

/A CITIZENS GUIDE TO THE KANSAS STATE  
PROCEDURE FOR EMINENT DOMAIN/

by

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## TABLE OF CONTENTS

### CHAPTER

	ACKNOWLEDGEMENTS.....	1
	INTRODUCTION.....	1
	Description of Problem.....	2
1	HISTORICAL DEVELOPMENT.....	4
	Historical Background.....	4
	The Intent of Eminent Domain.....	5
	The Right and Nature of a Sovereign.....	7
	Definition of a Public Use.....	8
	The Development of Just Compensation.....	11
2	PROFESSIONAL USE.....	14
	General Concepts.....	14
	Future Needs.....	17
3	LEGAL PROCEDURE.....	18
	Kansas Eminent Domain Procedure.....	19
	Property Owners Rights.....	22
4	COMPENSATION.....	24
	Kansas Procedure for Compensation.....	24
	Property Owners Rights.....	27
	NOTES.....	31
	REFERENCE LIST.....	33
	CONCLUSION.....	
	A Citizens Guide to the Kansas State Procedure for Eminent Domain.....	

## INTRODUCTION

Today, "Eminent Domain" (condemnation) is recognized as the pre-eminent power of government to acquire private property for public use. This power has affected a broad spectrum of our society and will continue to affect thousands of citizens in the future because of the increasing need of government to use private property for public services. "As economic and social conditions change and as public requirements for highways, schools, utilities, and other uses expand, private property will be taken in ever-increasing quantities to meet the public need" (Rokes, 1961).

"The law of eminent domain is little understood by most judges, attorneys, legislators, and the American public. Very few law schools teach the subject, and most judges lack extensive experience in condemnation matters" (Rokes, 1961). The result has been that, despite the growing need for the use of eminent domain, there is a serious lack of knowledge of condemnation by the property owner and condemnor alike. In addition, the state statutes enacted to guide the eminent domain power in this country has developed a legal language that precludes private citizens from gaining the necessary understanding of the law.

This report proposes to examine the development, need, use, and legal procedure of eminent domain and, after obtaining this information, to propose a guide that provides citizens with an understanding of condemnation procedure.



## Description of Problem

In recent years, eminent domain has been utilized and expanded to satisfy certain material needs of the public sector. Public authorities clearly possess the power to acquire private property for public purposes. However, the continued existence and ultimate success of planning programs entailing land acquisition depends on (1) the receptiveness of the courts to the public; (2) legislative authorization and appropriation; and (3) an absence of public indignation over the disruptions to private property (Rams, 1973).

Point three, which focuses on the lack of indignation among those who must forfeit their property is the general basis for this study. This master's report proposes that by educating the public sector on condemnation and enlightening citizens of their legal rights, public indignation over the use of eminent domain may be stimulated.

The lack of knowledge or understanding by citizens of any procedure, whether public or private, usually will induce an unfavorable public attitude and interrupt or delay public projects. Eminent domain, a powerful planning tool, should not be used without first allowing citizens knowledge of its affect. Also, the planning professions must understand that those changes created by the condemnation procedure must not create ill will among the citizens that are being asked to make sacrifices. Individual sacrifices may seem minimal compared to insuring public need; nevertheless, the planning profession must keep alive the interests of both public and private sectors. Opening communication lines is the best way to accomplish this goal.

Today, as governmental procedures become increasingly complex, citizens must learn to protect their rights by educating themselves to procedures that may affect their lives. Protecting individual rights is important to the planning profession, because, while planners

must acquire land through condemnation, it is necessary to maintain public support.

In summary, the problems of eminent domain are:

1. The lack of knowledge or understanding by the planning profession of the condemnation procedure.
2. The lack of knowledge or understanding by citizens of the condemnation procedure.
3. State statutes used to guide the procedure of eminent are so technically written as to preclude citizens from gaining the necessary understanding of the procedure.
4. The lack of knowledge or understanding by citizens of any procedure, whether public or private, usually will induce an unfavorable public attitude.
5. Eminent domain is a powerful planning tool that should not be used against private citizens unless they are knowledgeable of its effect.
6. The protection of individual rights is important to the planning profession because of the need to use condemnation and at the same time retain public support.

## CHAPTER 1

### HISTORICAL DEVELOPMENT

#### Historical Background

The use of eminent domain dates back to the era of the Roman Empire when private property was first taken for a public use. "In the year 302 A.D., when Diocletian was building his famous aqueducts and baths in Rome, such property as fell within the right-of-way of these semi-public utilities was apparently expropriated" (Rokes, 1961).

It was not until centuries later, during the late Middle Ages, that acquisition of private property began to be discussed in England as a governmental power, regulated by the Magna Charta in 1215.<sup>1</sup> During this time, when title to property passed from monarchical ownership to private citizens, a king retained certain rights, which were similar in meaning to today's definition of public use. These rights gave a monarch the power to enter private property to erect defenses against the country's enemies, to build beacons and lighthouses, and to seize provisions for the use of the royal households.

In 1625 a famed Dutch jurist, Hugo Grotius, originated the term *dominium eminens* (eminent domain) and declared that the state of he who acts for it may use and even alienate and destroy the property of its subjects for the ends of public utility, provided that, when this is done, the state is bound to make good the loss of those who lose their property (Rokes, 1961).

As defined today, the power of eminent domain was first recognized in the 1789 Declaration of Rights during the French Revolution. At this time the requirement of just and previous indemnity was first required to be paid to private landowners.

The colonists of North America brought the ideas of Seventeenth

and Eighteenth Century England to the new continent; a land that stretched endlessly before them.

This plentitude of land and the cherished freedom to use it generated a fierce pride in land ownership that was a key element in the frontier spirit of self-reliance. Nevertheless, only a few years after colonization began the colonial governments also began to regulate the use of land, and to develop procedures as eminent domain and patterns of land regulation that grew to resemble the pattern of regulation in England rather closely (Bosselman, Callies, and Banta, 1973).

As the colonies in America gained their independence from England in 1776, each colony became a sovereignty vested with the power of eminent domain. The exercise of the power, however, was not verified until the adoption of the United States Constitution in 1789. Today's definition of eminent domain was not developed until 1791 under the Fifth Amendment to the Constitution, which reads in part: "nor shall private property be taken for public use, without just compensation."

Under our system of constitutional government and free enterprise, private property may not be taken except for public use and upon payment of just compensation. The tremendous public improvements that are now in progress, such as the redevelopment of substandard areas in many cities throughout the country, the construction of low cost housing, the building of modern highways, superhighways, and thruways, as well as new schools, parks, parkways, playgrounds, airports, and a host of other public projects, invariably involve the acquisition of private property<sup>2</sup> (Jahr, 1953).

#### The Intent of Eminent Domain

Eminent domain can be defined as a power vested in a sovereign to take, or to authorize the taking of, private property without the owner's consent, when just compensation is paid to the owner and the purpose for the acquisition is a public use.

This power may be exercised to take any kind of private property,

real or personal, tangible or intangible. The type of property that is usually taken is the fee or leasehold interests in lands and buildings, or easements to use the land by public or quasi-public use.

Where an easement is acquired, the owner is restricted in the use of his land. For example, a telephone company, by exercising the authority given to public utilities, may be allowed to erect a telephone pole on a property owner's land. Not only may the pole be erected there and remain to restrict the use of the land, but the company may enter and leave the property in order to service the pole. Where the fee is taken from the property owner, title passes, and the owner is a trespasser if he remains on the land. This is exemplified when private property is converted into a public highway (Rokes, 1961).

Eminent domain is a superior power to all private rights, but specific limitations and statutory prohibitions have been imposed by the states to restrict the acquisition of certain types of property. For instance, some states restrict the acquisition of property being used for certain types of commercial buildings, dwellings, gardens, yards, orchards, and cemeteries when the taking is not by the state itself.<sup>3</sup> This nature of allowing states to govern themselves by controlling limitations involving the eminent domain powers is separate to each state, and it is generally understood that each state has the power to establish or to remove such limitations at the will of its legislature.

Blackstone, in his Commentaries, recognizes three absolute rights possessed by all individuals in a free society: (1) the right of personal security, (2) the right of personal liberty, and (3) the right of private property. The condemnation of private property would thus appear to be in violation of an "absolute right." Blackstone goes on to say, however, that the individual's absolute right of property consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only the laws of the land (Jahr, 1953).

Since the laws governing private property are subject to a higher law, it is clear that private property can be controlled and taken by the sovereign's exercise of eminent domain. It is evident that the absolute right to private property is not absolute.

#### The Right and Nature of a Sovereign

Sovereign power is that power in a state to which none other is superior or equal, and which includes all the specific power necessary to accomplish the legitimate ends and purposes of government. Also, a sovereign right is a right which the state alone, or some of its governmental agencies, can possess, and which it possesses in the character of a sovereign, for the common benefit, and to enable it to carry out its proper functions (Black, 1979).

The legislative act granting the use of eminent domain is carefully interpreted by the courts, because it is one of the highest sovereign powers exercised by the states and affects the rights of private property. This power may be used only under legislative authority and to the extent described in the procedures allowed by the legislature.

The legislature may confer the power of eminent domain upon the State's political subdivisions and upon any public agency or corporation created by it for governmental purposes. It may even be conferred upon private persons, corporations, and partnerships for exercise by them in furnishing the public with what are generally called public utility services (Rokes, 1961).

Although the courts strictly scrutinize the legislative act granting eminent domain, the states tend to give public authorities the widest possible latitude in its exercise of the power. The general test for granting the power of eminent domain is not whether the power is public or private but whether the power is to be exercised for a public use.

### Definition of a Public Use

Public use is the constitutional and statutory basis for taking by eminent domain. For condemnation purposes, public use is one which confers some benefit or advantage to the public; it is not confined to actual use by the public. It is measured in terms of right of public to use proposed facilities for which condemnation is sought and, as long as public has right of use, whether exercised by one or many members of public, a public advantage or public benefit accrues sufficient to constitute a public use (Black, 1979).

The development of a definition of public use has gone through a judicial evolution, because over the years it has fallen to the courts to define the term. Instead of setting a judicial definition to distinguish between a public use and a private purpose, the courts have usually left each case to be determined on its own merit.

Starting in the 1930's the courts began to broaden the definition of public use to allow private property acquisition for uses not considered public in the traditional sense. "Land taken for a road or a park would be used by the public at large; but land taken for a low rent public housing project raised the question of whether such a use is a 'public use' within the meaning of the constitutional provision" (Rose, 1980). In 1936 the courts upheld the use of eminent domain for slum clearance for a low income public housing project by defining public use in terms of public benefits, such as the reduction in crime, the removal of health hazards and the increase in tax revenues that would result from improving the neighborhood.<sup>4</sup>

Once having defined public use in terms of social and economic benefits, the path was cleared for the courts to take the next step in broadening the concept of public use. "In 1943 the courts held that the elimination of substandard housing constitutes a benefit to the total population and is a public use even though it may be

necessary to take private property from one private owner and transfer the ownership to another private owner"<sup>5</sup> (Rose, 1980).

"In 1954, a decision by the United States Supreme Court upheld the use of the eminent domain power for an urban renewal program in the District of Columbia" (Rose, 1980). The following paragraphs contain the most frequently cited statements from this landmark decision.<sup>6</sup>

Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Mr. Justice Douglas

It thus appears that the concept of public use is incapable of a precise and comprehensive definition. In most eminent domain cases, it is common practice for the courts to settle on a definition by weighing the acquisition of private property against the necessities of the people of the state in which the question arises. "The majority



of the courts have adopted the broad view that public use means public advantage. According to this concept, it is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement so long as the use is for the public benefit" (Rokes, 1961).

The concept of a 'public use' does not have strict limitations: it changes with varying conditions of society, new appliances of the sciences, and changing conceptions of the scope of governmental functions. Administration, travel and communication, navigation, public health, education, public utilities, market places, and parking lots have all been considered as public in character by the courts.

In the past, the courts have ruled that eminent domain could only be used to take private property for public necessity. But today, eminent domain is being granted by the courts for such projects involving aesthetic purposes as beautifying parks, preserving natural scenic beauty along rivers and highways, and prohibiting land development or improvements that might cause harm to the beauty of lands improved with public funds.

Under the law as it presently is interpreted, it is

impossible to determine the limits, if any of the exercise of the power of eminent domain. It is not inconceivable that the state could use the power to condemn farmland and then redistribute it on the theory that the public will benefit if more people occupy less acreage, or the public will benefit if only farmers who are graduates of certified agricultural schools are allowed to till the soil. It is also possible under the broad view that the state could condemn a property owner's house because it has not been painted in the last three years and therefore, is a blight on the neighborhood. These very extreme examples are only used to point out the fact that under the broad view of public use, nobody knows what the limits of the power of eminent domain are, for the future, or, and even more important, what they are now (Rams, 1973).

## The Development of Just Compensation

Although the 5th Amendment to the United States Constitution provides that private property shall not be taken without the payment of just compensation, this provision does not restrict the powers of the states, but only those of the federal government. The 14th Amendment, passed in 1868, prohibited the states from depriving persons of their property, without due process of law. It did not, however, specifically impose on the states the obligation of paying just compensation. All but two of the states (North Carolina and New Hampshire) now have just compensation requirements in their constitutions. Even these states must pay just compensation under the requirements of the 14th Amendment, according to a ruling by the United States Supreme Court<sup>7</sup> (Rokes, 1961).

Today, federal and state constitutions require the condemnor to pay just compensation to the owner for property taken by the power of eminent domain. But what is just compensation? Just compensation has been defined by the courts as the full equivalent in money for the value of the private property being taken, and the full equivalent in money has been defined as the market value of the property at the time of eminent domain. The market value in turn, has been defined as the price that a buyer is willing and able to pay, but not obliged to buy, and what a seller is willing and able to accept, but not obliged to sell. "Most eminent domain litigation involves the question of what is the market value of the property taken by governmental action" (Rose, 1980).

Over the years, the courts have developed five (5) methods to determine market value used in providing just compensation for property acquired through eminent domain, these methods are defined as follows:

1. Comparable Sales Method. The market value of a house in question would be determined by obtaining evidence of the selling price of similar or comparable houses in the area. The persuasiveness of the evidence that the selling price of other houses is accurate indication

of the market price of the house in question will depend upon whether the other houses are in fact comparable in (1) construction, (2) condition, (3) location, and (4) time.<sup>8</sup>

2. Capitalization of Income. Is a method of determining the value of income-producing property by deciding the dollar amount of net income by the expected rate of return, known as the capitalization rate. This simple arithmetic operation is derived from an elementary formula that expresses the relationship between Principal (or Capital Investment), Interest, and Rate of Return.<sup>9</sup> Thus:  $\text{Income} = \text{Principal} \times \text{Rate of Return}$ .
3. Reproduction Cost Less Depreciation Method. Under this method the cost of reproducing the building under current costs would be estimated. This amount would then be reduced to a fraction of that cost which reflects the depreciation of the existing building resulting from age.<sup>10</sup>
4. Highest and Best Use Method. Suppose the property is zoned for one purpose but the owner argues that at the time of the taking the market value of the property reflects a probability of rezoning to permit a more valuable use within the reasonably foreseeable future. If the property taken is vacant land or a building that is capable of more than one use, then the value attributed to such property in eminent domain proceedings must be its highest and best use.<sup>11</sup>
5. Partial Taking Methods:
  - a. Before and After Rule. The usual method of determining just compensation for a partial taking is to apply the "before and after rule", by which the compensation is calculated as the difference between the value of the entire parcel of land before the taking the value of the remainder of the land after the taking.<sup>12</sup>
  - b. Two-Step Procedure. In some states, just compensation for partial taking is calculated by a two-step procedure in which the owner is compensated; (1) for the market value of the land taken, and (2) the difference in the before and after value of the remainder of the property.<sup>13</sup>
  - c. Consequential Damages. A difficult problem arises where the owner of land seeks compensation for the loss in market value resulting not from the taking of his/her land but rather from the taking of adjoining land owned by others. An even more troublesome issue arises where compensation is made for the taking of a building but no payment is made for

the loss of good will or the destruction of a business conducted in the building, or the cost of moving fixtures and personal property from the building<sup>14</sup> (Rose, 1980).

## CHAPTER 2

### PROFESSIONAL USE

#### General Concepts

For even if the good of the individual is identical with the good of the state, yet the good of the state is evidently greater and more perfect to attain or to preserve. For through the good of an individual is something worth working for, to insure the good of a nation or a state is nobler and more divine.

Aristotle

The professional use of eminent domain in the development of planning for public needs goes beyond the compulsory acquisition of sites for governmental functions. Public acquisition of private property is being used in conjunction with other forms of land-use control, to open new vistas in directing the development of urban growth. Engaged at strategic places and at decisive times, it can influence land development far beyond the limits of the property being acquired. A new highway can directly affect the land-use development in the surrounding environment, and slum clearance may set off the economic renewal of an entire community. In addition, "Master plans and the implementation of urban design call forth the full panoply of government power. Regulatory measures affect rights in land; the outright acquisition of interests in land by government through its power of eminent domain" (Haar, 1977).

To insure proper planning and to meet the complications created by the increasing growth of our cities, it is important to understand the wide range of municipal uses for publicly owned land. The list below is an indication of the wide variety of public uses that require publicly owned land. These uses fall under four classifications;

some are found in every municipality, but the need for others may be very limited and some that are rarely needed, might in the future become more common.

### 1. Customary Public Uses

Needed by some units of government, whether national, state, or local agencies, which are customarily provided without a direct service charge. Some of these have emerged within this century but are well established and accepted by the people.

#### Public Structures

- City halls, courthouses, post offices, office buildings.
- Educational buildings.
- Fire stations, police stations, prisons and jails, health clinics.
- Recreation centers, public rest areas.
- Homes for aged and indigent.
- Libraries, aquariums, museums, zoos.
- Incinerators, sewage disposal plants.
- Municipal warehouses, garages, repair shops, greenhouses.
- Dikes and levees.
- Statues, monuments, foundations, historic sites.
- Armories, arsenals, navy yards, forts.
- Bandstands and shells.

#### Public Areas

- Streets, alleys, open squares, parkways, bridges.
- Parks, playgrounds, public beaches.
- Canals, reservoirs, watersheds, artificial lakes.
- Forests, woodlands.
- Cemeteries.

- Fairgrounds.
- Town commons, public gardens, picnic grounds.
- Airports.
- Parade grounds, proving grounds.
- Refuse fills and dumps.

## 2. Quasi Public Uses

Uses from which the public ordinarily receives returns for its services and pay their cost in full or in part. Some of these uses have been developed very recently or exist as yet in only a few communities.

- Public utility structures and rights-of-way (for water, gas, electricity, transit systems, and terminals).
- Docks, piers, public markets.
- Asphalt plants, gravel pits, and quarries.
- Hospitals.
- Stadiums, auditoriums, theaters, amphitheaters.
- Golf courses, swimming pools.

## 3. Emerging Public Uses

Uses that are gradually evolving with the expansion of governmental activities and which may be operated directly by a private agency under special public control.

- Redevelopment projects (downtown malls).

## 4. Emergency Public Uses

Uses which arise under the pressure of abnormal conditions.

- Dams, dikes, lakes, and backwaters for flood control.
- Allotment gardens when food shortages threaten.

- Additional national defense areas such as landing fields, drill grounds, bomb shelters, army bases.

#### Future Needs

We are living in a rapidly changing world. In the ever increasing blighted areas in our cities, characterized by dilapidated buildings, noncompatible mixed land uses, and obsolete comprehensive plans, it has become necessary to develop tools that allow more drastic treatments. These tools have been developed in connection with housing and urban renewal programs that require planning agencies to use the power of eminent domain to acquire blighted land and buildings. These agencies can either redevelop property directly or resell the property to private developers under conditions that are enforced by statutes, covenants, or zoning. In recent years a whole series of new programs have been developed, including the following:

1. Public housing for low-income families, either replacing slums or located on vacant land.
2. Public and semi-public housing for middle-income families, first for veterans and then for others.
3. Private residential redevelopment of residential slums.
4. Private redevelopment of residential slums for commercial or industrial use.
5. Redevelopment of non-residential blighted areas for appropriate use.
6. Redevelopment of blighted vacant land for appropriate use.
7. Neighborhood and community rehabilitation and conservation programs, including spot clearance of dilapidated structures.



## CHAPTER 3

### LEGAL PROCEDURE

Today in the United States the systems for taking private property under eminent domain are established and governed by statute. Each state has not only a general statute providing the manner of condemning property, but also numerous special statutes, which may apply either to one specifically named corporation or to particular kinds of corporations. This multiplication of statutes with consequent complexity of procedure has been due to the extension of state and municipal functions to provide for new kinds of public uses. In general, however, despite numerous individual differences, the statutes provide for either of two types of condemnation; one by administrative order and the other by judicial decree (Rokes, 1961).

To take land by the administrative method of condemnation, the condemnor must first pass an ordinance or a resolution which is then filed in the registry of deeds of the country in which the land is located. Title to the property then passes immediately to the condemnor. At the same time, the condemnor must award either compensation to the owner or place on deposit in the appropriate court an amount of money which he deemed sufficient by the condemnor for the property. If the property owner will not settle for the amount offered, or is dissatisfied with the amount deposited, he is entitled to have the issue of damages determined by a Court of Law.

Several of the state constitutions provide that compensation must first be paid before an authority may take title to private property under the power of eminent domain. Such provisions preclude the use of the administrative method of condemnation, which provides no means of judicially determining the amount of the compensation before appropriation. For this reason the more typical method of appropriation is by judicial decree.

When using the judicial decree method of condemnation, the condemnor will first attempt to acquire the private property by negotiating with the owners to avoid the expense and delay associated with court proceedings. If a landowner is dissatisfied with the amount of compensation offered and refuses to settle, the condemnor must institute court proceedings. The landowner is then given notice of the proceedings and the right to appear and defend his/her property. The court first determines the right of the condemnor to use eminent domain. If the condemnor is held by law to possess the necessary authority, the amount of compensation due the landowner is then determined. In any event, whether settlement is made with or without suit, title will not pass to the condemnor until compensation has been paid to the property owner or placed on deposit with the appropriate court.

#### Kansas Eminent Domain Procedure

The state of Kansas utilizes the judicial decree method of condemnation and sets forth the procedure for eminent domain under the provisions of the Kansas Statutes.

#### Condemnor

The parties that have been granted the power of eminent domain in the state of Kansas:

1. State: used through state boards and commissions.
2. Counties: used through county boards and commissions.
3. Cities: used through city boards and commissions.
4. Quasi Public/Private Corporations: the power of eminent domain granted to companies such as utility and transportation corporations.
5. Quasi Public/Private Partnership: as corroboration between cities

and private development corporations in urban renewal and development projects.

#### Eminent Domain Procedure

The procedure for exercising eminent domain as set forth in the Kansas Statutes Annotated 26-501 thru 26-517:

1. Petition to the Court: The proceedings shall be brought by filing a verified petition<sup>15</sup> in the district court of the county in which the property is situated. If the property is situated in two or more counties, then proceedings may be brought in any county in which the property is situated.
2. Contents of Petition: A petition to the district court includes the following:
  - a. A description of the authority granting the condemnor the power of eminent domain and the purpose of the acquisition of the property.
  - b. A legal description of each lot, parcel or tract of property and nature of the property to be taken.
  - c. The name of any owner and all lien-holders and the name of any person in possession of the property.

After the petition, is verified by affidavit,<sup>16</sup> and properly filed the court fixes the time when the proceedings are to be held. Mistakes in the petition, which do not impair substantial rights of either party will not invalidate any proceedings.

3. Public Notice: The condemnor must publish in a newspaper of general circulation<sup>17</sup> in the county where the property is situated, a notice of the court proceedings at least nine (9) days before the date fixed by the court, and at least seven (7) days before

the court proceedings, mail to each party named in the petition a copy of such publication notice and the petition. Mistakes in the petition, which do not impair substantial rights of either party will not invalidate any proceedings.

4. City Procedure: A city has the right to acquire through condemnation any interest in real property as set forth in the Kansas Statutes.
- a. Whenever it is deemed necessary by the governing body to appropriate private property for public use, the governing body by ordinance or resolution must declare such necessity and authorize a survey and description of the land or interest to be acquired to be made by some competent engineer and filed with the city clerk.
  - b. Such ordinance or resolution must be approved by 2/3 vote of the city's governing body.
  - c. Upon filing of the survey and description of the land or interest to be acquired, the petitioner must publish the ordinance or resolution in the official city newspaper.
  - d. If in the opinion of the governing body any property is especially benefited by the proposed improvement for which the property is to be acquired, such property can be designated as a benefit district by ordinance or resolution.
  - e. The governing body, as soon as practical after passage of the ordinance or resolution authorizing the acquisition and fixing of the benefit district, if any is to be fixed, can then proceed to petition the district court for the right to acquire the property.

5. Court Procedure: If the judge finds from the petition:
- a. The condemnor has the authority to acquire property under the power of eminent domain, and
  - b. The acquisition is necessary to the lawful purpose of a public use, then
  - c. The judge will enter an order appointing three (3) disinterested residents of the county in which the petition is filed to view and appraise the value of the property to be acquired, and to determine the damages to the owners, lien-holders, or persons in possession of the property that have been named in the petition.
  - d. Such order must fix the time for the filing of the appraisers report to the court, which cannot be more than twenty (20) days after the entry of the order, (if a good cause is shown, the court may extend the time for filing).
  - e. The granting of an order determining that the condemnor has the right to acquire the property through eminent domain shall not be consider a final order for the purpose of appeal to the supreme court, but an order denying the petition is considered a final order without the right of appeal.

#### Property Owners Rights

These rights are set forth in the Kansas Statutes to protect the owners, lien-holders, and any person in possession of the property who have been named in the petition for acquisition of private property under the power of eminent domain.

1. Appeals: Appeals by the property owners to the supreme court may be taken from any final order under the provisions of this act.

- a. Such appeals must be prosecuted in the same manner as other appeals and will take precedence over other cases, except other cases involving eminent domain and cases in which preference is granted by statute.

## CHAPTER 4

### COMPENSATION

#### Kansas Procedure for Compensation

What is just compensation? In theory, the courts have long recognized that not all losses suffered by property owners through the use of eminent domain can be compensated. In the absence of statutory mandate, the condemnor needs to pay only for what it takes and not for indirect and remote injuries that are consequential to the acquisition. Just compensation, as in the state of Kansas, has been paid when the condemnor has received the fair market value of the property taken, plus any damages to the remaining property from which a severance has been made. Under such a standard, the property owner is not always fully indemnified for his actual monetary losses.

#### Compensation Procedure

The procedure for providing compensation for the use of eminent domain as set forth in the Kansas Statutes Annotated 26-505 thru 26-517.

1. Appraisers Instructions: After the appraisers are appointed, they must take an oath to faithfully discharge their duties as appraisers. The judge will then instruct that they are officers of the court and not representatives of the condemnor or any other party, that they are to receive their instructions only from the judge, and he will instruct them as to the nature of their duties and authority, and as to the basis, manner, and measure of ascertaining the value of the land taken and resulting damages.
  - a. Upon the completion of their work the appraisers must file their report in the office of the clerk of the district court

and the appraisers will then notify the condemnor of such filing.

- b. The condemnor must, within three (3) days after receiving such notice, mail a written notice of the filing of the report to every person who owns any interest in any of the property being taken, if the address of such person is known, and then must file in the office of the clerk of the district court an affidavit showing proof of the mailing of the notice.

2. Appraisers Procedure: The appraisers, after then have been sworn and instructed by the judge, make their appraisal and assessment of damages by actual view of the property to be taken and by hearing of oral or written testimony from the condemnor and property owners as named in the petition.

- a. Such testimony must be given at a public hearing held in the county where the action is pending at a time and place fixed by the appraisers.
- b. Notice of the hearing must be mailed at least ten (10) days in advance to the condemnor and to each party named in the petition if their address is known or can be reasonably ascertained, and by one publication in a newspaper of general circulation in each county where the property is situated at least ten (10) days in advance of the hearing.
- c. In case of failure to meet on the day designated in the notice, the appraisers may meet on the following day without further notice, but in case of failure to meet on either of said days, a new notice will be required.



- d. After a hearing has begun, it may be continued or adjourned from day to day and from place to place until the hearing with respect to all properties involved in the action has been concluded.
3. Compensation Payment: If the condemnor desires to continue with the proceedings, they must, within thirty (30) days from the time the appraisers' report is filed, pay the clerk of the district court the amount of the appraisers award and court cost accrued to date, including appraisers' fees.
- a. Such payment will be without prejudice to condemnor's right to appeal from the appraisers' award.
  - b. Upon such payment being made the title, easement, or interest appropriated in the property condemned will go to the condemnor, and immediate possession of the property to the extent necessary for the purpose for which it was taken. The condemnor will be entitled to all the remedies provided by law for the securing of such possession.
4. Abandonment: If the condemnor does not make the payment for any of the property described in the petition within thirty (30) days from the time the appraisers' report is filed, the condemnation is abandoned. Judgment for cost, including appraisers' fees together with judgment of the property owner for his reasonable expenses incurred in defense of the action, will be entered against the condemnor.
- a. After such payment is made by the condemnor within the allowed thirty (30) days to the clerk of the court, the proceedings as to the property for which payment has been made can only

be abandoned by the mutual consent of the condemnor and the property owners.

5. Division of Award: In any action involving the condemnation of real property with more than one owner, in which there is a dispute among interested parties as to the division of the amount of the appraisers' award, the district court shall, upon motion by any party, determine the final distribution of the amount.

#### Property Owner's Rights

These rights are set forth in the Kansas Statutes to insure just compensation for property being acquired under the power of eminent domain.

1. Appeal Procedure: If the condemnor, or any property owner, is dissatisfied with the award of the appraisers, he may, within thirty (30) days after the filing of the appraisers' report, appeal from the award by filing a written notice of appeal with the clerk of the district court.
  - a. In the event any parties files for an appeal, copies of such notice of appeal shall be mailed to all parties affected, within three (3) days after the date of the filing for appeal.
  - b. An appeal by the condemnor or any property owner will bring the issue of all damages to the property before the court for trial a second time.
  - c. The appeal must be filed as a civil action and tried as any other civil action. Provided, however, the only issue to be determined is that of just compensation and for any other damages allowable by law.

2. Trial by Jury: In an action on an appeal, the court must assign the case for trial by jury.
  - a. Whenever the condemnor appeals the award of the court appointed appraisers', and the jury renders a verdict for the landowners in an amount greater than the first award, the court may allow an amount to be paid for the fees of the landowner's attorney.
3. Final Judgement:
  - a. If the compensation finally awarded an appeal exceeds the amount of money previously paid to the clerk of the court, the judge will enter judgment.
  - b. If the compensation finally awarded on appeal is less than the amount paid to the clerk of the court by the condemnor the judge will enter judgment infavor of the condemnor for the return of the difference, with interest at the rate of six percent (6%) per annum from the time payment was made to the clerk to the date of the judgment.
4. Just Compensation: Private property must not be taken or damaged for public use without just compensation.
  - a. Taking Entire Tract: If the entire tract of land or interest is taken, the measure of compensation is the value of the property or interest at the time of the taking.
  - b. Partial Taking: If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

c. Factors to be Considered: In ascertaining the amount of compensation and damages as defined above, the following factors must be given consideration if shown to exist. They are not to be considered as separate items of damages, however, but are to be considered only as they affect the total compensation and damages.

- Advantageous use of property to a reasonable adaptation.
- Access to the property that is remaining.
- Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
- Productivity, convenience, use to be made of the property taken, or use of the property remaining.
- View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.
- Severance or division of a tract, where changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design.
- Loss of tree and shrubbery to the extent that they affect the value of the land taken and to the extent that their loss impairs the value of the land remaining.
- Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent such affects the value of the property remaining.
- Destruction of a legal nonconforming use.

- Damage to property abutting on a right-of-way due to change of grade where accompanied by taking land.
- Proximity of new improvements to remaining condemnee's land.
- Loss of or damage to growing crops.
- Loss of a use that the property could be or had been adapted which was profitably carried on.
- Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.
- Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.

## NOTES

1. Magna Charta. Granted by King John of England to the Barons at Runnymere, on June 15, 1215, and afterwards, with some alterations, confirmed in Parliament by Henry III and Edward I. This charter is justly regarded as the foundation of English constitutional liberty. Among its thirty-eight chapters are found provisions for regulating the Administration of Justice, defining the temporal and ecclesiastical jurisdictions, securing the personal liberty of the subject and his rights of property and limits of taxation, and for preserving the liberties and privileges of the church (Black, 1979).
2. People v. Adirondack Railway Co., 160 N.Y. 225, 237, 54 N.E. 689, aff'd. 176 U.S. 335, 20 S.Ct. 460, 44 L.ed. 492; Limits Industrial R. Co. v. American Spiral Pipe Works, 321 Ill. 101, 151 N.E. 567, 569; Heyward v. Mayor etc. of New York, 7 N.Y. 314, 324.
3. Balch v. Essex County, 103 Mass. 106; Peru Cemetery Co. v. Mount Hope Cemetery of Peru, 224 Ind. 202, 65 N.E. (2nd) 849; Barett v. Palmer, 135 N.Y. 336, 31 N.E. 1017, 17 L.R.A. 720, aff'd 162 U.S. 339, 16 S.Ct. 837, 40 L.ed. 1015; Matter of City of New York (Cruger Ave.), 238 N.Y. 84, 143 N.E. 799.
4. New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).  
In the Muller case, the court upheld the use of the eminent domain power by the New York Housing Authority for a public housing project by defining "public use" in terms of public benefits, such as the reduction in crime, the removal of health hazards and the increase in tax revenues that would result from the slum clearance and improvement of the neighborhood.
5. Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1943).  
In this case the New York of Appeals upheld the taking of land under a state urban renewal program, and the transfer of that land to a private company for construction of low income housing.
6. Berman v. Parker, 348 U.S. 26, 75S.Ct. 98L.Ed. 27 (1954).  
In this decision the United States Supreme Court upheld the use of the eminent domain power for urban renewal programs for the District of Columbia.
7. Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226.
8. State of Louisiana, Dept. of Highways v. Crow, 286 So. 2d 353 (Louisiana, 1973).
9. Denver Urban Renewal Authority v. Cook, 186 Colo. 182, 526 P.2d 652 (1974).

10. Keator v. State, 23 N.Y. 2D 337, 244 N.E. 248 (1968).
11. Masheter v. Ohio Holding Co., 38 Ohio App. 2d 49, 313 N.E. 2d 413 (1973).
12. City of Pearland v. Alexander, 483 S.W.2d 244 (Tex. Supp., 1972).
13. City of Youngstown v. Thomas, 97 Ohio App. 193, 124 N.E. 2d 184 (1953).
14. Lucas v. State, 44 A.D. 2d 633, 353 N.Y. S.2d 831 (1974).
15. Verified Petition. A formal, written application to a court requesting judicial action on a certain matter which has been verified by the county clerk whose duty it is to confirm accuracy and authenticity, and to affirm the names of the signers and all parties named in the petition against an official registration list.
16. Affidavit. A written statement of facts, made voluntarily and confirmed by the oath of the party making it, taken before a person having authority to affirm such oath.
17. Newspaper of General Circulation. (a.)it must be published at least weekly fifty (50) times a year and have been so published for at least five (5) years prior to the publication of any official publication; (b.)it must be entered at the post office of publication as second class mail matter; (c.)it must have general paid circulation on a daily, weekly, monthly or yearly basis in the county and shall not be a trade, religious or fraternal publication; and (d.)it must be printed in the state of Kansas and published in the county publishing the official publication, or if there are no newspapers published in said county, then in a newspaper printed in Kansas and having general paid circulation in said county.

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## CONCLUSION

A CITIZENS GUIDE TO THE KANSAS STATE  
PROCEDURE FOR EMINENT DOMAIN

# A Citizens Guide to the Kansas State Procedure for Eminent Domain

by  
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## TABLE OF CONTENTS

INTRODUCTION.....	1
Historical Background.....	1
Definition of a Public Use.....	1
Development of Just Compensation.....	2
KANSAS EMINENT DOMAIN PROCEDURE.....	4
Authority with the Power of Eminent Domain.....	4
Court Procedure.....	4
Property Owners Rights to Appeal Taking.....	7
KANSAS PROCEDURE FOR COMPENSATION.....	7
Compensation Procedure.....	8
Property Owners Rights to Appeal Compensation.....	10
GLOSSARY.....	13

## INTRODUCTION

Today, "Eminent Domain" is recognized as the highest power of government, enabling private property to be taken for public use after making just compensation. This power has affected a broad spectrum of our society and will continue to affect thousands of citizens, because of the increasing need of government to use private property for public services. Everyday as public requirements for highways, schools, utilities and other uses expand, private property will be increasingly needed for public use.

This citizens guide to the Kansas procedure for eminent domain should not be used to replace the need of legal representation in a court of law. This guide has been developed as an information source to help citizens facing the loss of their property, to increase their knowledge of the procedure of eminent domain. By acquiring more knowledge on the subject, property owners also may be able to take necessary steps to stop procedures or to obtain fair payment for their property.

### Historical Background

The use of eminent domain goes back perhaps to Roman times. In the year 302 A.D., when the public water system and baths were being constructed in Rome, private property was taken to create the right-of-way for this utility.

It was not until years later at the end of the Middle Ages that the taking of private property began to be discussed in England as a governmental power, regulated by the Magna Charta. The Magna Charta was created by King John of England on June 15, 1215. This charter is justly regarded as the foundation of English constitutional liberty. Among its thirty-eight chapters are found provisions for regulating the taking of private property and the citizen's rights to property.

The colonists of North America brought the ideas of Seventeenth and Eighteenth century England to the new continent, where the land stretched endlessly. Nevertheless, only a few years after colonization, the colonial governments also began to regulate the use of land and to develop procedures of eminent domain.

As the colonies gained their independence from England in 1776, each colony became independent and each had the power of eminent domain. The use of the power, however, would not be verified until the adoption of the Constitution of the United States in 1789. Today's definition of eminent domain was not developed until 1791 under the Fifth Amendment to the Constitution and reads, "nor shall private property be taken for a public use, without just compensation."

### Definition of Public Use

Public use is the constitutional and legal basis for taking private property through eminent domain. It must confer some type of benefit or advantage to the general public, but it is not required to allow actual use by the public.

Over the years, the development of a definition of public use has gone through a gradual change. Because the legal system were the ones left to define the term, language became difficult to understand. The courts as a rule, however, left each case to be determined on its own merit.

Starting in the 1930s, the courts began to broaden the definition of public use to allow the taking of private property for uses that were not considered public in the traditional sense. Land taken for a road or a park are logical sites to be used by the general public, but when land is taken for a low-rent public housing project, the question is raised as to whether such a use is a "public use." In 1936, for example, the courts upheld the use of eminent domain for slum clearance for a low-income public housing project. They did so by defining public use in terms of public benefits as the reduction in crime, the removal of health hazards and the increase in tax revenues that would result from improving the neighborhood.

Once having defined public use in terms of social and economic benefits, the path was cleared for the courts to take the next step in broadening the definition. In 1943 the courts held that the removal of substandard housing was a benefit to the total population, and therefore a public use even though it may be necessary to take private property from one owner and transfer the ownership to another private owner.

In 1954, in a decision by the United States Supreme Court, the power of eminent domain was allowed to be used to take private property for an urban renewal program. It thus appears that the concept of public use has developed into a broad and comprehensive definition. In most eminent domain cases, it is common practice for the courts to settle on a definition by weighing the necessity of the general public against the rights of the private property owner.

The majority of the courts have adopted the broad view that public use means public advantage. According to this concept, it is not required that the entire community or even a large portion should directly enjoy or participate in any improvement so long as use includes public benefit.

With the ambiguities existing in today's law, it is impossible to determine the limits of eminent domain power. It is not inconceivable that the state could use the power to take a person's house because it has not been painted in the last three years, and therefore, is a blight on the neighborhood. This very extreme example points out that under a broad view of public use, no one knows the limits to the power of eminent domain for now or the future.

#### The Development of Just Compensation

Although the Fifth Amendment to the United States Constitution provides that private property shall not be taken without the payment of just compensation, this provision does not restrict the powers of the states, but only those of the federal government. The Fourteenth Amendment, passed in 1868, prohibited the states from depriving persons of their property without due process of law. It did not, however, specifically impose on the states to make a proper payment. All but

two of the states now have just compensation requirements in their constitutions. But under the requirements of the Fourteenth Amendment, according to a ruling by the United States Supreme Court, even these two states must pay just compensation.

But what is just compensation? The term has been defined by the courts as the "full equivalent in money for the value of the private property being taken." "Full equivalent in money" has been defined as the market value of the property at the time of eminent domain. The market value, in turn, has been defined as "the price a buyer is willing to pay and the price a seller is willing to accept."

Over the years, the courts have developed five (5) methods to determine "market value" when used to provide just compensation in eminent domain cases. These methods are defined as follows:

1. Comparable Sales Method. The market value of a house would be determined by obtaining the selling price of similar houses in the area. When using similar houses for comparing market values, they must be equal in (1) construction, (2) condition, (3) location, and (4) age.
2. Capitalization of Income Method. The market value of an income producing apartment house would be determined by dividing the dollar amount of net income (gross rental income, less expenses) by the investor's expected rate of return (capitalization rate).

$$\text{market value} = \frac{\text{net income}}{\text{rate of return}}$$

3. Reproduction Cost Less Depreciation Method. The market value of buildings that have been constructed for a special purpose, such as a brewery, would be determined by obtaining the cost of reproducing the building under current costs minus the amount of depreciation of the existing building.
4. Highest and Best Use Method. The market value of vacant and undeveloped land would be determined by obtaining the different property uses possible and then valuing the property at its highest and best use.
5. Partial Taking Methods.
  - a. Before and After Rule. The usual method of determining just compensation for a partial taking is to apply the "before and after rule." Compensation is calculated as the difference between the value of the entire parcel of land before taking and the value of the remainder of the land after taking.
  - b. Two-Step Procedure. In some states, just compensation for a partial taking is calculated by a two-step procedure in which the owner is compensated; (1) for the market value of the land taken, and (2) the difference in the before and after value of the remainder of the property.

- c. Consequential Damages. A difficult problem arises in which land owners seek compensation for loss in market value resulting not from the taking of their land, but rather from the taking of adjoining land owned by others. An even more troublesome issue arises where compensation is made for taking a building, but no payment is made for the loss of that business, or for the cost of moving the building.

#### KANSAS EMINENT DOMAIN PROCEDURE

The state if Kansas utilizes the judicial decree method of taking private property for public use as outlined under the provisions 26-501 through 26-517 of the Kansas Statutes (laws).

When using the judicial decree method of eminent domain, the authority will first attempt to purchase the private property by negotiating with the owners to avoid having the expense and delay associated with court proceedings. If a landowner is dissatisfied with the amount of compensation offered and refuses to settle, the authority must initiate court proceedings to be allowed to take the private property.

#### Authorities with the Power of Eminent Domain

The parties that have been granted the power of eminent domain in the state of Kansas are:

1. State. used through state boards and commissions.
2. Counties. used through county boards and commissions.
3. Cities. used through city boards and commissions.
4. Quasi Public/Private Corporations. the power of eminent domain granted to companies such as utility and transportation corporations.
5. Quasi Public/Private Partnerships. as corroboration between cities and private development corporations in urban renewal and development projects.

#### Court Procedure

If a private property owner will not accept the price offered by an authority and refuses to settle out of court, it will be necessary for the authority to initiate court proceedings through the following steps.

1. Petition to the Court. The authority must initiate court proceedings by filing a formal, written application to the district court



requesting action to allow taking of private property. The petition must be verified by the county clerk to confirm accuracy and authenticity, and to affirm the names of the signers and all parties named in the petition.

- a. The petition must be filed in a district court that is located in the same county as the property, except if the property is situated in two or more counties. The court proceedings then may be held in any county in which the property is situated.
2. Contents of Petition. A petition to the district court must include the following information.
- a. The authority must give proof that it has been granted the power of eminent domain and the reasons why the private property is needed for public use.
  - b. A legal description of each lot, parcel or tract of property and the type of property to be taken.
  - c. The name of any owner, all lien-holders and the name of any person in possession of the property as a renter.
  - d. Such a petition to the district court must be verified by a written statement (affidavit) confirming that the contents of the petition are factual.

Upon filing of the petition the district court will fix the time and date when the court proceedings shall be held. Mistakes in the petition, which do not impair the substantial rights of either party, will not invalidate any proceedings.

3. Public Notice. The authority is required to publish a public announcement stating the time and place of the court proceedings.
- a. This notice must be published in a newspaper of general circulation in the same county that contains the private property to be taken.
  - b. For a newspaper to qualify as general circulation, it must be printed at least weekly (50 times a year) in the same county that contains the private property to be taken. If there is no newspaper published in that same county, then a state-wide newspaper will qualify if it is delivered weekly in the same county as the private property to be taken.
  - c. The notice of the court proceedings must be published at least nine (9) days before the date fixed by the court.
  - d. The authority is also required to mail a copy of the newspaper notice and a copy of the petition that has been filed with the district court to each person named in the petition at least seven (7) days before the court date.

Mistakes in the petition, which do not impair the substantial rights of either party, will not invalidate any proceedings.

4. City Procedure. Before a city can file a petition with the district court asking the right to use the power of eminent domain to take private property for public use, it must first accomplish the following requirements.
  - a. When a city believes it to be a necessary to take property through eminent domain, it must first pass an ordinance or resolution (regulation) declaring that land acquisition is necessary.
  - b. This ordinance must be passed by a 2/3 vote of the city's governing body (city commission).
  - c. After approving the ordinance the city must obtain a legal survey and description of the land or property by a competent engineer and then file it with the city clerk.
  - d. Upon filing the survey and description of the property, the city is required to publish the ordinance in the city's newspaper.
  - e. If the city's governing body decides that privately owned property in the area of the improvements, but outside of the private property being taken, will benefit from the improvements, then the city can declare such private property a "benefit district" by passing another ordinance. This action is usually done to allow the city to increase property taxes of the private property that they believe has increased in value because of public improvements.
  - f. After the city has passed the required ordinance and fixed a benefit district (if any is to be fixed), then the city is allowed to petition the district court for right to use the power of eminent domain.
5. District Court Procedure. If during the district court proceedings, the judge finds from all of the information and the petition that:
  - a. The authority has been granted the power of eminent domain and has the right to take private property, and
  - b. The private property is being taken for a legal public use, then
  - c. The judge will appoint three (3) persons that are residents of the same county that contains the private property, to view and appraise the property to be taken and to determine the damages to the owners, lein-holders, or persons in possession of the property (as renters), which are all named in the petition.

- d. The judge will also fix the time and date when the appraisers are required to submit reports to the district court. This date must not be more than twenty (20) days after the judge has appointed the appraisers, (unless, there is a good reason for extending the time needed by the appraisers).
- e. If the judge of the district court determines that the authority has the power to take the private property, this does not restrict the owners, lien-holders, or persons in possession (as renters) from appealing the decision to the Kansas Supreme Court.
- f. If the judge of the district court determines that the authority does not have the right to take the private property, a final decision is made and can not be appealed to a higher court.

#### Property Owner's Rights to Appeal Taking

Most development projects are set on a strict time schedule, because as economic conditions change through increasing interest rates, land prices, and construction cost, the feasibility of the project could become less likely. A citizen should understand that any delay in the time schedule could hurt the project; a long delay could possibly stop it.

At this point during the eminent domain procedure, owners, lien-holders, or persons in possession of the property (as renters), have the legal right to appeal the decision of the district court to the Kansas Supreme Court. Such a decision should not be made without first obtaining the guidance of an attorney.

An appeal at this stage of the eminent domain proceedings is a method of delaying the project, but it is important to understand that an appeal could be expensive because of attorney fees and court cost. The delay may not stop the project either.

#### KANSAS PROCEDURE FOR COMPENSATION

What is just compensation? In theory, the courts have long recognized that not all losses suffered by property owners under eminent domain can be compensated. In the absence of laws regulating compensation for all types of property as well as indirect damages resulting from taking of private property, the authority is usually required to pay only for what it takes.

In the state of Kansas, just compensation has been paid when property owners have received a fair market value for their property, plus any damages to the remaining property created by the taking. Under such a standard property owners are not always fully compensated for their actual monetary losses.

## Compensation Procedure

In the state of Kansas the procedure for compensation for the taking of private property for public use is outlined under the provision 26-505 through 26-517 of the Kansas Statutes (laws).

1. Appraiser's Instructions. After the judge of the district court has appointed three (3) residents of the same county, these appraisers are required to follow the instruction below.
  - a. After appraisers are appointed, they are required to take an oath to honor their duties.
  - b. The judge will instruct them that as officers of the court, they cannot allow outsiders or the parties involved to affect their judgement.
  - c. Appraisers receive their instructions only from the judge, who will instruct them as to their duties and authority, and the basis, manner, and measure of obtaining the value of the property in question and the resulting damages.
  - d. Upon the completion of their work, appraisers file a report in the office of the clerk of the district court and notify the responsible authority for eminent domain.
  - e. The authority is required within three (3) days after receiving notice of the appraisers report, to mail a written notice of the report's completion, to each interested person in any of the property involved, if the addresses of the persons are known. Then the authority is required to file in the office of the clerk of the district court an affidavit showing proof of mailing the notice.
2. Appraiser's Procedure. After the appraisers have been sworn in and instructed of their duties by the judge of the district court, they must make their appraisal and assessment of damages by actually viewing the property in question and by hearing the oral or written testimony of the authority and property owners named in the petition.
  - a. Such oral and written testimony must be given to the appraisers at a public hearing held in the county where the court proceedings are being conducted, and at a place and time set by the appraisers.
  - b. The appraisers are required to mail notice of the public hearing, at least ten (10) days before the hearing, to the authority and to each person named in the petition, if their addresses are known. Public notice is also required by publishing a notice at least ten (10) days before the hearing in a newspaper of general circulation.

- c. In case of failure to meet on the day in the notice, appraisers may meet on the following day without further notice, but in case of failure to meet on either day, a new notice shall be required.
  - d. After the public hearing has begun, it may be continued or adjourned from day to day and from place to place until the hearing of the authority and all persons named in the petition is completed.
3. Compensation Payment. If the authority desires to continue with eminent domain procedures action is required within thirty (30) days from the time the appraisers filed their report to the district court, to make just payment to the clerk of the district court the amount of compensation award by the appraisers, plus court cost including the appraisers fees.
- a. If the payment is made, this will not restrict the authority's rights to appeal the appraiser's amount of compensation.
  - b. Upon payment of the appraiser's compensation for the taking of private property, title, easement, or interest taken by the power of eminent domain, and possession of the property will go immediately to the authority. The authority will also be entitled to all legal remedies for securing of the possession.
4. Abandonment. If the authority does not make the payment for compensation as set by the appraisers for any of the property as described in the petition within thirty (30) days from the time that the appraisers filed their report to the district court, taking of the property is stopped (abandoned).
- a. If the authority stops procedures by failing to make payment of the compensation, then it is required to pay all court costs, appraiser's fees, property owners attorney fees, and for the time that the property owners spent in defending their property.
  - b. After the authority has made just compensation within the allowed thirty (30) days, the procedure of eminent domain can only be stopped (abandoned) by mutual consent of the authority and all persons named in the petition.
5. Division of Compensation. In any court proceedings involving the taking of real property (as land, and generally anything erected or growing on or affixed to the land) with more than one owner, in which there is a dispute among the owners to the division of just compensation, the district court is required to settle the dispute by determining the division of the compensation.

## Property Owner's Rights to Appeal Compensation

At this point during the eminent domain procedure, the courts have approved the authority's right to take the private property and the only decision to be determined, is agreement of amount for just compensation.

To insure just compensation, a property owner should be willing to work with the appraisers by showing the property to them while pointing out items of value. It is important to understand that the appraisers are not enemies, but rather officers of the court. Being uncooperative could possibly lower the amount of compensation.

If any property owner, lien-holder, or any person in possession of the property (as a renter) is not satisfied with the amount of compensation, they should first obtain the service of a competent appraiser to value their property and if the amount of compensation is low, an attorney's fee may be justified. The right to appeal the amount of compensation to the same district court for a trial by jury is possible.

1. Appeal Procedure. If the authority responsible for eminent domain or any property owner, lien-holder, or any person in possession of the property (as a renter) is not satisfied with the amount of compensation as determined by the appraisers, they can appeal the amount of compensation, within thirty (30) days after the appraisers file their report with the district court. By filing a written notice with the clerk of the district court, appeal can be made.
  - a. If any person named in the petition files for an appeal, notice of the appeal is required to be mailed to all persons named in the petition, within three (3) days after the date of the filing of the appeal.
  - b. An appeal by the authority, or any property owner, will bring the issue of all damages resulting from the taking before the court for trial a second time.
  - c. The appeal must be tried as a civil action (action brought to protect private rights) as any other civil action, provided the only issue is for compensation.
2. Trial by Jury. If an appeal is filed by any persons named in the petition unsatisfied with the amount of compensation, the district court is required to assign the case to a trial by jury.
  - a. Whenever the authority that is responsible for the taking of private property appeals because it is not satisfied with the amount of compensation awarded to property owners and the jury increases the amount of compensation, the jury may require the authority to pay court costs and the property owner's attorney fees.



3. Final Judgement of Compensation.

- a. If the final amount of compensation awarded by the jury exceeds the amount of money paid to the clerk of the district court by the authority responsible for the taking, then the authority is required to pay the difference plus six percent (6%) interest from the date of the first payment to date of the second payment.
- b. If the final amount of compensation awarded by the jury is less than the amount of money paid to the clerk of the district court by the authority responsible for the taking, then the court is required to return the difference plus six percent (6%) interest from the date of the first payment to the date that the difference is returned.

4. Taking Entire Tract. If the entire tract of land use is taken, the measure for determining compensation is the value of the property or use at the time of the taking.

5. Partial Taking. If only a part of the land or use is taken, the measure for determining compensation is the difference between the value of the entire property or use before the taking, and the value of that portion of the property or use after the taking.

6. Factors to be Considered. In measuring the amount of compensation and damages for the taking of private property, the following factors are provided in the provisions outlined by the Kansas Statutes (laws). These should not be considered as separate items of damages but are to be considered as they affect the total compensation and damages.

- a. The best use to which the property is suitable.
- b. How much available access is left for the remaining property.
- c. Appearance of the remaining property, if appearance is an element of value in connection with any use that the property can be used.
- d. Productivity or convenience uses that could be made of the property being taken or the property remaining.
- e. View, ventilation, and light to the extent to which they are beneficial to the use of the remaining property or to which the property can be used.
- f. Severance or division of a tract of land that creates the loss or impairs access.
- g. Loss of trees and shrubbery to the extent to which this affects the value of the remaining land.

- h. The loss of fences and the cost of new fences, to the extent to which it affects the value of the remaining property.
- i. Destruction of legal nonconforming use.
- j. Damage to property next to a right-of-way due to changes of grade created by the taking of abutting property.
- k. Change of location of new improvements on remaining property.
- l. Loss or damage to growing crops on property being taken or remaining property.
- m. The loss of a use which was profitable to the property being taken or remaining property.
- n. Loss of a drainage system and the cost of a new drainage system to the extent to which such a loss affects the value of the remaining property.
- o. Loss of private roads or passageways and the cost of replacing them to the extent that the loss affects the remaining property.



## GLOSSARY

Acquisition, to gain ownership of property, which does not necessarily mean that the present owner has given consent for the acquisition, but acquisition gained through the use of eminent domain.

Advantage, anything favorable to the desires of the community at large.

Affidavit, a written statement of facts, made voluntarily, and confirmed by the oath of the party making it, taken before a person having authority to affirm such oath.

Appeal, resort to a superior court to review the decision of inferior court or administrative agency.

Appraiser, a person selected or appointed by competent authority, or interested party to make an appraisement to ascertain and state the true value of goods or real estate.

Benefit, profit; privilege; interest; gained by the community at large.

Benefit District, a district that is designated to accrue benefits directly to the owners through public improvements.

Condemnation, the process of taking private property for public use through the power of eminent domain. Just compensation must be paid to owner for taking of such property.

Condemnor, government, corporation, or persons that possess the legal right of (condemnation) the power to take private property through the use of eminent domain.

Compensation, payment to owners of private property taken or injured by the exercise of the power of eminent domain.

Eminent Domain, also known as condemnation, is the power of government to take private property for a public use, without the owner's consent, on the payment of just compensation.

Judicial Decree Method of Eminent Domain, the condemnor will attempt to acquire right-of-way by negotiating with the property owners. If a landowner is dissatisfied with the amount of compensation offered to him and refuses to settle peaceably, the condemnor institutes court proceedings.

Lien-holder, a person or institution with a legal claim upon the property of another person for the payment of a debt or the satisfaction of an obligation.

Newspaper of General Circulation, (a) it must be published at least weekly, fifty (50) times a year and have been so published for at least five (5) years prior to the publication of any official

publication; (b) it must be entered at the post office of publication as second class mail matter; (c) it must have general paid circulation on a daily, weekly, monthly or yearly basis in the county and must not be a trade, religious or fraternal publication; and (d) it must be printed in the state of Kansas and published in the county publishing the official publication, or if there be no newspaper published in said county, then in a newspaper printed in Kansas and having general paid circulation in said county.

Ordinance or Resolution, in its most common meaning, the term is used to designate the enactments of the legislative body of a municipal corporation.

Petition, a formal, written application to a court requesting judicial action on a certain matter.

Public, the inhabitants or citizens as a whole body of a nation, state, county, community or municipality.

Real Property, land, and generally whatever is erected or growing upon or affixed to the land.

Statute, an act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

Substantial Rights, a right of real worth and importance; of considerable value; belonging to substance; actually existing; real; not illusive.

Verified Petition, a formal, written application to a court requesting judicial action on a certain matter; that has been verified by the county clerk in with his duty to check or confirm accuracy, authenticity, and to affirm the names of the signers and all parties named in the petition against official registration list.

A CITIZENS GUIDE TO THE KANSAS STATE  
PROCEDURE FOR EMINENT DOMAIN

by

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AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF REGIONAL AND COMMUNITY PLANNING

Department of Regional and Community Planning

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## ABSTRACT

The use of eminent domain dates back to the era of the Roman Empire when Diocletian was building his famous aqueducts and baths in Rome and private property was apparently expropriated to create the right-of-way for these semi-public utilities. Today, eminent domain (condemnation) is recognized as the pre-eminent power of government to acquire private property for public use when just compensation is made.

The power of eminent domain has affected a broad spectrum of our society and will continue to affect thousands of citizens in the future. Because of the ever-increasing public requirements for transportation, education, utilities and other public needs, the acquisition of private property will be necessary. To open new vistas in directing the development of today's urban growth, the acquisition of private property is being expanded for public use and other land-use control. Engaged at strategic places and at decisive times, eminent domain can influence land development far beyond the limits of the property acquired. For example, a new highway can directly affect the land-use development in the surrounding environment; slum clearance may set off the economic renewal of an entire community.

The professional use of eminent domain to insure proper planning, to discourage land speculation and to meet increasing growth of our cities, has created complications because of the serious lack of knowledge of condemnation by the property owner and condemnor alike. In addition,

the state statutes that are used to guide the eminent domain power are written in a language that precludes private citizens from gaining the necessary understanding of the law.

The purpose of this report is to examine the (1) historical development; (2) professional use; (3) legal procedure; and (4) compensation for Eminent Domain. The result of this report will be, "A Citizens Guide to the Kansas State Procedure for Eminent Domain," which will provide citizens of Kansas with an understanding of condemnation procedures.