused to declare the zoning ordinance invalid and the U.S. Supreme Court, after granting certiorari, dismissed the case on jurisdictional grounds and thus did not address the issue whether a property owner can sue for damages in inverse condemnation where a "taking" of property has been proven as a result of a zoning regulation. The dissenting opinion of Justice Brennan was joined by Justices Stewart, Marshall and Powell. Justice Rehnquist wrote a concurring opinion stating he was satisfied the case should be dismissed on jurisdictional grounds, but he acknowledged his agreement "with much of what is said in the dissenting opinion, of Justice Brennan." 450 U.S. at 633-34. In his dissenting opinion Justice Brennan argued that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation. This interpretation, I believe, is supported by the express words and purpose of the Just Compensation Clause, as well as by cases of this court construing it." 450 U.S. at 1305.

Thus, the four dissenters' opinion (plus Justice Rehnquist's comment in his concurring opinion) supports the use of inverse condemnation when an exercise of the police power results in a "taking" of private property. The Lucas case was an action alleging inverse condemnation by virtue of a regulation enacted pursuant to the police power. It at least confirms that an action in inverse condemnation is a viable remedy for an alleged regulatory taking. See 3 Nichols § 8.01[4].

(5) Use of the Civil Rights Acts to Recover Damages, for "Taking" Property Without Just Compensation

There are a number of courts that now allow a property owner to recover damages under the Civil Rights laws from local governmental entitles which unduly interfere with the

owner's use of property. See San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983); Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978); Bruce v. Riddle, 464 F. Supp. 745 (D.S.C. 1979), aff'd. 631 F.2d 272 (4th Cir. 1980); MacLeod v. Santa Clara County, 749 F.2d 541 (9th Cir. 1984), cert. denied, 472 U.S. 1099 (1985); Vari-Building v. Reno, 596 F. Supp. 673 (9th Cir. 1984).

The Civil Rights Act, Section 1983, Title 42, United States Code, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, .. .

42 U.S.C. § 1983.

Thus, Section 1983 provides an alternative remedy whenever a political subdivision of a state deprives a person of a right guaranteed by the Federal Constitution or federal law. While property may be regulated by the local state agencies, if regulation goes so far as to substantially interfere with the owner's right to use the property for any reasonable purpose, it will be recognized as a "taking." See Ocean Acres Ltd. Partnership v. Dare County Bd. of Health, 514 F. Supp. 1117 (E.D.N.C. 1981), aff'd. 707 F.2d 103 (4th Cir. 1983); see also Monell v. Department of Social Services, 436 U.S. 658 (1979) and Owen v. City of Independence, 445 U.S. 622 (1980), holding that local governmental entities, such as counties and municipalities, are not entitled to sovereign immunity from civil rights actions that is afforded states by the Eleventh Amendment.

There are two requirements of a Section 1983 claim. First, the owner must show that the defendant local government deprived him of a right secured by the constitution and laws of the United States and, second, that the defendant acted under color of state law. Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978).

In Rodgers, it was alleged that the town deprived the Rodgers of equal protection of the law and took their property without due process of law by constructing a sewer line across their land without an easement and "in calculated bad faith" and "in retaliation" for William Rodger's outspoken criticism of the manner in which the town was governed. The court held the Rodgers alleged a cause of action under Section 1983 of the Civil Rights Act. Id. at 317.

In Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983), a real estate developer alleged the defendant county wrongfully withheld a building permit for low-income housing. The Fourth Circuit held that the developer was denied due process of law, even if the developer failed to prove a racially discriminatory motivation. The court further stated that the developer's claim for damages arising from his economic interest in profits flowing from successful completion of the housing development was not too highly speculative to merit

"judicial protection." Id. at 1411. Thus, the developer in this case not only properly invoked the jurisdiction of the federal courts under the Civil Rights Act but may be able to prove and recover "loss of profits" which he could not do in an inverse condemnation action. See Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960).

Last, Section 1983 of Title 42, United States Code, provides for the payment of reasonable attorney fees to the prevailing party in the discretion of the court.

It is now clear that actions under Section 1983 are a viable alternative to state inverse condemnation proceedings. However, some federal courts have stated rather clearly that land-use controversies between local property owners and local governmental entities are best resolved by state courts. For example, in Albery v. Reddig, 718 F.2d 2415, 251 (7th Cir. 1983), the court stated, "the idea that constitutional rights are implicated in this quarrel over the zoning rules is not one to which we would like to become accustomed." See also Studen v. Becke, 588 F.2d 560 (6th Cir. 1978) and Scudder v. Town of Greendale, 704 F.2d 999, 1003 (7th Cir. 1983). The recent case of National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir.), cert. denied, 504 U.S. 931, 112 S.Ct. 1997 (1992), also confirms that the applicable statute of limitations in North Carolina for § 1983 actions is N.C. Gen. Stat. § 1-52(5).

C. Inverse Condemnation and Demolition of Unsafe Buildings

1. Generally Not a "Taking"

Destruction by a municipality of an unsafe building which is in violation of the building code is generally not a "taking" in the constitutional sense and, therefore, cannot give rise to an inverse condemnation. But in Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970) (overruled to the extent it prohibited regulation on aesthetic considerations alone in State v. Jones, 305 N.C. 525, 29 S.E.2d 675 (1982)), the court ruled that a dwelling house unfit for habitation may not be demolished without giving the owner a reasonable opportunity to bring the building into conformity with the housing code. The court stated:

> As Mr. Justice Holmes, speaking for the Supreme Court of the United States, said in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 . . . 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'

277 N.C. at 362, 177 S.E.2d at 891. The court further stated:

> '[P]ublic necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way.'

Id. at 363, 177 S.E.2d at 892.

The court expressly recognized that it did not have before it the question of the authority of the city to destroy the dwelling, without paying the owner compensation, in the event the owner did riot repair the dwelling to make it comply with the Housing Code. However, under the prevailing view as stated in Yates v. City of Raleigh, 46 N.C. App. 221, 264 S.E.2d 798 (1980), if the dwelling continued to constitute a nuisance after the owner had ample time to repair it to Housing Code standards, it could be removed by the city without payment of compensation, if the city had statutory authority to abate such nuisances. See Horne v. City of Cordele, 239 S.E.2d 333 (Ga. 1976).

2. Problem Areas That May Constitute a "Taking"

One of the problems encountered by local governments in entering property to abate such nuisances has been its employee's failure to limit their destruction of property to the property constituting the nuisance. For example, in Rhyne v. Town of Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960), the Town, in the exercise of its governmental power to abate nuisances, entered upon a lot which the owner had permitted to grow up in weeds and, in addition to cutting the weeds (which constituted the nuisance sought to be abated), bulldozed all trees and plants including over 100 oak trees 12 to 15 feet high. The Court ruled that the city may be held liable on the theory of a "taking" of private property. Justice Bobbitt stated the relevant question as follows:

> Where defendant, acting under its power to abate a nuisance, constituting a menace to health, goes upon plaintiffs lot, without plaintiffs permission or consent, for the purpose of eradicating what defendant deems to be such nuisance, and in so doing destroys trees thereon that do not in fact constitute a nuisance, is plaintiffs right to recover compensation for the impairment in value of his property caused by the destruction of the trees defeated because defendant was then engaged in the performance of a government function?

251 N.C. at 525, 112 S.E.2d at 44. Justice Bobbitt answered the inquiry "No," and in affirming the verdict for the plaintiff, he concluded:

> Where a municipal corporation, in the exercise of its governmental power to abate nuisances, enters upon and damages private property by the destruction of trees, buildings, etc., thereon, it is liable for the payment of just compensation unless its acts were in fact necessary to remove or abate a nuisance.

251 N.C. at 528, 112 S.E.2d at 46 (emphasis original).

In short, even when authorized by ordinance (duly enacted under the police power) to abate a nuisance on property, a municipality must act lawfully within such power to abate the nuisance, and it may not unlawfully take or destroy private property not necessary to the abatement of the nuisance without payment of just compensation to the owner. See Yates v. City of Raleigh, 46 N.C. App. 221, 264 S.E.2d 798 (1980).

XXI. ETHICAL CONSIDERATIONS

A. Competent Representation

A condemnation case can be a complex proceeding. The Rules of Professional Conduct (R.P.C.) provide guidance for the practitioner when facing ethical concerns. Under R.P.C. 6(A)(1) and (2), a lawyer has an ethical duty to make every effort to become informed about the statutory and case law, procedure and evidence specially applicable to his client's condemnation case. Under R.P.C. Rule 6(A)(1), a lawyer shall not handle a legal matter which he knows or should know he is not competent to handle; and competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A common practice which would satisfy the mandates of R.P.C. 6 is the association of an expert in condemnation law. The lawyers involved in an association to represent a landowner should be careful to avoid "fee splitting" in violation of R.P.C. 2.6(d). But as with many ethical considerations, most potential problems under R.P.C. Rule 2.6(d) can be avoided by attention to the rule and full and adequate written disclosures to the client.

A graphic illustration of a failure to understand the statutory requirements applicable to private condemnors under Article 2, Chapter 40A, is the holding in Carolina Power & Light Co. v. Crowder, 89 N.C. App. 578, 366 S.E.2d 499 (1988). In the Crowder case, the attorney for the landowner failed to file exceptions to the commissioners' report prior to confirmation by the Clerk of Court. The failure to file exceptions within 20 days of the filing of the report waived the right to appeal the clerk's final judgment to the superior court for a trial de novo. City of Raleigh v. Martin, 59 -N.C. App. 627, 297 S.E.2d 916 (1982). The case shows the traps for the inexperienced practitioner in this area, and the wisdom of exhaustively reviewing the statutory requirements and considering association with a practitioner experienced in condemnation proceedings. The facts of the case also suggest a hypothetical which raises conflicts between professionalism and zealous representation.

Hypothetical Facts:

Young Turk, an associate with a farm specializing in condemnation law, is representing a private utility in a condemnation proceeding seeking a right-of-way across valuable urban real estate. Sam Allthings, a general practitioner, is representing a landowner affected by the condemnation. The Commissioners' Report has just been filed and Sam has not filed exceptions to it, although he tells Turk he intends to appeal if, as is usually the case, the clerk confirms the award. Young Turk realizes that Sam is not aware of the Crowder decision and does not realize that he must file exceptions within 20 days of the filing of the report in order to preserve his appeal.

As Young Turk realizes that Sam will lose the right to appeal, he approaches John Grayhair, the senior partner of his firm. He explains the situation to Grayhair, who has been friends with Sam for thirty years, and asks if he should inform Sam of his mistake or wait for the 20 days to run and have any subsequent appeal dismissed. Grayhair responds that, as a "Southern Gentleman Lawyer", he does

not believe in practicing law by embarrassing another attorney who has fallen into a procedural trap. Reluctantly, Turk disagrees with Grayhair. Who is correct?

Under R.P.C. 7.1(B)(1) a lawyer is permitted to "exercise his professional judgment to waive or fail to assert a right or position of his client." The Comment to R.P.C. 6 further instructs that "a lawyer is not bound to press for every advantage that might be realized for a client." But the Rules and commentary may not justify notifying another attorney of a "procedural trap" which provides a bar to further proceedings against a client. A lawyer would be prudent to obtain the client's consent before affirmatively notifying opposing counsel of a "procedural trap" that lay ahead.

B. Fees

A condemnation proceeding presents the customary ethical considerations which always confront litigators, but certain issues of general concern are especially pertinent to condemnation cases. R.P.C. 3.2 provides that a lawyer or law firm shall not share legal fees with a non-lawyer, and this rule applies to appraisers. In addition to the prohibition against sharing fees, paying an appraiser a percentage of the recovery would conflict with R.P.C. 7.9(B)'s prohibition against making a payment to a witness contingent upon the outcome of the case.

An attorney in a condemnation case may not acquire a proprietary interest in the subject of the litigation in violation of R.P.C. 5.3. While a contingent fee which is reasonable under R.P.C. 2.6 is permissible, an attorney would not be allowed to accept an interest in the real property at issue.

C. Statements to the Media

Because condemnation proceedings often involve matters of intense public interest, attorneys should take special note of R.P.C. 7.7, which forbids an attorney from making statements to the media which "have a reasonable likelihood of materially prejudicing" a jury proceeding. Especially when a local government is the condemnor, the media may have an intense interest in the condemnation proceeding. An attorney should review the Rule in order to disseminate only permissible information.

D. Ex Parte Contacts

Another concern involves R.P.C. 7.10's prohibition on ex parte contact "with a judge or an official before whom the proceeding is pending". An attorney may have occasion to come in contact with a commissioner who has been chosen to set the value of the property. Because a commissioner may not be as familiar with the standards for judicial proceedings as judges are, an attorney should take care to assure that no discussion of the merits inadvertently takes place.

XXII. KEY STATUTES

A. Articles 1, 2 and 4, Chapter 40A, N. C. General Statutes - Condemnation Proceedings by Private Condemnors.

B. Articles 1, 3 and 4, N. C. General Statutes - Condemnation Proceedings by Local Public Condemnors.

C. Article 9, Chapter 136, N. C. General Statutes - Condemnation Proceedings by Department of Transportation and Other State Agencies through Department of Administration.

D. Fed. R. Civ. P. 71A - Federal Eminent Domain Procedure.

XXIII. KEY REFERENCES

A. Wake Forest Continuing Legal Education, Real Property Practice Manual, Chapter 14 (1983).

B. Wake Forest Continuing Legal Education, Annual Review, North Carolina, "Eminent Domain" (annually).

C. North Carolina Bar Association, Institute on Maintaining Your Real Property Practice in 1983, Section VII (1983).

D. North Carolina Bar Association, Institute on Practice Before the Clerk, Section V (1982).

E. North Carolina Academy of Trial Lawyers, Condemnation Law (1989).

F. Nichols, The Law of Eminent Domain (Rev. 3d ed. 1990 and Supp. 1992).

G. 5 Strong's North Carolina Index 3d, Eminent Domain.

H. Pattern Jury Instructions for Civil Cases - Eminent Domain - North Carolina

I. Haley, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation, 54 Wash. L. Rev. 315 (1979)

J. Bley, Use of the Civil Rights Act to Recover Damages for Undue Interference with the Use of the Land, Institute on Planning, Zoning and Eminent Domain [Matthew Bender (1985)].

K. Loeb, Eminent Domain Procedure for North Carolina Governments, Institute of Government, UNC-CH (1984)

L. Hill, Regulatory Taking - The Limits of Land Use Controls, Section of Urban, State and Local Government Law, American Bar Association (1990)

M. Epstein, Takings - Private Property and the Power of Eminent Domain, Harvard Univ. Press (1985)

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Appendix

SAMPLE LANGUAGE FOR TRANSACTIONAL DOCUMENTS

Eminent Domain Clause in Deed of Trust

Eminent Domain Clause in Deed of Trust Permitting Creditor to Apply Condemnation Proceeds to Outstanding Balance Due

Eminent Domain. The Company assign; to the Bank and the Bank is authorized to Collect an amount up to the then outstanding balance on the Obligations and any other sums secured hereby, of any proceeds or awards which may become due by reason of any condemnation :)r other taking for public use of the whole or any part of the Mortgaged Property or any rights appurtenant thereto, and the Bank may, as its option, either apply the same to the Obligations and any other sums secured hereby or release the same to the Company without thereby incurring any liability to any other person. The Company agrees to execute such further assignments and agreements as may be reasonably required by the Bank to assure the effectiveness of this paragraph 2.17.

Apartment Lease

Apartment Lease Permitting Landlord to Terminate Lease if Property is Condemned

Eminent Domain and Casualties: The Landlord shall have the option to terminate this Apartment Lease if the Apartment or any part of it or of the apartment complex of which it is a part is condemned or sold in lieu of condemnation or is damaged by fire or other casualty.

Lease of Building

Lease of Building Giving Landlord the Option to Terminate Lease and Retain Condemnation Proceeds if Material Part of the Building is Taken

Condemnation. In the event the whole or ;my material part of the Building shall be taken by eminent domain or in any manner for a public use, the Lessor may at its option terminate this Lease. Lessee shall not be entitled to any part of any award or payment which may be paid to Lessor or made for Lessor's benefit in connection with such public use and Lessee shall have no claim or rights as against Lessor for the value of any unexpired term of this Lease. It is provided, however, that the widening of streets abutting the land on which the Building stands shall not affect this Lease, provided that no material part of the Building is so taken.

Commercial Space Lease

Lease Terminates if Property is totally Taken, and Lessee has Option to Terminate if Premises Rendered Substantially Unfit for Use

Condemnation. If the Premises are totally condemned or otherwise totally taken by the exercise of any governmental power, this Lease shall terminate on the date the condemnor has

the right to possession of the property being taken. If a portion of the Premises or the Building within which the Premises are located or appurtenances thereto shall be condemned or otherwise taken by the exercise of any governmental power so as to render the Premises substantially unfit for use by Lessee, then Lessee can elect to terminate this Lease as of the date the condemnor has the right to possession of the property being taken.

Commercial Lease

Lease Terminates if Land is Condemned or Sold Under Threat of
Condemnation and Lessee Has No Claim for Portion of Landlord's Proceeds but
Lessee May Seek Compensation from Condemnor

CONDEMNATION: If the whole or any part of the Premises or all means of access thereto shall be condemned or sold under threat of condemnation, this lease shall terminate and Tenant shall have no claim against Landlord or to any portion of the award in condemnation for the value of any unexpired term of this lease, but this shall not limit Tenant's right to compensation from the condemning authority for the value of any of Tenant's property taken (other than Tenant's leasehold interest in the Premises). In the event of a temporary taking, this lease shall not terminate, but the term hereof shall be extended by the period of the taking and the rent shall abate in proportion to the area taken for the period of such taking.

Lease of Space in Shopping Center

Lease Terminates Upon Written Notice by Landlord and Lessee is Entitled to
No Proceeds from the Landlord and Only Those Proceeds from the
Condemnor which shall not Reduce the Proceeds Awarded to the Landlord

Condemnation. In the event the whole or any part of the Shopping Center shall be taken by eminent domain or in any manner for public use, the Landlord. may at its option terminate this Lease and the state hereby granted by giving written notice of such termination to Tenant and upon the giving of such written notice of and all rights of Tenant hereunder shall expire as of the earlier of the date when title to or the right to possession of the Shopping Center or a .part thereof shall vest in or be taken by public authority as aforesaid and any rent or other charges paid for any period beyond said date shall be repaid to Tenant. Tenant shall not be entitled to any part of any award or payment which may be paid to Landlord or made for Landlord's benefit in connection with such public use and Tenant shall have no claim or rights as against Landlord for the value of any unexpired term of this Lease. Tenant may, however, claim and receive from the condemning authority, if legally payable, compensation for Tenant's relocation costs and/or business interruption provided that the same shall not reduce amounts otherwise payable to Landlord. It is agreed, however, that the widening of streets abutting the Land shall not affect this Lease, provided that no part of the Shopping Center is so taken.

Ground Lease

Allocates Condemnation Award to Landlord and Tenant Pursuant to Formula
which
Varies Depending upon Amount of the Premises Taken and Point
During the Lease Term at which Taking Occurs

Article 18

TAKING OF PROPERTY

Section 18.1 Tenant to Give Notice. In case of the Taking of all or any part of the Leased Property, or the commencement of any proceedings or negotiations which might result in any such Taking, Tenant will promptly give written notice thereof to Landlord, generally describing the nature and extent of such Taking or the nature of such proceedings of negotiations and the nature and extent of the Taking which might result therefrom, as the case may be.

Section 18.2 Total Taking. In case of (a) the Taking of the fee of the entire Leased Property, (b) the Taking (other than for temporary use) of such substantial part of the fee of the Leased Property i hat the remaining portion of the Leased Property is insufficient to permit the repair, replacement or restoration of the remaining Improvements so as to render the remaining portion of the Leased Property suitable for continued use by Tenant as a separate and distinct commercial enterprise, taking into consideration previous use by Tenant and potential use by Tenant, this Lease shall terminate as of the date of such Taking, and the awards and proceeds of such Taking shall be distributed in accordance with Section 18.4. Any Taking of the Leased Property of the character referred to above in this Section which results in a termination of this Lease is referred to herein as a "Total Taking." In the event of a disagreement between Landlord and Tenant as to whether the Taking of a portion of tie Leased Property is such as to make applicable claims (b) of the first sentence of this Section 18.2, such disagreement shall be settled by arbitration in accordance with Article 33 of this Lease.

Section 18.3 Partial Taking - Reduction in Basic Rent. In case of a Taking of the Leased Property other than (a) a Total Taking or (b) a Taking for temporary use, this Lease shall remain in effect as to the portion of the Leased Property remaining immediately after such taking without any abatement of Basic Rent, Additional Rent or any other sum payable hereunder, provided that, effective as of the date of the receipt of the awards and proceeds of such Partial Taking, the annual Basic Rent shall be reduced by an amount equal to _____ percent (__%) of the amount received by Landlord pursuant to paragraph (a) of Section 18.4.

Section 18.4 Awards Upon Total Taking or Partial Taking.

(a) In case of a Taking of the Leased Property other than a Taking for a temporary use, the awards and proceeds of such Taking, after payment of the reasonable expenses of Landlord, Tenant and Mortgagee incurred in collecting the same shall be divided between Landlord and Tenant as follows:

(i) First, if such Taking occurs prior to January 1, 2031, Landlord shall be entitled to that portion of the wards and proceeds thereof that is equal to the Fair Market Value of

the Land taken set forth in Section 3.2 of this Lease and, if such Taking occurs subsequent to January 1, 2032, Landlord shall be entitled to that portion of the awards and proceeds thereof that is equal to (a) the Fair Market Value of the Land taken set forth above in Section 3.2 or (b) the Fair Market Value of the Land as of December 30, 2030, determined pursuant to Section 3.3 above, which ever is greater (the portion of such awards and proceeds that is distributable to Landlord under this subsection (i) being hereinafter referred to in this Section 18.4 as "Fair Market Value"); the distribution of Fair Market Value to Landlord shall be made first out of that portion of such awards and proceeds as are attributable to the value of the Land taken, and, if that portion of such awards and proceeds is insufficient for such purpose, the portion of such awards and proceeds attributable to the value of the Improvements on the Land taken shall be availed of to the extent necessary to make a distribution to Landlord of Fair Market Value.

(ii) Next, out of the balance of the portion of such awards and proceeds attributable to the value of the Land takes remaining after deducting Fair Market Value pursuant to subsection (i) above, tenant shall be entitled to that portion of such balance as represents the value of the remaining term of Tenant in the Land so taken and the remaining balance, if any, of such portion of such awards and proceeds shall be distributed to Landlord.

(iii) Next, Landlord shall be entitled to that percentage of such awards and proceeds attributable to the value of the Improvements, if any, on the Land so taken that the number of years, if any, remaining beyond the year 2050 of the useful life used in computing the allowance: for depreciation of any such Improvements bears to the total number of years remaining as of the date of any such Taking, of the useful life used in computing the allowance for depreciation of any such improvements, and Tenant shall be entitled to the balance.

(b) Tenant anticipates that it will execute a certain Mortgage in favor of _____ (the "Lender") as Mortgagee. Landlord covenants and agrees that, so long as any indebtedness secured by said Mortgage (or any subsequent Mortgage placed by Tenant or the Lender with another person, firm or institution as a refinancing of the Lender's Mortgage) remains outstanding (whether said indebtedness is due to the Lender of to any transferee or assignee of the Lender's right, title and interest under said Mortgage or to any such person, firm or institution with whom or with which said Mortgage is refinanced):

(i) Landlord shall not have any compensable interest under subsection (iii) of the preceding paragraph (a) with respect to any Improvements now constructed on the Land or any Improvements constructed on the Land at any time prior to December 31, ____; and

(ii) If the amount of the awards and proceeds that would be payable to Tenant pursuant to subsections (ii) and (iii) of the preceding paragraph (a) is less than the full amount of the remaining indebtedness of said Mortgage, Landlord as between it and the Lender (or any transferee or assignee of the Lender's right, title and interest under said Mortgage or any person, firm or institution with whom or with which said Mortgage is refinanced) will waive its right to obtain payment of any portion of the awards and proceeds attributable to the value of the improvements to the extent necessary to make the amount of the awards and proceeds payable to Tenant equal to the amount of the remaining indebtedness on said Mortgage.

As between Landlord and Tenant, the provisions of subsections (i), (ii) and (iii) of the preceding paragraph (a) shall remain in full force and effect without regard to any of the provisions of this paragraph (b) and if, by reason of the application of this paragraph (b) any portion of such awards and proceeds that would otherwise be payable to Landlord under paragraph (a) shall be required to be paid to the Lender or its successor mortgagee, such amount so required to be paid to the Lender or its successor Mortgagee out of such awards and proceeds shall be a liability of Tenant to Landlord payable an demand with interest at the rate of eight percent (8t) per annum but failure to pay such amount skull not be considered an Event of default hereunder. In any event, all of the provisions of this paragraph (b) shall be null and void and of no force and effect upon the discharge of all indebtedness due on said Mortgage or any refinancing thereof.

Section 18.5 Taking for Temporary Use. In the event of a Taking of all or part of the Leased Property for temporary use., this Lease shall continue in full force and effect without any abatement or reduction in the Basic Rent and Additional Rent and any awards or proceeds of such Taking shall, after deducting, the reasonable expenses of Landlord, Tenant and Mortgagee incurred on collecting the same, be distributed as follows, with the priorities set forth below:

(a) to cover the payment of the Basic Rent and Additional Rent payable and to become payable hereunder during the period of such Taking;

(b) to cover the payment of the installments payable and to become payable on the indebtedness secured by the mortgage during such period; and

(c) to distribute the balance, if any, to Tenant, except that, if such awards and proceeds are paid with respect to a period of temporary use or occupancy extending beyond the termination date of this Lease. such balance shall be apportioned between Landlord and Tenant in accordance with their respective interests.

Ground Lease

Provides that Mortgagee is Entitled to the Amount of any Award up to the Amount of the outstanding Balance and Provides for Disbursement to Landlord and Tenant Based upon the Value; of any Improvements that Tenant has Constructed and the Remaining Term of the Lease

Eminent Domain

a. In the event that the Demised Premises, or any part thereof, shall be taken in condemnation proceedings or by exercise of any right of eminent domain or by agreement between Landlord, Tenant and those authorized to exercise such right (any such matters being hereinafter referred to as a taking), Landlord, Tenant and any person or entity having an interest in the award or awards shall have the right to participate in any such condemnation proceedings or agreement for the purpose of protecting their interests hereunder. Each party so participating shall pay its own expenses therein.

b. Upon any taking, the award or awards therefor shall be apportioned between Landlord and Tenant as follows:

(1) if at the time of such taking Tenant shall have erected or be engaged in the erection of a building, Tenant shall be entitled to the building award as the term "building award", is hereinafter defined plus, in the case of a partial taking not resulting in the termination of this Lease, consequential damages to the part of the building or buildings which are untaken. From such building award there shall be paid to Landlord such portion of the building award as is attributable to the estimated value of the Improvements then constructed an the Demised Premises at the expiration of the date of this Lease as set forth in subparagraph 3.a. above, after consideration of the estimated useful life of such improvements after said expiration date. The building award shall be deemed to be that part of the award which shall be specifically attributable by the condemnation court (or condemnation commissioner or other body authorized to make the award) to any building or buildings (or any portion or portions thereof) or, if not so attributed by the Court, as shall be determined by agreement between the parties or by arbitration pursuant hereto to be attributable to such building or buildings.

(2) Landlord shall be entitled to the award for the Demised Premises (or any portion thereof) excluding the Project or other improvements constructed by Tenant (hereafter "the land") and for consequential damages to and diminution of the assemblage or plottage value of the land not so taken less such portion of the award for the land as is attributable to the value of the leasehold estate of Tenant for the balance of the Term if such taking had not occurred, which such amount shall be payable to Tenant.

(3) In addition to the allocation of components of the condemnation awards set forth in subparagraph 15.6.(1) and (2) above and notwithstanding anything to the contrary, Landlord acknowledges that any condemnation award relating to the Project will be allocable to the value of Tenant's leasehold estate in at least some respect or portion and Tenant shall be entitled to all portions of each condemnation award which are determined to be allocable to the value of Tenant's leasehold estate. The value of Tenant's leasehold estate shall include, in addition to the other elements defined in this paragraph 15., the replacement costs to Tenant to lease substitute property to replace all or any portion of the Project upon the same terms and conditions set forth under this Lease including, without limitation, Rental paid by Tenant herein.

c. If any taking shall be a taking of the whole or substantially all of the Leased Premises, this Lease shall terminate and expire on the date of such taking, and the rent and additional rent hereunder shall be apportioned and paid to the date of such taking. Substantially all of the Demised Premises shall be deemed to have been taken if the Demised Premises cannot be utilized by Tenant, in its judgment, for the same purposes for which they were used immediately prior to the taking.

d. If any taking is not a taking of the whole or substantially all of the Demised Premises, this Lease shall continue and remain unaffected except:

(1) The rent shall be reduced by an amount which bears the same proportion to the annual rental immediately prior to the partial taking as the rental value of the part of the Demised Premises so taken shall bear to the rental value of the whole Demised Premises immediately prior to such taking.

(2) Tenant shall, promptly after such taking and at its expense, restore such building or buildings to a complete architectural unit, in which event Tenant shall be entitled to reimbursement for the costs thereof from Tenant's share of awards pursuant to this paragraph 15.

(3) The building award, or that part thereof which shall be Tenant's, shall be paid to Tenant promptly. If Tenant shall proceed to repair *and* restore, and its portions of the building award and the land award shall be insufficient to defray the cost of restoration, the balance of the award shall be used to the extent necessary to pay such deficiency. If the balance of the award is then insufficient, Tenant shall pay such deficiency.

e. In the event of the taking of an easement of any other taking which shall be of an interest or estate in the land less than a fee simple (other than a taking for temporary use), as a result of which the Demised Premises cannot be economically utilized by Tenant for the same purposes for which they, were used immediately prior to the taking, this Lease shall terminate and expire as provided in subparagraph 15.c. hereof. If there shall be any payment or award predicated on a change in the grade of a street or avenue on which the Demised Premises abut, Tenant shall be entitled, after making such change or restoration as may be necessary and appropriate by reason of such change of grade, by Landlord (or from the award) for the expense thereof to the extent of the net amount of any payment or award, after deduction of costs of collection, including attorneys, fees, which may be awarded for such change of grade. Any part of an award for change of grade which shall remain unexpended after such restoration shall be the property of Landlord. If any award shall *include change* of grade and any other item or element of damage, that part thereof shall be applied in accordance with this subparagraph 15.e. which shall be specifically attributed to change of grade by the condemnation Court (or condemnation commissioner or other body authorized to make the award) or, if not so attributed, shall be determined by agreement between the parties or by arbitration pursuant hereto.

f. In the event of a taking of all or a part of the Demised Premises for temporary use, this Lease shall continue without change, as between Landlord and Tenant, and Tenant shall be entitled to the award made for such use; provided that:

(1) such award shall be apportioned between Landlord and Tenant as of the date of the expiration of the then current or any renewed term or terms of this Lease; and

(2) Tenant shall be entitled to file and prosecute any claim against the condemnor for damages and to recover the same for any negligent use, waste or injury to the Demised Premises throughout the balance of the then current Term of this Lease.

g. In the event of any dispute between Landlord and tenant with respect to any issue of fact (other than one determined by the condemnation court or condemnation commissioner or other body authorized to make the award) arising out of a taking such dispute shall be resolved by arbitration by the American Arbitration Association under its then. current rules and regulations at its office in Charlotte, North Carolina, or most proximate thereto.

h. In case of any taking, the entire award shall be paid to a trustee appointed by agreement of the parties or by arbitration pending final resolution of the issues raised in connection therewith unless this Lease shall have been mortgaged to Tenant's Mortgagee, in

which event the entire award shall be payable to such mortgagee for distribution to the parties entitled thereto after final resolution of the issues raised in connection therewith.

i. Notwithstanding anything herein to the contrary, as long as a Mortgagee(s) has a lien on Tenant's leasehold estate therein, said Mortgagee(s) .shall be entitled to the portion of the award payable to Tenant under this paragraph 15 to the extent of the outstanding balance of indebtedness secured by the Mortgage(s).

Lease

Provides for Termination of the Lease if Condemnation
Materially Affects Tenant's Use. with Rent Prorated and
Both Landlord and Tenant Entitled to Make a Claim for the Taking

CONDEMNATION. If the whole or any significant part of the Demised Premises, which would materially and detrimentally affect Tenants use of the Demised Premises shall be taken or condemned by any competent authority for any public or quasi-public use or purpose, then, and in that event, the term of this Lease shall be terminated, and the rent shall be apportioned to the date of such taking. In the event only a portion of the Demised Premises which would not so materially and detrimentally affect Tenant's use of the Demised Premises, shall be taken or condemned by any competent authority for any public or quasi-public use, then in that event, the term of this Lease will not terminate and Tenant will receive a rental deduction proportionate to the area so taken. In any such case, each party shall be entitled to claim and receive an award of damages suffered by it by reason of such taking or conveyance, but Tenant shall not be entitled to any award attributable to the unexpired portion of the term or to any renewal option. Tenant shall be allowed to share in the award if only a single award is made up to the value of its leasehold improvements. Landlord shall promptly, following any partial condemnation that does not result in a termination of the Lease, restore the Demised Premises as nearly as possible to the condition as existed immediately prior to such taking and rent shall equitably abate during such restoration.

Deed of Trust

Provides that Lender is Entitled to Receive the Condemnation Award and Apply
the Award Toward the Outstanding Balance

ARTICLE VIII

CONDEMNATION AND CASUALTY LOSS

8.1 If the Mortgaged Properties, or Borrower's Property or any part thereof, shall be condemned or taken for public use under the power of eminent domain Beneficiary shall have the right to demand and receive all awards and. damages for such taking of, or injury to, the Mortgaged Properties or Borrower's Property be paid to the Beneficiary. To the extent such moneys are received by Beneficiary, Beneficiary may apply the same or so much thereof as is necessary, less the reasonable expenses of collecting such funds, as a credit upon the Secured Obligations, whether or not then matured.

8.2 In the event that Beneficiary shall have received the proceeds of condemnation pursuant to the terms of Sections 8.1 above, Beneficiary may, at Beneficiary's sole option, hold such proceeds (net of costs of collection), without interest, to be disbursed to Grantors incident to the rebuilding and restoration of that portion of the Mortgaged Properties or Borrower's Property from which such proceeds were derived. Grantors agree to proceed promptly with such rebuilding and restoration of the Mortgaged Properties or Borrower's Property to as near their condition prior to such event as may be practicable, to provide to Beneficiary assurances that all funds required in addition to such proceeds are available to Grantors, to present paid invoices for all labor and materials as the work of such rebuilding and restoration progresses, and to suffer no lien against the Mortgaged Properties or Borrower's Property or any portion thereof or interest therein incident to such rebuilding and reconstruction.

Deed of Trust

Provides that the Proceeds of a Condemnation Award are Payable
Solely to the Lender and are to be Applied to the Outstanding Debt

CONDEMNATION AWARD. Any award for the taking of, or damages to, all or any part of the property or any interest therein upon the lawful exercise of the power of eminent domain shall be payable solely to Beneficiary, which may apply the sums so received to payment of the Debt.

Deed of Trust to a Guardian

Provides that the Lender is Entitled to Receive the Full Amount of the
Condemnation
Award but the Lender has the Option of Applying the Amount of the Award to the
Outstanding Loan Amount or Releasing the Funds to the Guardian

Guardian assigns to Lender and Lender is authorized to collect an amount up to the then outstanding balance on the Loan and any other sum secured hereby, of any proceeds or awards which may become due by reason of any condemnation or other taking for public use of the whole or any part of the Mortgaged Property or any rights appurtenant thereto, and Lender may, at its option, either apply the same to the Loan and any other sums secured hereby or release the same to Guardian without thereby incurring any liability to any other person. Guardian agrees to execute such further assignments and agreements as may be reasonably required by Lender to assure the effectiveness of this paragraph 2.8.