

CHAPTER 1

OVERVIEW OF THE CONDEMNATION CASE

Overview. This Chapter provides a general overview of the condemnation process, including a brief overview of the structure and objectives of the Eminent Domain Act, the types of data and witness expertise that are routinely required, considerations applicable to counsel for condemners and condemnees, and the subject of jurisdictional prelitigation negotiations.

Basic Tools. When setting out to handle a New Jersey condemnation case, the basic research tools include: *The Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.*; *Rule 4:73-1 et seq.*; the Cases; the appraisal textbook, Appraisal Institute, *The Appraisal of Real Estate* (15th Ed. 2020).

Ten Condemnation Cases You Need to Read. These seminal cases are the “starting point” for fundamental topics more fully developed in subsequent holdings.

Valentine v. Lamont, 13 N.J. 569 (1953), *cert. denied*, 347 U.S. 966 (1954)

State v. Gorga, 26 N.J. 113 (1958)

State v. New Jersey Zinc. Co., 40 N.J. 560 (1963)

Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 384 (1971)

Housing Auth. City of Newark v. Norfolk Realty Co., 71 N.J. 314 (1976)

Village of South Orange v. Alden Corp., 71 N.J. 363 (1976)

Borough of Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982)

State v. Silver, 92 N.J. 507, 514 (1983)

State, by Comm’r of Transp. v. Jan-Mar, Inc., 210 N.J. Super. 236 (Law Div. 1985)
aff’d in part, dismissed in part, 236 N.J. Super. 28 (App. Div. 1989)

Housing Auth. of City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2 (2003)

The Eminent Domain Act of 1971. The Eminent Domain Act of 1971, L.1971, c.361; *N.J.S.A. 20:3-1 et seq.*, effective December 21, 1971, governs actions to acquire property by New Jersey condemners. “Condemn” means to take private property for a public purpose under the power of eminent domain. *N.J.S.A. 20:3-2(a)*.

The Eminent Domain Act applies to all actions in which (1) property is being condemned or required to be condemned; (2) the amount of compensation to be paid for such condemnation is being fixed; (3) the persons entitled to such compensation and their interests therein are being determined; and (4) all other matters incidental to or arising therefrom are being adjudicated. *N.J.S.A. 20:3-2(g)*. Any reference to the prior Title 20 of the Revised Statutes in any other statute is to be given effect as a reference to the Eminent Domain Act of 1971. Prior Title 20 was repealed upon passage of the Act. *N.J.S.A. 20:3-48; N.J.S.A. 20:3-49*.

The Eminent Domain Act is applicable to every agency, authority, company, utility or any other entity having the power of eminent domain exercisable within the State of New Jersey except for property condemned or taken by bodies organized and administered as a result of or under compacts between States. *N.J.S.A. 20:3-50; N.J.S.A. 20:3-49*. Thus, the Eminent Domain Act

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is inapplicable to proceedings instituted under Title 32 by the Port Authority of New York and New Jersey. That agency has discretion to employ Title 20 but is not required to do so. *Port of New York Auth. v. Heming*, 34 N.J. 144, *appeal dismissed and cert. denied, sub nom., Cervieri v. Port of New York Auth.*, 367 U.S. 487 (1961).

The Eminent Domain Act creates a four-stage condemnation process: (1) An attempt to resolve the acquisition without litigation through bona fide negotiations between the condemnor and the property owner; in lieu thereof; (2) Determination of the authority and due exercise of the power of eminent domain by the condemnor by final judgment appealable as of right; (3) Non-binding determination of the issue of just compensation by condemnation commissioners appointed by the court; (4) Trial in the Law Division of the issue of just compensation. Litigation under the Eminent Domain Act requires grasp of some fundamental concepts:

The Purpose of the Eminent Domain Act is Uniformity. The purpose of the Eminent Domain Act is to establish a uniform practice and procedure for the exercise of the power of eminent domain, equally applicable to all bodies vested with such power. *Report of the Eminent Domain Revision Commission* 6-7 (1965). *Monmouth County v. Wissell*, 68 N.J. 35 (1975); *Hillsborough Township v. Robertson*, 260 N.J. Super. 37 (Law Div. 1992). The *Report of the Eminent Domain Revision Commission of New Jersey*, April 15, 1965, is frequently relied upon in cases which interpret the statute. See e.g., *Borough of Rockaway v. Donofrio*, 186 N.J. Super. 344 (App. Div. 1982); *State, by Comm'r of Transp. v. Town of Morristown*, 129 N.J. 279 (1992); *State, by Comm'r of Transp. v. Carroll*, 123 N.J. 308 (1991).

The Eminent Domain Act Establishes Procedures Only. The Eminent Domain Act is not enabling legislation and does not confer the power of eminent domain independently of specific legislation authorizing the exercise of the power by a putative condemnor. *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361, 409-410 (App. Div. 2008). “The Eminent Domain Act prescribes a comprehensive sequence of procedures that regulate the manner and terms by which a governmental body in New Jersey may forcibly take a private citizen’s property.”; *County of Monmouth v. Wissell*, 68 N.J. 35, 39 (1975); *Elizabeth Bd. of Educ. v. New Jersey Transit Corp.*, 342 N.J. Super. 262, 268 (App. Div. 2001); *Magliochetti v. State, Dept of Transportation*, 276 N.J. Super. 361, 371 (Law Div. 1994); *Twp. of Hillsborough v. Robertson*, 260 N.J. Super. 37, 42 (Law Div. 1992).

Compliance With Aspects of the Statutory Scheme Are Not Evidential. The Eminent Domain Act excludes potentially prejudicial “evidence” resulting from compliance with the statutory scheme requiring a prelitigation offer and negotiations, deposit of the estimated compensation and the owner’s withdrawal thereof, and an award of commissioners. *N.J.S.A. 20:3-6* (“Neither the [required] offer nor the refusal thereof shall be evidential in the determination of compensation.”); *N.J.S.A. 20:3-27* (“Neither the making of the deposit nor any withdrawal thereof pursuant to this article, shall affect or prejudice the rights of either the condemnor or the condemnee in the determination of compensation. The amount of such deposit and any withdrawal thereof, shall not be evidential in such determination.”); *N.J.S.A. 20:3-13(b)* (“The award of the commissioners shall not be admitted in evidence.”)

Single Proceeding. A condemnee gets “one bite at the apple.” All damages, present and prospective, which affect a property because of the taking must be alleged during the initial

condemnation proceedings. There cannot be successive proceedings. *State Highway Comm'r v. Nat'l Fireproofing Corp.*, 127 N.J.L. 346 (E. & A. 1941); *Gray v. Miller*, 130 N.J.L. 415 (1943); *Joseph L. Muscarelle, Inc. v. State, by the Dep't. of Transp.*, 175 N.J. Super. 384 (App. Div.), certif. granted, 85 N.J. 484 (1980), appeal dismissed, 87 N.J. 321 (1981); *Village of South Orange v. Alden Corp.*, 71 N.J. 363, 368-69 (1976) (rejecting a claim for provision in the final judgment binding the condemnor to perpetual use of part taken for parking purposes or granting leave to apply in future for further damage should such use change).

Single Issue. The only issue in the trial of a condemnation action subsequent to the entry of judgment that the condemnor has duly exercised its power of eminent domain is the amount of just compensation for the property and rights acquired. *State, by and through Adams v. New Jersey Zinc. Co.*, 40 N.J. 560, 573-574 (1963) (“[T]he only issue to be determined by the commissioners and by the fact finder in event of appeal is the lump sum compensation to be paid by the condemnor for the property represented by its fair market value, *State by State Highway Comm'r v. Cooper*, 24 N.J. 261, 268 (1957), cert. denied, 355 U.S. 829 (1957); *City of Trenton v. Lenzner*, 16 N.J. 465, 475-479 (1954), cert. denied, 348 U.S. 972 (1955), plus any damages to the remaining property of the owner if the taking is only a part thereof.”)

Basic Questions for Owner. The initial questions for owner’s counsel when all or a portion of the client’s real estate is sought to be taken by an instrumentality of government or private corporation are: (a) Does the condemning agency have the power of eminent domain for the purpose alleged for the taking?; (b) Has the condemning agency duly exercised its power? If so, how shall just compensation for the taking be proved (usually measured by the fair market value of the property sought to be acquired plus, in the case of a partial taking, any reduction in the value of remaining property)?

Marshaling the Facts. Each parcel of real estate is unique in relation to all others. Every parcel has a unique size, shape, and location. Each parcel has attributes which contribute to or detract from market value. Find out what they are. What makes the parcel useful, and therefore valuable? Numerous factors affect the value of real estate beyond “location.” The supply of property with the same or similar use or income potential is certainly one. Physical characteristics (topography, wetlands, streams, and the like), regulatory and other legal restrictions (*e.g.*, zoning requirements, regulated area restrictions (*e.g.*, Highlands, Pinelands, coastal areas, and the like) all affect the use and intensity of use of real estate, and therefore property value. Indeed, almost any factor which would be considered by a buyer or seller negotiating an arm’s length transaction are fair considerations in a condemnation action, subject, as we shall see, to manifold evidential exclusionary rules respecting “compensability.”

Property Data. In each case, counsel must decide, in conjunction with appraisal, engineering, environmental and other professionals, what information is important to the presentation of evidence of value. Some routine items of information, often providing leads to other areas of inquiry, include: When was the property purchased? What attributes of the property were significant to the client as purchaser? Were there any unusual circumstances surrounding the acquisition of the property? How is the property used? How does it function? Partial takings impacting the utility of the remaining property require an in-depth investigation of the operations on the site. For example, from which direction do vehicles arrive on the site? How do they maneuver on the site? Where do vehicles park or unload? What are the industrial or commercial processes which occur on the site? How does product or machinery move about