



A SELECTED READING

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The Power to Condemn

Eminent domain, by definition, is the power of the state to take private property for public use. In Alabama this practice and procedure is known as the right of condemnation. This power is founded on common necessity of taking an individual's property for the benefit of the whole community. The consent of the individual is not necessary since the state has a superior right to appropriate for public use private lands within its borders subject, of course, to payment for the land.

The exercise of this power of the sovereign, an ancient right, became increasingly important as the nation developed its factories, utilities, highways and railroads. The vast expansion of the armed forces and federal installations was possible because of the existence of the right to condemn. It is a necessary and useful tool of government.

Like all other rights in a democracy, the power to condemn is limited by the constitutional prohibitions that private property shall not be taken for public use without the payment of just compensation and that no person shall be deprived of property without due process of law. These prohibitions have given rise to limitations in which the courts have defined "public use," "taking" and "just compensation."

Municipalities in Alabama have been specifically authorized by the Legislature to condemn private property for public or municipal uses. This article examines this legislation, its scope and effect, and its constitutional limitations. Practical pointers and procedures are discussed so municipal officials may be better informed about the methods of employing this right.

The Authority to Condemn

The statutory authority for condemnation actions is found in Sections 18-1A-1 through 18-1A-311, Code of Alabama 1975. These sections allow municipalities to apply to the probate court in the county in which the lands are situated for an order of condemnation. Other sections deal principally with the procedures, both at the municipal level and in court, and will be discussed more at length later in this article.

Limitations on the power to condemn are found in the Fifth and Fourteenth Amendments to the Constitution of the United States. These amendments state that no person shall be deprived of life, liberty or property without due process of law. The Fifth Amendment provides further that no private property shall be taken for public use without just compensation. The latter limitation is a prohibition on the federal government, but the Supreme Court has, in recent years, under authority of the Fourteenth Amendment, applied many principles of the Bill of Rights (first ten Amendments) to state procedures.

Section 23 of the Alabama Constitution of 1901 deals with the right of eminent domain and provides that just compensation must first be made before the taking of private property. Section 235 of the Alabama Constitution provides specifically that municipal corporations shall make just compensation for private property taken, injured or destroyed, and further, that such compensation must be paid before the taking, injury or destruction. Section 235 further provides that entry may be obtained, notwithstanding an appeal from the probate court, after the judgment of condemnation, provided the damages assessed are paid into court and a bond in double the amount of damages is filed to secure payment of the amount of damages determined upon appeal. It also provides that on appeal either party may demand the right of trial by jury.

Additional Authority

Sections 11-47-170 through 11-47-173, Code of Alabama 1975, provide additional authority for municipalities to condemn. These statutes prescribe the procedure. It is recommended, however, that the procedures set out in Title 18 be used by municipalities in condemnation cases because the Title 18 procedures are more fully developed than the procedures found at Sections 11-47-170 through 11-47-173.

Authorized Uses

The Code of Alabama authorizes municipalities to acquire property by condemnation generally for any city or town purpose. Section 11-47-171, Code of Alabama 1975. Municipalities commonly acquire property for street and sidewalk improvements, water supplies and sources, drainage and sewage projects. Cities and towns may acquire sites for public museums and public art galleries. Section 11-47-16, Code of Alabama 1975. City boards of education may acquire lands for school purposes under Section 16-11-13 of the Code. Lands for development of municipal airports may be acquired under the provisions of Section 4-4-5, Code of Alabama 1975. Section 4-4-10, Code of Alabama 1975, authorizes the abatement of obstructions within one-quarter mile of municipal airports. Public corporations organized under the provisions of Sections 11-59-1, et seq., Code of Alabama 1975, may acquire sites for athletic fields and facilities. Gas districts organized under Sections 11-50-391, et seq., Code of Alabama 1975, are granted the power of eminent domain, subject to the same limitations as in the case of municipal corporations. The Alabama Supreme Court held that use of property for off-street public parking in urban areas is a “public use” for which property may be condemned. *Florence v. Williams*, 439 So. 2d 83 (Ala. 1983).

These citations are sufficient to point out the many and varied purposes for which lands, easements and privileges and property may be acquired by cities and towns. The city attorney, in drafting the petition or bill of complaint seeking the right to condemn, should be encouraged to specifically name the statutory authority under which the petition is brought. Likewise, if doubts or questions arise concerning the right of a municipality to acquire property for specific reasons, a conference with your city attorney and the legal department is recommended.

Statutes delegating the power of eminent domain must be strictly construed in favor of the owner of the property sought to be condemned. In other words, the public use, which would be alleged in the petition, must be based on sound legal authority.

Why Condemn?

The reasons for condemnation are numerous. Perhaps the most common reason property is condemned is because of a disagreement as to its value. If a city needs an entire tract, an agreement must exist between the municipality and the landowner as to the value of the tract before a contract of sale may be executed. If the city needs only a portion of a tract, then the question arises as to the value of the part required. The problem is further complicated by arriving at the damage, if any, to the part not needed. This situation makes bargaining more difficult since a second problem is introduced.

Section 18-1A-171, Code of Alabama 1975, states that the amount of compensation shall not be reduced because of any incidental benefits which may accrue to the owner in consequence of the use of the lands which are to be taken. An exception to this rule is made in cases where lands are taken for public highways or for water and sewer lines or through proceedings instituted by water conservancy districts and water management districts. Further, in *Mobile County v. Brantley*, 507 So. 2d 483 (Ala. 1987), the Alabama Supreme Court held that where a second condemnation of a person’s property occurs, the owner is not entitled to the enhanced value created by the first taking, if subsequent condemnations were contemplated at the time of the first condemnation.

Another common reason for condemnation arises because of title defects which can take many forms – uncertainty as to the actual owner; the owner is of unsound mind or is an infant; or in cases where the property has been held in one family for a number of years, the record title holder is deceased and no administration has been had on the estate.

Problems often arise because of absentee ownership which makes negotiations difficult and uncertain. Normally, time is of the essence since a city is usually anxious to proceed with a proposed project. Often it is quicker to condemn than to take a chance on a breakdown of negotiations with an absentee owner. If negotiations are begun and then break down, the time devoted to negotiations has been lost and the project is further delayed. Absentee ownership normally means the owner is not conversant with the affairs of the city, has little or no interest therein and may be suspicious of any offer made by the city. Usually such an owner has no concept of the market value of the property, especially if the owner has been away from the city for a number of years. All of these factors make bargaining more difficult.

Occasionally there is an active dispute between adverse claimants of the property. The city, not wanting to act as a referee between the claimants, merely condemns against both and lets the court determine the validity of the claims.

A city should not be reluctant to file actions for condemnation since the progress of the general public often requires such actions by the governing body. Criticisms directed to the governing body because of the exercise of this right should be met with a forthright statement that the city is merely resorting to the courts to settle bona fide disputes.

Procedures

The legal procedures for condemnations are set out in Title 18, Code of Alabama 1975. These statutes are strictly

construed and, therefore, every effort to comply with them should be employed by the governing body, city employees and the city attorney.

Before commencing a condemnation action, a municipality must have the property appraised to determine the amount that constitutes just compensation and offer to pay the owner the full amount established by the appraisal. The property owner must be given a written statement and a summary of the appraisal, showing the basis for the amount established. No increase or decrease in the fair market value caused by the project for which the property is acquired can be considered in arriving at the appraisal price. Nor can any incidental benefits accruing to the property owners because of the project be considered.

If the property owners agree with the appraisal price, they are not required to move until they are paid, or the amount awarded by the condemnation order is deposited as required. Except in an emergency, property owners have 90 days after receiving written notice from the condemnor to move from the property. A party cannot appeal from a condemnation order to which he or she has consented. *State v. Coheley*, 549 So. 2d 483 (Ala. 1989).

If the property owners do not agree with the appraisal price, Section 18-1A-32, Code of Alabama 1975, requires the municipality to commence a condemnation action to acquire the property. However, Section 18-1A-4 of the Code permits a municipality to reach a settlement with the property owners either before or during the condemnation proceedings. No condemnation action can be maintained unless the municipality has offered to acquire the property on the basis of its approved offer by purchase before commencing the action.

The condemnation action is commenced by filing a complaint with the probate court in the county in which the property or any portion thereof is located. The complaint must:

- Designate as plaintiffs the parties on whose behalf the condemnation is sought;
- Include the names of all persons holding any right, title or interest in the land, specifying each person's interest;
- Contain a legal description of the property and the interest sought to be obtained;
- Allege the plaintiff's right to condemn the property; and
- List all items the condemnor (the municipality) seeks to obtain from the property.

A map or diagram depicting the property sought to be condemned and any remainder must be attached to the complaint.

The probate judge must set a date for the condemnation hearing and issue a copy of the complaint to the defendants along with notice of the hearing date. Notice can be waived. The municipality must file a notice of the pendency of the action in the office of the probate court in each county in which the described property is located.

A defendant may file an answer to the municipality's complaint objecting to the right of condemnation. All preliminary objections must be heard prior to the final determination of just compensation but the probate judge may join all preliminary objections into a single hearing. The burden of proof of all issues – except bad faith, fraud, corruption or gross abuse of discretion on the part of the plaintiff – is on the plaintiff. If the probate court finds a preliminary objection meritorious, the court shall make whatever disposition it deems appropriate under the circumstances, including an award of defendant's litigation expenses.

The Alabama Rules of Civil Procedure and the rules of evidence apply to condemnation actions in circuit court. The circuit court may require severable issues to be tried separately before the trial on the issue of the amount of compensation. Either party may demand a trial by jury. After the determination of the just amount of compensation, the plaintiff may withdraw from further participation in the trial as all that remains is the apportionment of the award among the interested defendants.

Consistent with prior Alabama law, Section 18-1A-270, Code of Alabama 1975, provides that the state of Alabama or any county or municipality or any person or association proposing to acquire land or an interest in land, may apply to the probate court for an order of condemnation. Within 30 days after the filing of the complaint, the probate judge must conduct a hearing on the condemnation request among all interested parties. Within 10 days after the hearing, the probate judge must issue an order granting or refusing the complaint.

If the complaint is granted either in whole or in part, the probate court must within ten days appoint three citizens of the county in which the property is located to determine the amount of damages and compensation for the condemnation. The commission must make a written report to the probate judge within 20 days of their appointment, setting out the damages and compensation owed. Within seven days, the probate judge must issue an order that the report be recorded, and the property condemned upon payment or the deposit into the court of the damages and compensation assessed. Either party may appeal to the circuit court. If the municipality wishes to enter the property pending the appeal, it may pay the sum awarded into the court and post a bond in double the amount of the damages. If the condemnor fails to pay the damages and compensation

assessed within 90 days after the assessment or within 60 days after the determination of an appeal, the condemnation will cease to be binding.

Duties of Officials

When the governing body decides to condemn property, a resolution to that effect, directed to the owners and property, should be adopted. This resolution should state that it is necessary and expedient to acquire a right of way (or easement, as the case may be); that in the judgment of the governing body it is necessary and expedient for carrying out the full powers granted to the city that such right of way be acquired; and further, that the city attorney be authorized to acquire such right of way by purchase or condemnation. The city clerk should furnish the attorney with certified copies of this resolution for attachment to the petition.

The city engineer should prepare an accurate description of the lands to be taken for use in the resolution and in the petition. The city engineer should also furnish the attorney with as much information on the title as is available. The city engineer should be prepared to testify at the original hearing as to the accuracy of the description. The city clerk should be prepared to testify that the resolution was duly adopted and properly recorded in the minutes of the governing body. All other responsibility for the success of the action then shifts to the shoulders of the city attorney.

The Role of the City Attorney

The city attorney must steer the entire proceeding through the courts. The attorney should, as a first step, draft the resolution for adoption by the governing body. This resolution is the authority to proceed in court on behalf of the municipality. The title should be examined to ascertain the names of all persons interested in the property and the names of all defendants in the case. The defendants include the record owners and all persons having a lien on the property in question, such as mortgages, judgment holders and the county tax collector. Any omission in naming the proper defendants is at the peril of the condemnor. The attorney will probably decide to file a lis pendens at the same time the petition is filed, although this step is not mandatory.

It is of the utmost importance that the attorney ensures that notice and service be properly given to all defendants. The probate judge will appoint a guardian ad litem to represent infants, unknown owners or incompetents, if the allegations of the petition indicate a need. At the initial hearing of the cause, the attorney will prove the averments of the petition and help the judge draft the order granting condemnation. The right of the condemnor to condemn the particular property is a question of law for the court and practice in Alabama has made this part of the condemnation proceedings fairly routine.

After the right to condemn has been established, the court appoints the commissioners and the attorney will seek an opportunity to present evidence to the commissioners on the question of value or damages. In this hearing, the attorney is normally assisted by a qualified appraiser who testifies as to the value or damages. The attorney should, in each case, ensure that the commissioners are cognizant of all of the facts surrounding the city's requirements.

The attorney usually prepares and assists in the preparation of all orders, reports, notices and so forth, needed during the entire course of the proceeding. Upon report of the commissioners, the attorney assists the judge in preparing the judgment of condemnation, the order which formally gives the city the green light to take the property.

Appeals

The governing body and the attorney should discuss the desirability of an appeal on the part of the city. Appeals are filed based on the results obtained in the probate court proceedings. If the award is considerably out of line with the evidence gathered by the city, normally an appeal is justified. The statutes authorize an appeal by either of the parties, so the attorney must be prepared to represent the city in circuit court, either in prosecution of the city's appeal or in defense of the landowner's appeal.

Time Elements

Frequently the question arises as to how long condemnation will take. While it is difficult to give an exact time frame, a minimum schedule can be deduced by studying the statutes. Measuring from the date the decision is made to condemn, the resolution can be drafted and adopted at the next meeting of the governing body. Next, preparation and filing of the petition should not require, under ordinary circumstances, more than 15 days. The court, upon receipt of the petition, must issue notice to each named defendant and hold the hearing within 30 days. In addition, the municipality must be able to show that reasonable diligence was used to find all defendants, which may require extra time.

The court must appoint the commissioners and this procedure will take up to 10 days. The sheriff must serve notice on the commissioners. The statute requires the commissioners, within 20 days from their appointment, to make their report to

the court. Sometimes the commissioners act immediately but they can legally take up to 20 days. The court, upon receipt of the commissioners' report, issues an order (judgment) of condemnation and the city may immediately pay the award, which gives the right of entry. Either party has 30 days to appeal to the circuit court.

Actions in condemnation cannot be concluded nearly as fast as many people believe. Sometimes the city may elect to pay slightly more than is justified to save time and avoid delays inherent to condemnation proceedings.

Condemnation Expenses

It is virtually impossible to predict the exact expenses of any lawsuit. An estimate of costs, however, should be helpful to city officials faced with the decision of whether or not to condemn, especially if there is not a wide difference of opinion as to the estimate of value between the city and the owner.

The first factor to consider is the value of expediting the initiation of the proposed project. Often a delay in the beginning of a project, caused by the time taken to condemn, will result in additional construction costs. Second, the value of the time of the clerk, engineer and attorney must be considered. This evaluation and analysis must take into consideration other work these persons may put aside in order to handle the case.

The actual costs of court are fairly standard from county to county, except for the allowance of commissioners' fees. Section 18-1A-293, Code of Alabama 1975, authorizes the probate judge to set the compensation of the commissioners for their services. The commissioners selected by the court are usually persons trained in property evaluation and are entitled to a good rate of pay for their time and service. If notices are required to be published, the printing charges are an additional cost which is determined by multiplying the publication rate times the number of words. The probate court charges fees for filings, reproducing copies and other court costs. The sheriff is entitled to regular service fees plus the expense of mileage. The probate judge makes an additional charge for services by registered or certified mail.

There can also be expenses involved in a dismissed condemnation action. Section 18-1A-232, Code of Alabama 1975, governing the award of litigation expenses for a dismissed eminent domain action makes payment of the landowner's litigation expenses mandatory following dismissal by the circuit court. *Russell v. State*, 51 So.3d 1026 (Ala. 2010).

Considering all these expenses and costs, it is sometimes actually cheaper to pay a bit more for the land to be taken than it is to pay the costs and slightly less money through court for the same land.

Random Practical Tips

As pointed out above, sometimes it is cheaper to settle than to condemn. In addition, a settlement often saves time. Generally, constituents (voters) are usually better satisfied if no suit is brought. The city attorney should be encouraged to combine as many tracts or parcels as possible into one complaint to reduce court costs.

City officials should realize that land appraisers are using their judgment and experience and that their estimates are mere opinions. In other words, the appraiser may actually be too low and a little give and take in bargaining with the landowner may avoid a lawsuit and may save the city money in the long run. The old adage that land values go up when a condemnation suit is filed generally holds true. Further, people have a tendency to revolt against the power to condemn, a feeling sometimes reflected in a verdict.

The best qualified appraisers available should be employed so that their opinions and the methods used in preparing the appraisal will stand up under vigorous cross-examination. It is fatal in a lawsuit for a witness to be uncertain of the facts about which he or she is testifying.

Give the attorney a perfect description of the land to be taken and authorize the expenditure of funds necessary to secure accurate information as to actual ownership. A false start is usually costly in time and in money.

In cases where some owners along a right of way are willing to donate their property and others are not, all lands of the former should be acquired before suits are filed against the latter. Many owners will reverse their decisions and accept payment after learning that neighbors are being paid. This is a ticklish situation which should be recognized by city officials.

The city attorney's job is finished when the case is closed and the money is paid into court. Often the attorney can gain good will for the city by assisting the owners in securing their money from the court. Section 18-1A-291, Code of Alabama 1975, requires that the owners file a petition in court to collect their share of the award of damages and, if an owner is not represented by counsel, this requirement poses a problem.

Negotiators for the city should be encouraged to deal openly and frankly with landowners. They should be thoroughly familiar with the entire proposed project, its estimated cost, the city's need for it and all the other "whys and wherefores" so that landowners will be sympathetic instead of antagonistic.

All land should be acquired before the construction contract is awarded. Litigation often bogs down because of unanticipated delays. Contractors will be justified in complaining if required to perform on a piecemeal basis.

Finally, the authority to condemn is a power of the sovereign. Condemnation should be used when necessary and no apologies are in order for any criticism because of its use.

Additional Court Decisions and Attorney General's Opinions Related to Condemnation

- The Alabama Supreme Court held that the method for valuing property in a partial taking case is the fair market value of the property before the taking and the fair market value of the remainder of the property after the taking. *Cullman v. Moyer*, 594 So.2d 70 (Ala. 1992).
- The Court of Civil Appeals held that a city did not have authority to condemn land for a roadway outside its corporate limits. *Huntsville v. Brown*, 611 So.2d 372 (Ala. Civ. App. 1992).
- In *Doughty v. Birmingham Airport Authority*, 675 So.2d 431 (Ala. Civ. App. 1995), the Alabama Court of Civil Appeals held that the condemning authority was responsible for the costs of a lienholder's claim for distribution of the condemnation award.
- In *Jefferson County v. Flanagan*, 722 So.2d 763 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that a probate court's condemnation award did not preclude filing of claims for trespass, conversion, negligence, private nuisance and Section 1983 violations.
- A municipality may condemn the property of a municipal officer or employee provided that the officer or employee refrains from the decision-making process regarding the condemnation. AGO 1996-231.
- The condemnation notice published initially pursuant to Section 18-1A-74, Code of Alabama 1975, may also include the preliminary notice of a possible commissioner's meeting. AGO 1997-120.
- Economic Development can constitute a "public use" within the meaning of the Fifth Amendment's takings clause so as to justify a local government's use of eminent domain to take private property, in exchange for just compensation, as part of a comprehensive plan intended to provide a distressed community with such benefits as increased tax revenue and new jobs, even if the proposed economic rejuvenation will benefit private parties. *Kelo v. New London, Conn.*, 125 S.Ct. 2655 (2005).
- The Alabama statute regarding interest on compensation in eminent domain actions, rather than the statute regarding interest on money judgments, controls the rate of post-judgment interest in eminent domain cases. *Alabama Department of Transportation v. Williams*, 984 So.2d 1092 (Ala.2007).
- Constitutional provision for compensation upon a municipal corporation's taking of property did not allow for compensation for administrative or regulatory taking. The eminent domain provision of state constitution did not apply to preclude town from adopting regulations preventing intended use of private property as rock quarry. *Town of Gurley v. M & N Materials, Inc.* 143 So.3d 1 (Ala. 2012).
- The purchase of a temporary or permanent easement or right-of-way with public funds is subject to public disclosure under section 9-15-100 of the Code of Alabama. The purchase of same without public funds is not subject to disclosure. The acquisition by purchase, but not by condemnation, in eminent domain, of land in fee simple or a temporary or permanent easement or right-of-way, is subject to public disclosure. Disclosure is not required if the decision to purchase was made at an open meeting of the purchasing entity for which notice was given under the Open Meetings Act and the minutes include the information required by section 9-15-100(b). AGO 2015-024.

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