

A Basic Overview of Eminent Domain and Certain Issues

Eminent domain proceedings in North Carolina are governed by Chapter 40A for any private condemners or local public condemners and Chapter 136 for the North Carolina Department of Transportation (formerly NC State Highway Commission). There are some local modifications to Chapter 136 which enables local public condemners to avail themselves of the provisions of Chapter 136 but those will not be discussed in this paper and presentation since, if you encounter a local condemner who by local modification is entitled to use Chapter 136 procedures rather than Chapter 40A procedures, then any discussion concerning Chapter 136 in the North Carolina Department of Transportation will be applicable.

Article 1 of Chapter 40A provides:

“(a) Notwithstanding the provisions of any local act, it is the intent of the General Assembly that, effective August 15, 2006, the uses set out in G.S. 40A-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted to private condemners, local public condemners, and other public condemners.

G.S. 40A-1(b) further states, “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 condemners and all local public condemners.”

G.S. 40A-3 sets out the entities by whom the power of eminent domain may be exercised pursuant to Chapter 40A.

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. - For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works, which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

- a. Not be less than 50 feet nor more than 100 feet in width; and
- b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing

and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding.

(5) A condemnation in fee simple by a State-owned railroad company for the purposes specified in subdivision (4) of this subsection and as provided under G.S. 124-12(2).

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors - Standard Provision. - For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, Courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(b1) Local Public Condemnors - Modified Provision for Certain Localities - For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property or interest therein, either inside or outside its boundaries, for the following purposes.

- (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
- (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
- (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
- (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.
- (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
- (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, Courthouse jails and other buildings for use by any department, board, commission or agency.
- (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
- (8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the

purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

(10) Engaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

(11) Establishing access for the public to public trust beaches and appurtenant parking areas.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this chapter.

This subsection applies only to Carteret and Dare Counties, the Towns of Atlantic Beach, Carolina Beach, Caswell Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Sunset Beach, Surf City, Topsail Beach, and Wrightsville Beach, and the Village of Bald Head Island.

(c) Other Public Condemnors. - For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional public transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1; 2000-146, s. 8; 2001-36, ss. 1, 3; 2001-478, s. 2;

2001-487, s. 58; 2002-172, s. 4.1; 2003-282, ss. 1, 2; 2004-203, s. 32(a), (b); 2006-224, s. 2; 2006-259, s. 47.)

G.S. 40A-4 states that there is no requirement that the condemnor attempt to purchase the property prior to initiating eminent domain proceedings.

G.S. 40A-5 states that a condemnor listed in G.S. 40A-3(a), (b) or (c) shall not possess the power of eminent domain with respect to property owned by the State of North Carolina or a state-owned railroad as defined in G.S. 124-11, unless the State consents to the taking.

G.S. 40A-5(b) states that unless otherwise provided by statute, a condemnor listed in G.S. 40A-3(a), (b) or (c) may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner.

G.S. 40A-6 governs the repayment of taxes to a property owner. However, please note that G.S. 40A-6 only provides for payment of pro rata taxes if the taking involves a **total taking** under the power of eminent domain. In other words, if the taking is a partial taking, there is no statutory requirement that the owner be reimbursed for the taxes paid on the portion taken for the year of condemnation.

In addition, if an owner is a natural person who owns the property and owns agricultural land, horticultural land, or forest land that is contiguous to the condemned property and that is in active production and, as a result of the condemnation, is required to pay **deferred taxes (rollback)** pursuant to G.S. 105-277.4(c), then and in such event the

owner is entitled for reimbursement of those taxes which are incurred by him or her as a result of the taking.

G.S. 40A-7 contains a provision that where a project requires condemnation of only a portion of the parcel of land, leaving a remainder of such size, shape or condition that is of little value, a condemnor may acquire the entire parcel by purchase or condemnation. If the remainder is to be condemned, the Petition filed under the provisions of **G.S. 40A-20** or the Complaint filed under the provisions of **G.S. 40A-41** shall include:

- (1) a determination by the condemnor that a partial taking of the land would substantially destroy the economic value or utility of the remainder; or
- (2) a determination by the condemnor that economy in the expenditure of public funds would be promoted by taking the entire parcel; or
- (3) a determination by the condemnor that the interest of the public would be best served by acquiring the entire parcel.

G.S. 40A-8 governs the awarding of cost and states “(a) in any action under the provisions of Article 2 or 3 of this Chapter, 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 such appraisers or engineers testify as witnesses and such plats are received into evidence as exhibits by order of the Court.”

G.S. 40A-8(b) provides if a condemnor institutes a proceeding to acquire by condemnation any property and (i) if the final judgment in a resulting action is that the condemnor is not authorized to condemn the property, or (ii) if the condemnor abandons the action, the Court with jurisdiction of the action 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 reasonable costs; disbursements; expenses (including reasonable attorney, appraisal, and engineering fees); and any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of the Complaint under G.S. 40A-41.

G.S. 40A-8(c) governs those situations where an inverse condemnation is brought and where the owner is successful and obtains a judgment in his or her favor G.S. 40A “the Court shall award to the owner as a part of the judgment after appropriate finding of facts a sum that, in the opinion of the Court, based upon its finding of fact, will reimburse the owner as set out in subsection (b). If a property owner brings an inverse condemnation alleging that an entity which has the power of eminent domain has not filed an appropriate action but has by its actions actually taken or appropriated a portion of their property, then in the event the owner is successful in such action, in addition to any awards that the owner may be entitled and may be awarded by jury verdict or otherwise, the owner is entitled to be paid all expenses he has incurred including reasonable attorneys’ fees.

G.S. 40A-11 provides that any condemnor having the power of eminent domain may, without having filed a Petition or Complaint, nor having deposited any sum or taken any other action provided by Chapter 40A is authorized to enter up on the lands, but not structures, to make surveys, borings, examinations and appraisals as may be necessary or expedient in carrying out or performing its duties under this chapter. The condemnor shall give thirty (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.

In the event a condemnor enters on to the property after having given proper notice and causes damages to such property, then the owner is entitled to bring an action to

recover for such damage and if the owner recovers damages in excess of 25% over the amount offered by the condemnor for reimbursement for activities, the Court, in its discretion, may award reasonable attorneys' fees to the owner.

How Do They Do It

Condemnation Proceedings By Private Condemnors

Article 2 of Chapter 40A governs the taking of property by private condemnors, the list of which are contained in **G.S. 40A-3(a)**. The most common private condemnor actions that one will encounter will either involve natural gas, electrical corporations and telephone companies. There are others but these are the most common that one will encounter but the procedures to be utilized are the same regardless of who is exercising the power of eminent domain insofar as private condemnors are concerned.

A condemnation proceeding instituted by a private condemnor differs substantially from the procedure used by a public condemnor pursuant to Chapter 40A.

In a condemnation by a private condemnor, the action is commenced by the filing of a Petition with the Clerk of Superior Court "of any County in which the real estate described in the Petition is situated." The Petition must ask the Court to appoint Commissioners who are to appraise the property and the Petition must be signed and verified. It must also contain a description of the property which the condemnor seeks to acquire and it must state that the condemnor is duly incorporated and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of its public business and the specific use of the property and that the property described in the Petition is required for the purpose of conducting the proposed business.

G.S. 40A-20 goes on to state that “the Petition must also contain a statement as to whether the owner will be permitted to remove all or specified portions of any buildings, structures, permanent improvements, or other fixtures situated on or affixed to the land.”

The Petition must also state the names, places, and residences of all other owners as far as by reasonable diligence can be ascertained or those who claim to be owners of the property. Notice of this proceeding is filed with the Clerk of Superior Court of each County in which any part of the land is located. The Clerk is required to index and cross-index this Notice as required by G.S. 1-17 (lis pendens).

A Special Proceeding summons, together with a copy of the Petition, is required to be served on all persons whose estates or interests are affected by the proceedings and such service must be at least ten (10) days prior to the hearing of the same by the Court (**G.S. 40A-22**). **G.S. 40A-23** governs service where the parties are unknown.

Question: Is the property owner required to file a response to the Petition? No. **G.S. 40A-25** does provide that “all or any other persons whose estates or interests are to be affected by proceedings may answer such Petition and show cause against the granting of the prayer of same.” If an Answer is filed contesting the right to condemn, the Clerk is to hear proofs and allegations apart and if no sufficient cause is shown against the granting of the prayer of the Petition shall make an order for the appointment of three Commissioners and shall fix the time and place for the first meeting of the Commissioners. Note that G.S. 40A-25 provides that each Commissioner shall be a **resident** of the county **wherein the property condemned lies.**”

Question: What happens if a private condemnor attempts to file an action where property is situated in more than one county but constitutes one tract? Can the condemnor

simply comply with the requirements of Chapter 40A by filing the action in one county and allowing the Clerk of Court in one county to appoint Commissioners who reside in one county and yet determine the damages for property located in both counties? We shall see a recent case of **Rutherford Elec. Membership Corp. v. 130 of Chatham, LLC**, No. COA14-134, Slip Op. (N.C. App. Sept. 2, 2014) has pointed out some of the problems in Chapter 40A actions by private condemners. In fact, the Court, in its opinion, urged the legislature to address these issues. A petition for rehearing has been filed in the Chatham case.

Once the Commissioners are appointed, **G.S. 40A-26** clearly states the requirements of the Commissioners, which are to take an oath that they will fairly and impartially appraise the property in the Petition. Interestingly, the Commissioners have the power to issue subpoenas and administer oaths and any two of them may adjourn the proceedings before them from time to time and in their discretion. Once the Commissioners are appointed and take the oath, they are required to cause ten (10) days notice of such meeting to be given to the parties who are affected by their proceedings or their attorney or agent. They are further required to 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. After hearing the testimony, the Commissioners are required by majority to ascertain and determine the compensation, which ought justly be made by the condemner to the owner(s) of the property appraised by them. The method of valuation will be discussed later on since it is also applicable to takings by public condemners pursuant to Chapter 40A. Once the Commissioners make the award, they are to report the same to the Clerk within ten (10) days. G.S. 40A-26. **G.S. 40A-27** provides the form of the Commissioners' report that is to be filed with the Clerk.

Once the report of the Commissioners is made to the Clerk and filed, the Clerk is required to mail copies to the parties. **G.S. 40A-28(a)** recites “within twenty (20) days of the filing of the report, any party of the proceeding may file exceptions thereto. The Clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as Court may deem right and proper.” If the Clerk’s final judgment is in favor of the condemnor, **once the condemnor deposits the amount ordered by the Commissioners together with any cost allowed into the office of the Clerk of Superior Court, then and in that event, all owners who have been made parties to the proceeding shall be divested of the property or the interest therein to the extent set forth in proceedings.** However, any party in the proceedings may file exceptions to the Clerk’s final determination on the report and may appeal for trial de novo to the Superior Court. Notice of the appeal shall be filed within **ten (10) days** after the Clerk’s determination. **G.S. 40A-28(c)**. Please note that if a property owner or their attorney fails to file exceptions to the report of the Commissioners, that even if they thereafter except to the confirmation by the Clerk and give proper notice of appeal from the Clerk to the Superior Court, the Superior Court has no jurisdiction. **Carolina Power and Light Co. v. Crowder**, 89 N.C. App. 578, 366 S.E.2d 499 (1988).

Please be mindful that if a party excepts to the award of Commissioners and then excepts to the confirmation and appeals from the confirmation of the award by the Clerk of Court and provided that the condemnor deposits with the Clerk of Court the sum appraised by the Commissioners, then and in that event, the condemnor may enter, take possession of and hold said property in the manner and to the extent sought to be acquired by the proceedings until final judgment is rendered on appeal. **G.S. 40A-28(d)**.

Question: Suppose that a private condemnor has filed an action seeking to condemn a portion of property owner's land. The Clerk of Court has appointed Commissioners pursuant to the statute and property owner has objected that the condemnor does not have the authority to condemn the property. The Clerk denies property owner's claim and the Commissioners proceed with the taking of evidence over property owner's objections. The Commissioners enter their award and property owner's attorney files exceptions to the report of the Commissioners and the Clerk thereafter confirms the award and exceptions and a Notice of Appeal are filed. Property owner then appears before the Judge and again raises his argument that they did not have the right to condemn his property and after hearing legal argument, the Judge is persuaded that this is not a proper taking and dismisses the matter. Condemnor has paid the money into the Clerk of Court, which has not been drawn down by the property owner nor his attorney. What do you, as a Judge, do?

G.S. 40A-28(e) recites that

“If, on appeal, the Judge shall refuse to condemn the property, then the money deposited with the Clerk of Court in the proceedings, or so much thereof as shall be a Judge, shall be refunded to the condemnor and the condemnor shall have no right to the property and shall surrender possession of same, on demand, to the owner. The Judge shall have full power and authority to make such orders, judgments and decrees as may be necessary to carry into effect the final judgment rendered in such proceedings, including compensation in accordance with the provisions of G.S. 40A-8.”

Remember that G.S. 40A-8 provides that the Court shall “make appropriate findings of facts and 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 reasonable costs; disbursements; expenses (including reasonable attorney, appraisal and engineering fees); and any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of the Complaint.

Chapter 40A proceedings differ from Chapter 136 proceedings in that two measures of damages are available for Chapter 40A takings.

G.S. 40A-64 provides:

- (a) except as provided in subsection B, the measure of compensation for the taking of property is its fair market value (total taking);
- (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.

Chapter 136 (taking by the North Carolina Department of Transportation) only provides for the difference in the fair market value of the entire property based upon its highest and best use immediately before the taking and the value of the remaining property based upon its highest and best use after the taking.

What happens when an action pursuant to Article 2 of Chapter 40A has been commenced and the owner of the property has sold it to a third party or the property is otherwise been transferred? Do you have to have a change of substitution of parties?

G.S. 40A-33 provides “when any proceedings under this Article shall be commenced, no change of ownership by voluntary conveyance or transfer of the property shall in any manner affect such proceedings, but the same shall be carried on and perfected as if no conveyance or transfer has been made or attempted to be made.” **City of Kings Mountain v. Goforth**, 283 N.C. 316, 196 S.E.2d 231 (1973). This is consistent with the prior taking in the case of **N.C. State Highway Comm’n v. York Indus. Center, Inc.**, 263 N.C. 230, 139 S.E.2d 253 (1964), which held that the right to compensation rests in the person who owned the land immediately prior to the filing of the Complaint and Declaration of Taking and he has nothing he can sell pending ascertainment of just compensation.

Takings By Public Condemnors Pursuant To Chapter 40A

Unlike a taking by a private condemnor, an action by a public condemnor rather than being instituted by Petition before the Clerk of Superior Court institutes its action by the filing of a Complaint. However, **G.S. 40A-40** provides that

“(a) not less than thirty (30) days prior to the filing of the Complaint on the provisions of G.S. 40A-41, a public condemnor listed in 40A-3(b) or (c) shall provide notice to each owner whose name and address can be ascertained by reasonable diligence of its intent to institute an action to condemn property.”

The notice is required to be sent to each owner by certified mail, return receipt requested. The notice is further required to contain a general description of the property to be taken and of the amount estimated by the condemnor to be just compensation for the property condemned. The notice also must state the purpose for which property is being condemned and the date the condemnor intends to file the Complaint.

G.S. 40A-40(b) also contains other requirements and is attached hereto as an appendix. Once a public condemnor institutes an action pursuant to Chapter 40A, they are required (like the Department of Transportation) to deposit with the Clerk of Court the estimated amount of just compensation by the condemnor for the taking. Only when a local public condemnor is acquiring property for certain purposes does title vest immediately.

G.S. 40A-42 lists the instances when a local public condemnor can do what is called a “**quick take**.” The following are **not** permitted as quick takes by local public condemnors:

G.S. 40A-42:

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

If the taking is for one of the purposes **other** than a “quick take” as specified by G.S. 40A-42(a)(1) and (2), then and in such event title to property and right to possession shall vest in the condemnor only upon the following:

1. An Answer filed by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or
2. A failure of the owner to answer within the 120-day time period established by G.S. 40A-46; or
3. Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

Upon the filing of the Complaint, the condemnor is required to deposit their good faith estimate of damages to be awarded to the property owner. The property owner may petition the Court for an Order allowing the Clerk to disburse the funds deposited to the property owner as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation. If presented with such an application, **G.S. 40A-44** states “the Judge shall order that the money deposited to be paid forthwith to the person entitled thereto in accordance with the application.” Be cognizant of the fact that you, as a presiding Judge, are also entitled to make orders with respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges pursuant to **G.S. 40A-60(a)**. As a practice pointer, I would suggest that if presented with a Petition seeking that the monies be awarded to the property owner that it would be prudent to make an inquiry about lienholders and, if possible, review the actual court file which should reveal if there are lienholders or unpaid property taxes that you, as the presiding

Judge, should make provisions for pursuant to G.S. 40A-60(a). In addition, an Answer is not required to be filed before the expiration of 120 days from the date of service.

G.S. 40A-46 does provide that at any time 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 for thirty (30) days.

Settlement of Issues Hearing

Any issues, other than the issue of just compensation, are determined by the Judge pursuant to **G.S. 40A-47**. These issues are going to be discussed later herein. The issues encountered in this type of case are common to both Chapter 136 and 40A takings. G.S. 40A-48 provides that either the owner or condemnor may, within sixty (60) days after the filing of the Answer, request that the Clerk appoint Commissioners to determine compensation for the taking. (See NC G.S. 40A-48). If such request is made after determination of any issues as required by G.S. 40A-47, the Clerk is required to appoint three persons to serve as Commissioners. Once the Commissioners make the award, the Clerk is required to mail the report of the Commissioners to each of the parties or their counsel of record. Within **thirty (30) days** after the mailing of the report, either the condemnor or the owner may except thereto and demand a trial de nova by jury on the issue of just compensation. Note that any proceeding by public condemnor where a property owner or the condemnor themselves have filed a request for the appointment of Commissioners, that there is no action necessary by the Clerk insofar as confirmation of the award, unlike that of a private condemnor.

Once the amount of just compensation is awarded, interest is required to be added at 6% per annum from the date of taking. **G.S. 40A-53**. One should also be aware that in

the event we ever go back to the days when investments yielded double digit returns, that a property owner is entitled to present evidence under the “Prudent Investor Standard” to show that he is entitled to more than the statutory 6%. **Concrete Machinery Co., Inc. v. City of Hickory**, 134 N.C. App. 91, 517 S.E.2d 155 (1999). Even if a property owner presents evidence and the Court is convinced that under the “Prudent Investor Standard,” a higher rate of interest is applicable, it should only be awarded from the date of the taking to the date of the judgment and **not post judgment**.

What is the date of the taking? This is important because the evidence that the jury hears with regard to damages must be based on date of taking! **G.S. 40A-63** states that the determination of the amount of compensation shall reflect the value of the property **immediately prior** to the filing of the Petition under G.S. 40A-20 (private condemnors) or the Complaint under G.S. 40A-41 (local public condemnors) and, except as provided in the following sections, shall not reflect an increase or decrease due to condemnation.

G.S. 40A-65(a) states the value of the property taken, or of the entire tract if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by (i) the **proposed** improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

Chapter 136 Takings

The most common eminent domain cases tried are actions instituted by the North Carolina Department of Transportation for new highway construction or highway improvement programs. The procedure for such an action is governed by Chapter 136 of

the North Carolina General Statutes. The law governing condemnation pursuant to Chapter 136 begins at G.S. 136-103. However, there are other statutes contained throughout Chapter 136 that bear upon such takings and the trial of such matters.

As most of you know, the Department of Transportation institutes an action by filing civil action in the office of the Clerk of Superior Court where the property is located. At such time, the Department has to list a number of things on the Complaint, all which are enumerated in **G.S. 136-103**. The Department of Transportation is also required to deposit the sum of money estimated by the Department to represent just compensation for said taking. **G.S. 136-105** states that the person named in the Complaint may apply to the Court for disbursement of the money deposited in the Court as a credit against just compensation without prejudicing further proceedings in the cause to determine just compensation. In the event there are encumbrances, liens, rents, taxes, assessments, or other charges, the Judge is empowered to make such orders with respect to same. **G.S. 136-105**.

Any person named in the Complaint has the right to file an Answer within **twelve (12) months** from the date of service thereof. G.S. 136-107. Please note that **G.S. 136-107** states at any time prior to the entry of Final Judgment, the Judge, for good cause shown and after notice to the Plaintiff, may extend the time for filing the Answer for thirty (30) days. You, as a Judge, may be faced with a situation some day where an individual, who has been sued by the Department of Transportation in a Chapter 136 taking, did not hire a lawyer until the time for filing the Answer expired but before a Final Judgment had been entered and the individual may, through counsel, be appearing and requesting this thirty (30) day extension. One should consult G.S. 136-107 and the cases decided for guidance. However, unless the Department of Transportation can show some sort of detrimental reliance, since

the issue involves a constitutional issue, that is the taking of property for a public purpose, it would seem the better part of discretion would be to allow the owner to file their Answer, especially if the only issue is that of just compensation.

Issues Determined by the Court

The Court resolves all issues except the issue of just compensation. This is probably one of the most troubling areas for most Judges is the settlement of issues. **G.S. 136-108** states

“after the filing of the plat, the Judge, upon motion and ten days notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including but not limited to, if controverted, questions of necessary and proper parties, title of the land, interest taken and area taken.”

Issues that you may have to consider on a hearing pursuant to G.S. 40A-47 and/or NC G.S. 136-108:

1. **Inverse condemnation.** **N.C. Dep’t of Transp. v. Cromarti, Jr.**, 214 N.C. App. 307, 716 S.E.2d 361 (2011).
2. **Extent of existing right-of-way.** **N.C. State Highway Comm’n v. Nuckles**, 271 N.C. 1, 155 S.E.2d 772 (1967).
3. **Extent of property taken in dedication.** **N.C. Dep’t of Transp. v. Elm Land, Co.**, 163 N.C. App. 257, 593 S.E.2d 131 (2004).
4. **Unity of Ownership.** **N.C. Dep’t of Transp. v. Airlie Park, Inc.**, 156 N.C. App. 63, 576 S.E.2d 341 (2003).

5. **Proper and necessary party and joinder. N.C. Dep't of Transp. v. Stagecoach Village**, 360 N.C. 46, 619 S.E.2d 495 (2005).
6. **Adverse possession and amendment to map. City of Charlotte v. Williams**, 210 N.C. App. 257, 707 S.E.2d 710 (2011).

It would take me hours to go through each of these listed above. I have, however, selected the one which can create confusion to discuss in this paper. That being the Unity of Ownership issue which would also encompass the Extent of property taken or which should be reflected on the map.

The statute sounds very simple but some of the issues that you may be called upon in what is commonly referred to as a 108 hearing can sometimes be complex and require a great deal of time and study on your behalf. For example, a 108 hearing might consist of the following issues regarding the map. The Department of Transportation, by virtue of NC G.S. 136-106 is supposed, within ninety (90) days of the receipt of the Answer, to file a plat of the land taken and such additional area as may be necessary to properly determine damages. This is probably the most ignored requirement of Chapter 136 as maps sometimes take a year or longer. People, including attorneys, refer to these maps as surveys. They are not surveys. If you will look closely at any map, you will note that it does not contain the certificate necessary or required by a licensed surveyor in North Carolina stating that the map is a survey. Portions of the property or right-of-way are in fact surveyed but the entire tract of land is not surveyed by the Department of Transportation and this can lead to issues that you will be called upon to resolve. For example, the Department of Transportation will often times contend that it has an existing right-of-way and will show such purported existing right-of-way on the map, thus excluding the area

from consideration of just compensation. Until the property owner receives the map from the Department of Transportation and their attorney has an opportunity to review it, they are not in a position to agree or disagree with the Department as to any existing right-of-way. A property owner may file a motion for hearing pursuant to G.S. 136-108 contending that the plat does not accurately reflect the property affected by the taking. If this occurs, you will, of course, be hearing from surveyors on behalf of both parties and perhaps attorneys testifying as to the chain of title.

In the past, it was common practice by the North Carolina Department of Transportation and formerly the State Highway Commission to acquire easements of right-of-way and sometimes not record those easements. **N.C. Dep't of Transp. v. Auten**, 106 N.C. App. 489, 417 S.E.2d 299 (1992) held that the Department of Transportation was not required to record the right-of-way and that any purchasers took subject to the unrecorded right-of-way. Unfortunately, the attorneys in Auten did not appeal that decision and for several years this appeared to be the law of North Carolina. Fortunately, for property owners, **N.C. Dep't of Transp. v. Humphries**, 347 N.C. 649, 496 S.E.2d 563 (1998), was decided and held that the Department of Transportation (formerly the State Highway Commission) was required to record their easements in order to be binding on third party purchasers for value. Humphries was a case where the Department of Transportation under an unrecorded easement for an old right-of-way, reduced the amount of land for which they would have to compensate the owner. Humphries' attorneys had a 108 hearing and were ruled against on the basis of Auten. The case was appealed and ultimately the North Carolina Supreme Court held that the Department of Transportation was no different than anyone else and if they failed to record their easements of right-of-way, thus failing to

put a purchaser for value on notice, then the Department of Transportation could not assert the claim against a third party.

Another issue that often arises with a 108 hearing is what property should be included in the map. Many times, you will find properties which are contiguous to one another but for some reason the Department of Transportation has not included in the map or in the description of the property to be affected. The Bible for this issue can be found in **Barnes v. N.C. State Highway Comm'n**, 250 N.C. 378, 109 S.E.2d 219 (1959). If you are trying any highway cases at all, I recommend that you read Barnes several times. Barnes involved the taking of property in Forsyth County for what is now known as Interstate Highway 40 (Business 40) and U.S. Highways 158 and 421. The land of the petitioner (Barnes) contained 46.86 acres before the taking. The respondent (State Highway Commission) took 12.19 acres for the expressway (Business Interstate 40). All of the petitioner's property, at that time, was undeveloped and consisted of open fields and woodlands. A branch or creek ran from east to west through the property with about three-fourths of the property to the north of the creek. Knollwood Street, at the time of the taking, traversed the property running in a north-south direction in approximately the middle of the land. The property lying west of Knollwood Street contained 15.92 acres. The property lying east of Knollwood Street and north of an easement to the Thruway Shopping Center contained 24.22 acres and the remaining portion of the property was situated east of Knollwood and south of the easement to the shopping center and contained 6.72 acres. There were various zoning districts assigned to the portioned property ranging from "Residence A-1" (single-family dwellings) to "Business B" (retail trade, general business, and outlying shopping areas) and "Residence A-2" (single family and multi-family

dwellings). The Supreme Court held in *Barnes* that whether two or more parcels of land constitute one tract for purposes of assessing damages for injury to the portion not taken or offsetting benefits against damages is one of law for the Court. The Court stated that the factors generally emphasized are unity of ownership, physical unity, and unity of use (*Barnes*, 250 N.C. at 384, 109 S.E.2d at 224-25). However, please note that under certain circumstances, the presence of all these unities is **not** essential. Usually, unity of use is given the greatest of emphasis.

Unity of Ownership

While the parcels claimed as a single tract must be owned by the same party or parties, it is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all of the parts of the tract. **Tyson v. Highway Comm'n**, 249 N.C. 732, 107 S.E.2d 630 (1959).

For a detailed discussion of unity of ownership see **Dep't of Transp. v. Roymac P'ship**, 158 N.C. App. 403, 581 S.E.2d 770 (2003), holding that a parcel owned by a partnership and an adjacent parcel owned by a second partnership was the general partner could not be treated as a unified tract for the purpose of assessing condemnation damages. However, unity of ownership did exist for two parcels owned by different partnerships for purposes of determining whether both parcels must be treated as one for condemnation purposes, where 11 of 13 partners in both partnerships were the same. **Dep't of Transp. v. Nelson Co.**, 127 N.C. App. 365, 489 S.E.2d 449 (1997). Also, see **City of Winston-Salem v. Tickle**, 53 N.C. App. 516, 281 S.E.2d 667 (1981) for an excellent discussion of unity of ownership, unity of use and physical unity.

Physical Unity

The general rule is that parcels of land must be contiguous in order to constitute them as a single tract for severance, damages and benefits. But in exceptional cases, where there is an individual use of unity, owners have been committed to include parcels in condemnation proceedings that are physically separate and to treat them as a unit (Barnes at 384-385).

Unity of Use

The unity of use is determined by whether the various tracts of land are being used as an integrated economic unit. City of Winston-Salem v. Slate, 185 N.C. App. 33, 647 S.E.2d 643 (2007). The fact that the parcels of land are physically separate from one another does not necessarily mean that the owner can not treat them as a single unit. Dep't of Transp. v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836 (2000) rev'd on other grounds, 353 N.C. 671, 549 S.E.2d 203 (2001).

How about planned future uses? Generally, present use of the tracts as one is required. However, if a parcel or parcels have been surveyed and platted for development prior to notice of condemnation, the land owner will meet the unity of use test. Town of Hillsborough v. Crabtree, 143 N.C. App. 707, 547 S.E.2d 139 (2001).

Evidence Relating to Valuation

One of the most difficult areas for even experienced Judges and attorneys in trying condemnation matters is what evidence should be admitted during the presentation of the trial on the issue of just compensation. Rule 701 states that if the witness is not testifying

as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. It is rumored that some folks are now taking the approach that only “expert witnesses” can testify as to the value of property involved in an eminent domain proceeding. In this writer’s opinion, that is incorrect.

A witness who has knowledge of value gained from experience, information, and observation may give their opinion of the value of specific real property. **Brandis and Brown on North Carolina Evidence**, 7th Edition, Section 180, **citing Redevelopment Comm’n v. Denny Roll and Panel Co.**, 273 N.C. 368, 159 S.E.2d 861 (1968), **State Highway Comm’n v. Conrad**, 263 N.C. 394, 139 S.E.2d 553 (1965).

In addition, owners have always been able to testify as to the value of their property even though their knowledge and experience would not otherwise qualify them to do so. **N.C. State Highway Comm’n v. Helderman**, 285 N.C. 645, 207 S.E.2d 720 (1974). In addition, the witness offering such testimony may be cross-examined about their knowledge of the value or price of dissimilar neighboring land, though not ordinarily about the value, sale price, or offering price of such land. **Duke Power Co. v. Winebarger**, 300 N.C. 57, 265 S.E.2d 227 (1980). **Dep’t of Transp. v. Burnham**, 61 N.C. App. 629, 301 S.E.2d 535 (1983) held that, while a witness may be asked if they are familiar of the prices of sales of similar or dissimilar properties, they may not be asked about the specific price, unless the Judge conducts a hearing outside of the presence of the jury.

If the witness testifies they are familiar or are not familiar with such sales price, then the impeachment prong is satisfied. Counsel should not be allowed to ask about the

specific sales price, unless you conduct a voir dire and make specific findings to support its admission. If, at any time, any party in a condemnation proceeding (property owner or condemnor) attempts to introduce evidence of specific sales prices during the direct exam or cross-examination of any witness, I would suggest that you read **Duke Power Co. v. Winebarger**, 300 N.C. App. 57, 265 S.E.2d 227. I have attached a copy of that case for your convenience to this transcript. The Winebarger case was where the land owner's witness was cross-examined about specific sales prices in attempting to impeach the witness's credibility after the witness had opined as to value. The Supreme Court, in reversing the trial court, held that there was no showing that any of the properties referred to in those questions were in any way comparable to respondent's property. Therefore, there was no foundation for the use of such statements of their values or sales prices as competent circumstantial evidence of the value of respondent's land. Despite the trial court having given a limiting instruction to the jury not to consider the testimony as substantive evidence for the purpose of evaluating the land owner's property, the Supreme Court held that the admission of such testimony, even with such limiting instruction, resulted in error prejudicial to the respondents (land owners). In fact, the Court went on to say

“...that, while a witness's knowledge, or lack of it, of the values and sales prices of certain non-comparable properties in the area may be relevant to his credibility, the specific dollar amount of those values and prices will rarely, if ever, be so relevant. The impeachment purpose of cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry, which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit, is at

best mere surplusage. At worst, it represents an attempt by the cross-examiner to convey to the jury information which should be excluded from their consideration.” **Winebarger**, 300 N.C. App. at 64-65, 265 S.E.2d at 231-32.

Justice Exum then went on to reiterate the law of North Carolina, which provided that the price paid at a voluntary sale of land similar in nature, location, and condition of the land involved in the suit is admissible as independent evidence of the value of the land in question, if the sales are not too remote in time. Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other in question is to be determined by the trial judge, usually on voir dire. **State v. Johnson**, 282 N.C. 1, 191 S.E.2d 641 (1972), **Redevelopment Comm’n of High Point v. Denny Roll and Panel Co.**, 273 N.C. 368, 159 S.E.2d 861.

As a practical matter, I have never seen two parcels of real estate that are identical. This is especially true in the mountains of Western North Carolina where topography can vary greatly on adjoining parcels of real estate. There are generally other dissimilarities between properties such as road frontage, availability of utilities, zoning, the improvements located thereon, traffic counts, condition of the improvements located thereon, topography and the list goes on. Anyone who has tried an eminent domain proceeding knows that appraisers generally make adjustments to the sales used in their market or sales comparison approach. They will generally make adjustments, which are based on nothing more than their experience and their subjective decision as to how much a property should be adjusted upward or downward based upon the factor being considered. If a lawyer for any party is attempting to elicit specific sales prices evidence,

either on direct examination or on cross examination, you should immediately send the jury out of the room and conduct a voir dire as Winebarger suggests.

Following the conclusion of the voir dire, you must then make findings of fact to determine whether or not the sale or sales in question are so similar to the subject property that there will not be prejudice to the opposing party of the admission of such sales price. In 37 years of practicing law, I have never attempted to introduce into evidence, either by direct or cross-examination, sales prices of properties considered by the witness that I am examining.

“It is within the sound discretion of the trial judge to determine whether there is sufficient similarity to render the evidence of the sale admissible. It is the better practice for the Judge to hear evidence in the absence of the jury as a basis for determining such admissibility.” **Barnes**, 250 N.C. at 394, 109 S.E.2d at 232.

In **N.C. State Highway Comm’n v. Privett**, 246 N.C. 501, 99 S.E.2d 61 (1957), a witness was asked on cross-examination whether he knew the values of any other property in the area or the prices which such properties had been sold and he answered in the negative. Justice Bobbit stated,

“The testimony so elicited was relevant solely to the credibility of the witness and the weight, if any, to be given to his testimony. Let it be noted that none of the questions undertook to elicit testimony as to the valuations or sale prices of the properties, the questions being directed to whether the witness had opinions or knowledge with reference thereto.” **Privett**, 246 N.C. at 506-07, 99 S.E.2d at 65.

Rule 702 and its recent amendment, have created a great deal of confusion in the trial of eminent domain cases. It is rumored that some judges believe that only persons who qualify as “experts” pursuant to Rule 702 can opine as to the value of the property both before and after the taking by the Department of Transportation. If that is the case, then land owners are in great trouble.

Rule 702 states a person tendered as an expert may testify if qualified by knowledge, skill, experience, training or education, if all of the following apply:

1. The testimony is based upon sufficient facts or data.
2. The testimony is a product of reliable principles and methods.
3. The witness has applied the principle methods reliably to the facts of the case.”

Two qualified MAI certified appraisers can be appraising the same piece of property and each one may select four sales that they consider appropriate sales for comparison and neither has selected the same sale. These appraisers, if questioned under oath, would say that there is no way of determining who is right or wrong as the selection of the sales to be used for the comparison market approach is strictly left up to the appraiser based upon his or her experience and their subjective decision making process. In addition, even if the two appraisers select the same property for a comparison sales approach, the adjustments that they may make to such sales can vary drastically and again there is no test to resort to to determine who is right or who is wrong. In short, appraising is more of an art than a science. My suggestion, with all due respect, is to allow the lawyers for both the condemnor and the property owner, to do their jobs and point out shortcomings of any person who is opining as to value, whether it is based upon the sales they have selected for

market comparison or the adjustments they have made to such sales, whether or not they are biased for any reason, and whether there are inconsistencies in their appraisal.

In addition, many times, the sales used by the appraisers are by purchasers and sellers who are actually what I call “market makers.” These are also commonly referred to as traders or people who speculate and buy and sell real estate for a living. Often times, these are the most knowledgeable witnesses since they do not have to go to the courthouse to get their information on sales prices, they know it because they live it and they put their own money at risk in making such purchases and sales. The fact that a witness does not carry the name certified appraiser does not preclude the witness from opining as to value.

Who can testify about value?

Land owner – Generally speaking, a land owner is allowed to give his or her opinion of value. **Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville**, 308 N.C. 255, 302 S.E.2d 204 (1983), **Lea Co. v. N.C. Board of Transp.**, 308 N.C. 603, 304 S.E.2d 164 (1983), **N.C. State Highway Comm’n v. Helderman**, 285 N.C. 645, 207 S.E.2d 720. There are numerous other cases that also state without equivocation that the owner of the property is entitled to express his or her opinion as to the value of the property in question even if their knowledge and experience would not otherwise qualify them. See **N.C. State Highway Comm’n v. Helderman** and **Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville**. In addition, while the Commissioners may be called to testify as to their opinion, the report by the Commissioners is not competent as evidence upon the trial of just compensation nor shall evidence of the deposit by the condemnor be competent upon the trial issue of just compensation. NC G.S. 40A-48(d), NC G.S. 136-109(d).

Appraisal Witnesses – Clearly, any appraiser attempting to testify must use one of the acceptable methods of appraisal in making his or her appraisal of the subject property both in its before and after value. Appraisers generally use three methods of appraisal, which are referred to as the cost approach, market comparison approach, and capitalization of income approach.

The cost approach is where the appraiser attempts to locate parcels of unimproved real estate which are similar to the subject property and to which the appraiser will make adjustments for topography, zoning, utilities, frontage, traffic count, market conditions (time of sale to date of take) as well as other adjustments to try to come up with a value of the raw land based on a per square foot price to determine the value of the subject property. They will then, usually using Marshall & Swift, or sometimes in consultation with an independent third party, get the cost of reproducing the building. They will then depreciate the components of the building based upon their observation of the condition and using their subjective determination as to the useful life of that portion of the building to come up with a value of the structure(s).

The sales comparison or market comparison approach is where the appraiser will attempt to locate actual sales of property that he or she deems to be similar to the subject property but again making adjustments for size of the tract, configuration of the tract, zoning, road frontage, access, topography, market conditions, etc.. They will generally come up with a range of values and from which they will select (at random) a value to base their opinion upon.

The capitalization of income approach is an approach that is most often used where property is generating income. Please note with the one exception of a dairy farm. **City of**

Statesville v. Cloaninger, 106 N.C. App. 10, 415 S.E.2d 111 (1992), the income of a business being operated on the property is not admissible. **Dep't of Transp. V. Fleming**, 112 N.C. App. 580, 436 S.E.2d 407 (1993). The income referred to is the rent that property is capable of generating. In other words, the appraiser will determine by examining other properties that are being rented to determine a suitable rental rate for the subject property and then select a capitalization rate, which he or she deems appropriate for the type of investment and the time of the taking, to determine a value. Example: An appraiser determines that a piece of property being acquired by the Department of Transportation could be rented for \$120,000 per year. The appraiser determines that the appropriate capitalization rate is 6%. Assuming that it is a triple net lease, that is all of the income going directly to the owner of the property and the tenant paying taxes, insurance and other costs, then the value of the property would be \$2,000,000, which is determined by taking \$120,000 and dividing it by .06 ($\$120,000 \div .06 = \$2,000,000.00$). You will most often see this approach being used on commercial properties that are either being rented or capable of being rented to generate income. Do not confuse this with allowing introduction of the evidence of the income generated by the business located upon the property. **Dep't of Transp. v. Fleming**, 112 N.C. App. 580, 436 S.E.2d 407. The only exception to the income is stated in the Cloaninger case, although other jurisdictions have made other exceptions, but not North Carolina.

Realtors – Some condemnor attorneys will take the approach that a realtor is not qualified to testify and express his or her opinion as to value. This is not correct. Prior to 2012, the North Carolina Appraiser's Act required that persons performing appraisals for fee to have an appraisal license or certificate from the North Carolina Appraisal Board. An

exception was provided for licensed real estate brokers providing a CMA (Comparative Market Analysis) for perspective or actual brokerage clients or for real property involved in an employee relocation program. This created an obvious problem since realtors did not want to do the study necessary to determine the value for a piece of property, go to court and testify and be beaten up by the other lawyer, and receive no compensation for same. This problem was addressed in the North Carolina General Assembly in 2012 and in Senate Bill 521, which was enacted. Broker price opinions are now authorized for the following:

1. an existing or potential seller of a parcel of real estate;
2. an existing or potential buyer of real property;
3. an existing or potential lessor of a parcel or interest in real property;
4. an existing or potential lessee of a parcel or interest in real property;
5. a third party making decisions or performing due diligence related to the potential listing, offering, sale, option, lease or acquisition price of a parcel or interest in real property;
6. an existing or potential lienholder or **other party for the purpose other than as the basis to determine the value of parcel or an interest in real property for a mortgage loan origination**, including first and second mortgages, refinances, or equity lines of credit. The provisions of this subsection do not preclude the preparation of broker price opinion or comparative market analysis to be used in conjunction with or in addition to an appraisal.

In short, a broker can now testify for a fee in a condemnation case but may not do a comparative market analysis that will be used by some lender in conjunction with any

mortgage loan. In other words, the appraisers protected their turf insofar as lending institutions were concerned. The North Carolina Real Estate Commission adopted, in 21 NCAC 58A.2202, the standards that a broker must adhere to in performing a broker price opinion or comparative market analysis for a fee. I have attached that portion of the Administrative Code to the appendix hereto.

Lay Witnesses – Finally, anyone who is familiar with the subject property and real estate values should be allowed to testify subject to cross examination. Some “traders” have much more knowledge of values and sales prices in certain locales than appraisers. They can tell you what properties sold for, the approximate date of such sale as well as any conditions of the sale and differences between the subject property and the property which sold. These people clearly have the knowledge to assist the jury in determining the issue of just compensation. Remember Rule 701 provides that a person not testifying as an expert may testify in the form of an opinion(s), which are:

- (a) rationally based on the perception of the witness; and
- (b) helpful to the determination of a fact issue.

Surely a person who is familiar with the subject property, sales and sales prices of similar property acquired through his or her experience and/or personal dealings can testify and their testimony will assist the issue of fact.

A witness who establishes his familiarity with the land in question and states he has an opinion satisfactory to himself as to its value at the time in question is competent to give his opinion as to its value. **Harrelson v. Gooden**, 229 N.C. 654, 50 S.E.2d 901 (1948).

APPENDIX A

§ 40A-40. Notice of action.

(a) Not less than 30 days prior to the filing of a complaint under the provisions of G.S. 40A-41, a public condemner listed in G.S. 40A-3(b) or (c) shall provide notice to each owner (whose name and address can be ascertained by reasonable diligence) of its intent to institute an action to condemn property. (The notice shall be sent to each owner by certified mail, return receipt requested. The providing of notice shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper 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.)

The notice shall contain a general description of the property to be taken and of the amount estimated by the condemner to be just compensation for the property to be condemned. The notice shall also state the purpose for which the property is being condemned and the date the condemner intends to file the complaint.

(b) In the case of a condemnation action to be commenced pursuant to G.S. 40A-42(a), the notice required by subsection (a) of this section shall substantially comply with the following requirements:

(1) The notice shall be printed in at least 12 point bold legible type.

- (2) The words "Notice of condemnation" or similar words shall conspicuously appear on the notice.
- (3) The notice shall include the information required by subsection (a) of this section.
- (4) The notice shall contain a plain language summary of the owner's rights, including:
 - a. The right to commence an action for injunctive relief.
 - b. The right to answer the complaint after it has been filed.
- (5) The notice shall include a statement advising the owner to consult with an attorney regarding the owner's rights.

An owner is entitled to no relief because of any defect or inaccuracy in the notice unless the owner was actually prejudiced by the defect or inaccuracy, and the owner is otherwise entitled to relief under Rules 55(d) or 60(b) of the North Carolina Rules of Civil Procedure or other applicable law. (1981, c. 919, s. 1; 1981 (Reg. Sess., 1982), c. 1243, s. 3; 1999-410, s. 1.)

SECTION .2200 - BROKER PRICE OPINIONS AND COMPARATIVE MARKET ANALYSES

21 NCAC 58A .2201 **APPLICABILITY**

This Section applies to broker price opinions and comparative market analyses provided for a fee by a real estate broker whose license is not on provisional status pursuant to Article 6, Chapter 93A of the General Statutes.

History Note: *Authority G.S. 93A-83(d);*
 Temporary Adoption Eff. October 1, 2012;
 Eff. April 1, 2013.

21 NCAC 58A .2202 STANDARDS

(a) A broker performing a broker price opinion or comparative market analysis for a fee shall comply with all the requirements in G.S. 93A-83 and in this Rule.

(b) A broker shall only accept an assignment to provide a broker price opinion or comparative market analysis for a property if the broker has knowledge of the real estate market, direct access to real estate market sales or leasing data, and brokerage or appraisal experience in the subject property's geographic location.

(c) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker can exercise objective, independent judgment free of any influence from any interested party in the performance of his or her analysis of the facts relevant to determination of a probable selling or leasing price.

(d) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker has personally inspected the exterior and interior of that property, provided, however, that an inspection of the exterior or interior is not required if this is waived in writing by the party for whom the opinion or analysis is being performed.

(e) When developing a broker price opinion or comparative market analysis for a property or interest therein, a broker shall utilize methodology such as analysis of sales or income of sold or leased properties comparable to the subject property or capitalization as is appropriate for the assignment and type of subject property.

(f) When analyzing sales or income of properties comparable to the property that is the subject of a broker price opinion or comparative market analysis assignment, a broker shall comply with the following standards:

(1) The broker shall select from reliable information sources a minimum of three sold or leased comparable properties for use in his or her analysis that are similar to the subject property with regard to characteristics such as property type, use, location, age, size, design, physical features, amenities, utility, property condition and conditions of sale. The comparable properties selected shall reflect the prevailing factors or market conditions influencing the sale or lease prices of similar properties in the subject property's local market; and

(2) The broker shall make adjustments to the selling or leasing price of selected comparable properties for differences between the characteristics of the comparable properties and the subject property as necessary to produce a credible estimate of the probable selling or leasing price. Adjustments shall be considered for differences in property characteristics such as location, age, size, design, physical features, amenities, utility, condition, economic or functional obsolescence and conditions of sale. The amounts of adjustments shall reflect the values that the local real estate market places on the differences in the characteristics in question.

(g) A broker price opinion or comparative market analysis provided to the party for whom the opinion or analysis is being performed shall address, in addition to matters required to be addressed by G.S. 93A-83 and other provisions of this Rule, the following items:

(1) a description of the comparable properties used in the analysis (including any unsold properties listed for sale or rent that were used as comparable properties);

(2) the adjustments made to the selling or leasing prices of comparable properties;

(3) local real estate market conditions;

(4) if the date on which the sale or lease of a comparable property became final is more than six months prior to the effective date of the broker price opinion or comparative market analysis, an explanation of why the comparable property was used in the analysis and a description of the market conditions affecting the comparable property at the time the sale or lease became final; and

(5) each method used in deriving the estimate of probable selling or leasing price.

(h) In connection with a broker price opinion or comparative market analysis, an estimated probable leasing price may be reported by a broker as a lease rate and an estimated probable selling or leasing price may be reported by a broker either as a single figure or as a price range. When the estimated probable selling or leasing price is stated as a price range and the higher figure exceeds the lower figure by more than 10 percent, the broker shall include an explanation of why the higher figure exceeds the lower figure by more than 10 percent.

*History Note: Authority G.S. 93A-83(d);
Temporary Adoption Eff. October 1, 2012;
Eff. April 1, 2013.*