

EMINENT DOMAIN

State of Alabama

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Recent Developments

In response to Kelo, the legislature amended a few areas of law to restrict certain private purpose condemnations. The current text of these modified or new statutes are reproduced at pages 17 – 22 of this outline.

Alabama Constitution

There are two main sections in the Alabama Constitution pertaining to the power of eminent domain and to condemnation actions. The first section applies to the State of Alabama as well as to all those who are delegated the power of eminent domain from the State, and it provides as follows:

That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to

persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

Alabama Constitution, Art. I, Sec. 23.

The second section pertains only to those persons or entities with the delegated power of eminent domain, and it does not apply to the State itself. This section provides as follows:

Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The legislature is hereby prohibited from denying the right of appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise, but such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; and the amount of damages in all cases of appeals shall on demand of either party, be determined by a jury according to law.

Alabama Constitution, Art. XII, Sec. 235.

Who is Eligible to Condemn Property?

The State of Alabama has the inherent power of eminent domain. Gober v. Stubbs, 682 So. 2d 430, 433 (Ala. 1996).

The State may delegate the power of eminent domain to other persons or entities. City of Birmingham v. Brown, 2 So.2d 305 (Ala. 1941). To determine if a non-sovereign condemning agency has the power of eminent domain, one must look for a statutory, legislative grant by the sovereign of this power. Florence v. Williams, 439 So.2d 83 (Ala. 1983) (power of eminent domain cannot be exercised by another person or entity unless expressly conferred by statute); City of Huntsville v. Brown, 611 So.2d 372 (Ala.Civ.App.

1992) (power of eminent domain does not pass by implication). If there is a statutory grant of the power of eminent domain, then one must then look to the expressed terms of the grant, or its necessary implication, to determine the scope of the grant. Berry v. Alabama Power Co., 60 So.2d 681 (Ala. 1952); City of Huntsville v. Brown, 611 So.2d 372 (Ala.Civ.App. 1992) (power of eminent domain which is conferred by the sovereign is limited to the expressed terms or necessary implication of the statutory grant). Statutory grants to entities of the power to acquire land by purchase or gift and the right to own real property are not equivalent to a grant of the power of eminent domain. City of Birmingham v. Brown, 2 So. 2d 305, 308 (Ala. 1941). Statutory grants of the power of eminent domain are strictly construed against the condemning agency and in favor of the owner. Blanton v. Fagerstrom, 31 So.2d 330, 331 (Ala. 1947) (“statutes conferring the right [of eminent domain] must be strictly construed”).

Examples of Specific Legislative Grants of the Power of Eminent Domain:

Ala. Code, Sec. 2-3-20 -- Board of Agriculture and Industries

Ala. Code, Sec. 4-2A-6 -- International Airport Authority

Ala. Code, Sec. 4-3-11 -- Airport Authorities

Ala. Code, Sec. 4-4-3 -- Municipal Airports

Ala. Code, Sec. 9-2-3 -- Department of Conservation and Natural Resources

Ala. Code, Sec. 9-6-8 -- Environmental Improvement Authorities

Ala. Code, Sec. 9-6A-7 -- Synfuels Development Authority

Ala. Code, Sec. 9-8-61 -- Watershed Conservancy Districts

Ala. Code, Sec. 9-9-21 -- Water Management Districts

Ala. Code, Sec. 9-9-78 -- Drainage Subdistricts

Ala. Code, Sec. 9-10-5 -- Water Conservation and Irrigation Agency

Ala. Code, Sec. 9-10-34 -- Water Conservation and Irrigation Corporations

Ala. Code, Sec. 9-10A-14 -- Watershed Management Authorities

Ala. Code, Sec. 9-13-3 -- State Forestry Commission

Ala. Code, Sec. 9-14A-6 -- Alabama State Parks System Improvement Corporation

Ala. Code, Sec. 9-14A-6 -- Alabama Public Historical Sites and Parks Improvement Corporation

Ala. Code, Sec. 9-17-154 -- Underground Gas Storage Operators

Ala. Code, Sec. 10-2B-15.12 -- Foreign Corporations Generally

Ala. Code, Sec. 10-2B-15.13 -- Foreign Corporations extending lines, tracks, ways, or works into state

Ala. Code, Sec. 10-4-320 -- Water Power Companies

Ala. Code, Sec. 10-5-1 -- Railroads, street railroads, gas or electric works, water companies, power companies, canals, terminals, bridges, viaducts, wharves, piers, telegraph or telephone lines, pipelines or any other work of internal improvement or public utility

Ala. Code, Sec. 10-5-2 -- Railroad companies

Ala. Code, Sec. 10-5-3 -- Mining, manufacturing, industrial, power and quarrying corporation

Ala. Code, Sec. 10-5-4 -- Street railroad companies, telegraph, telephone, water, gas, electric, power, canal, pipeline companies and all other companies formed for constructing, operating or maintaining any work of internal improvement or public utility

Ala. Code, Sec. 10-5-6 -- Waterworks corporations

Ala. Code, Sec. 10-5-7 -- Railroads

Ala. Code, Sec. 11-14-23 -- Counties

Ala. Code, Sec. 11-18-21 -- Counties

Ala. Code, Sec. 11-43A-12 -- Municipalities (1982 Council-Manager form of government)

Ala. Code, Sec. 11-43A-74 -- Municipalities (1991 Council-Manager form of government)

Ala. Code, Sec. 11-43B-28 -- Municipalities (Class 4 Mayor-Council form of government)

Ala. Code, Sec. 11-47-14 -- Municipalities

Ala. Code, Sec. 11-47-170 -- Municipalities

Ala. Code, Sec. 11-47-171 -- Municipalities

Ala. Code, Sec. 11-47-251 -- Municipalities (for beach renourishment projects)

Ala. Code, Sec. 11-48-64 -- Municipalities

Ala. Code, Sec. 11-49A-8 -- Public Transportation Authorities (Class 3 Municipalities)

Ala. Code, Sec. 11-49B-7 -- Public Transportation Authorities (Class 1 Municipalities)

Ala. Code, Sec. 11-50-2 -- Municipalities (for electric power utilities)

Ala. Code, Sec. 11-50-4; 11-50-31 -- Municipalities (for water supply)

Ala. Code, Sec. 11-50-51 -- Municipalities (for sewers)

Ala. Code, Sec. 11-50-235; 11-50-261; 11-50-267 -- Waterworks and Sewer Boards

Ala. Code, Sec. 11-50-314 -- Board of Water, Sewer, Gas and Electric Systems

Ala. Code, Sec. 11-50-343 -- Boards of Water and Sewer Commissioners

Ala. Code, Sec. 11-50-396; 11-50-397 -- Gas Districts

Ala. Code, Sec. 11-50-524 -- District Electric Corporations

Ala. Code, Sec. 11-50A-8 -- Municipal Electric Authorities

Ala. Code, Sec. 11-50B-10 -- Public Telecommunications Providers

Ala. Code, Sec. 11-54-81 -- Industrial Development Boards

Ala. Code, Sec. 11-57-9 -- Public Library Authorities

Ala. Code, Sec. 11-58-5.1 -- Medical Clinic Boards

Ala. Code, Sec. 11-59-8 -- Public Athletic Boards

Ala. Code, Sec. 11-61A-9 -- Municipal Parking Authorities

Ala. Code, Sec. 11-80-1 -- Counties and Municipalities (for public building sites, roads, streets, construction materials, etc.)

Ala. Code, Sec. 11-81-200 -- Counties and Municipalities (for power plants, power lines, electric systems, etc.)

Ala. Code, Sec. 11-86-5 -- Counties and Municipalities (for recreation)
Ala. Code, Sec. 11-88-7; 11-88-110 -- Water, Sewer and Fire Protection Authorities
Ala. Code, Sec. 11-89-7 -- Water, Sewer, Solid Waste Disposal, and Fire Protection Districts
Ala. Code, Sec. 11-89A-14 -- Solid Waste Disposal Authorities
Ala. Code, Sec. 11-95-14 -- Public Hospital Corporations
Ala. Code, Sec. 11-97-14 -- Public Utility Service Corporations
Ala. Code, Sec. 11-99A-6 -- Improvement Districts
Ala. Code, Sec. 11-99B-7 -- Capital Improvement Cooperative Districts
Ala. Code, Sec. 14-2-9 -- Alabama Corrections Institution Finance Authority
Ala. Code, Sec. 16-8-40 -- County Boards of Education
Ala. Code, Sec. 16-11-13 -- City Boards of Education
Ala. Code, Sec. 16-18B-6 -- Alabama Forensic Sciences Bond Authority
Ala. Code, Sec. 16-47-191 -- University of Alabama (for museum)
Ala. Code, Sec. 16-54-15 -- University of Montevallo
Ala. Code, Sec. 18-1A-271 -- State of Alabama (for prisons)
Ala. Code, Sec. 18-1A-272 -- Foreign Telephone and Telegraph companies
Ala. Code, Sec. 18-1A-273, 18-1A-274 -- Railroad and Street Railroad companies
Ala. Code, Sec. 18-1A-295 -- State Chartered Institutions of Higher Learning
Ala. Code, Sec. 18-2-1, et seq. -- Dams for Mills, Gins, Factories or Electric
Ala. Code, Sec. 18-3-1, et seq. -- Private Acquisition of Right-of-way to Public road
Ala. Code, Sec. 18-3-20, et seq. -- Private Acquisition of Right-of-way to cemetery
Ala. Code, Sec. 22-3A-7 -- Alabama Public Health Finance Authority
Ala. Code, Sec. 22-4-16 -- State Board of Health
Ala. Code, Sec. 22-21-53 -- Public Hospital Associations
Ala. Code, Sec. 22-21-138 -- Municipal Hospital Building Authorities
Ala. Code, Sec. 22-21-319 -- Health Care Authorities
Ala. Code, Sec. 22-32-3 -- Department of Energy
Ala. Code, Sec. 22-50-11 -- Department of Mental Health and Mental Retardation
Ala. Code, Sec. 23-1-3 -- State of Alabama (for road building materials)
Ala. Code, Sec. 23-1-45 -- State Department of Transportation
Ala. Code, Sec. 23-1-82 -- County Commissions (for roads, bridges and ferries)
Ala. Code, Sec. 23-1-155 -- Alabama Highway Authority
Ala. Code, Sec. 23-1-175 -- Alabama Highway Finance Corporation
Ala. Code, Sec. 23-1-223 -- State Department of Transportation (for beautification)
Ala. Code, Sec. 23-1-306 -- Federal Aid Highway Finance Authority
Ala. Code, Sec. 23-1-378, 23-1-380 -- State Department of Transportation (for airports)
Ala. Code, Sec. 23-2-144 -- Alabama Toll Road, Bridge and Tunnel Authority
Ala. Code, Sec. 23-3-5 -- Highway Authorities (for controlled access facilities)
Ala. Code, Sec. 23-6-7 -- Industrial Access Road and Bridge Corporations
Ala. Code, Sec. 24-1-27 et seq. -- Municipal Housing Authorities
Ala. Code, Sec. 24-1-66 et seq. -- County Housing Authorities

Ala. Code, Sec. 24-2-2 et seq. -- Municipalities and Housing Authorities for
 Redevelopment projects
Ala. Code, Sec. 24-3-2 -- Municipalities and Housing Authorities for Urban Renewal
 projects
Ala. Code, Sec. 31-4-3, 31-4-8, 31-4-9 -- Armory Commissions
Ala. Code, Sec. 33-1-12.1, 33-1-22 -- Alabama State Port Authority
Ala. Code, Sec. 33-2-5 -- Alabama State Docks Department
Ala. Code, Sec. 33-7-31 -- Corporations improving navigation and generating
 hydroelectric power
Ala. Code, Sec. 33-12-5 -- Elk River Development Agency
Ala. Code, Sec. 33-15-6 -- Bear Creek Development Authority
Ala. Code, Sec. 33-16-8 -- Coosa Valley Development Authority
Ala. Code, Sec. 33-17-8 -- Tombigbee Valley Development Authority
Ala. Code, Sec. 34-3-104 -- State Bar Building Foundation Authority
Ala. Code, Sec. 37-4-113 -- Radio Utility companies
Ala. Code, Sec. 37-4-130 -- Public Electric Utility companies
Ala. Code, Sec. 37-5-3 -- Power Districts
Ala. Code, Sec. 37-6-3, 37-6-42 -- Electric Cooperatives
Ala. Code, Sec. 37-7-1, 37-7-10 -- Electric Membership Corporations
Ala. Code, Sec. 37-11A-1 -- Northeast Mississippi - Northwest Alabama Railroad
 Authority Compact
Ala. Code, Sec. 37-13-7 -- Railroad Authorities
Ala. Code, Sec. 39-7-22 -- Public Improvement Authorities
Ala. Code, Sec. 41-9-141 -- Building Commission
Ala. Code, Sec. 41-9-242, 41-9-249, 41-9-253 -- Alabama Historical Commission
Ala. Code, Sec. 41-10-54 -- Southern Products Mart Authority
Ala. Code, Sec. 41-10-91, 41-10-92 -- State Products Mart and Coliseum Authorities
Ala. Code, Sec. 41-10-267 -- Alabama Judicial Building Authority
Ala. Code, Sec. 41-10-457 -- Alabama Building Renovation Finance Authority
Ala. Code, Sec. 44-1-52 -- Youth Services Board
Ala. Code, Sec. 45-2A-61.02 -- Utilities Board of the City of Foley
Ala. Code, Sec. 45-2A-80.02 -- City of Loxley Utility Company
Ala. Code, Sec. 45-8A-20.21 -- City of Anniston Downtown Development Authority
Ala. Code, Sec. 45-8A-23.032 -- City of Anniston
Ala. Code, Sec. 45-8A-111.21 -- City of Oxford Downtown Development Authority

Who determines the right to take?

The trial judge decides whether the agency has the power of eminent domain in a condemnation action. Code of Alabama, § 18-1A-276 (probate court judge decides right

to take); Code of Alabama, § 18-1A-151(a) (circuit court judge decides right to take); Jefferson County v. Southern Natural Gas Co., 621 So.2d 1282 (Ala. 1993).

Taking or Damaging?

The State of Alabama is only liable for takings, not for merely damaging a parcel of property. Willis v. University of North Alabama, 826 So.2d 118, 121 (Ala. 2002); Alabama Constitution, Sec. 23. (exception for regulatory takings)

Lesser entities with the delegated power of eminent domain are liable in condemnations when they take or damage property. Willis v. University of North Alabama, 826 So.2d 118, 121 (Ala. 2002); Jefferson County v. Southern Natural Gas Co., 621 So.2d 1282, 1287 (Ala. 1993); Alabama Constitution, Sec. 235.

This means the State must physically take some property right to be liable in a condemnation action, but an entity with the delegated power can be liable with or without actually taking a property right so long as there is some damage to the property.

“Public Use” Interpretation

The “public use” requirement under the Alabama Constitution has been given a liberal interpretation by the courts. Parrish v. City of Bayou La Batre, 581 So.2d 1099 (Ala.Civ.App. 1989); Nicrosi v. City of Montgomery, 406 So.2d 951 (Ala.Civ.App. 1981). This is in keeping with the current federal court interpretation.

The Condemnation Proceedings

The Alabama Eminent Domain Code (Code of Alabama, 18-1A-1, et seq.) is based on the Uniform Eminent Domain Code (now Model Eminent Domain Code). It does not confer the power of eminent domain, but it does provide the main body of procedural rules and standards. Code of Alabama, 18-1A-2.

The first step in the condemnation process is for the agency to make a finding or determination that certain property is necessary for its use. Although this step does not appear in the Code, the necessity of the property is a constitutional requirement that is typically satisfied by the agency making a preliminary finding of necessity. The Code allows the agency the right to enter property to perform surveys and suitability tests to help determine suitability and necessity. Code of Alabama, §§ 18-1A-50 through 18-1A-53.

Once the agency intends to take certain property, there are several procedural requirements that must be followed prior to filing a complaint for condemnation. See,

Code of Alabama, § 18-1A-20(a). Because these procedures are mandatory, any deviation from these procedures may constitute a defense to a condemnation action unless waived. Code of Alabama, § 18-1A-33, Commentary; Code of Alabama, § 18-1A-31 (waiver of violations).

The first such requirement is to have the property inspected and appraised. The agency must give the owner a reasonable opportunity to accompany the appraiser during the inspection of the property. Code of Alabama, § 18-1A-21. Once the appraisal has been performed, the agency must use the appraisal to establish an amount which it believes to be just compensation, and it must offer to purchase the property from the owner for the amount of just compensation so determined. Code of Alabama, § 18-1A-22(a). It is important to note that the amount of the appraisal is not necessarily the amount of the offer. The agency is not required to furnish the owner with a copy of the appraisal, but it is required to submit a written statement and summary of the basis for the amount of the offer. Code of Alabama, § 18-1A-22(d).

The agency is not required to negotiate with the owner, it is only required to offer to purchase the property based on an appraisal before initiating the condemnation process.

It is a defense to a condemnation action that the agency did not (1) allow the owner the opportunity to accompany the appraiser or (2) provide a detailed offer letter offering to purchase the property prior to filing the action. Code of Alabama, § 18-1A-21; Code of Alabama, § 18-1A-55.

Pre-Filing Entry

To accomplish the conditions precedent, and to determine suitability and other matters, an agency has the power to go on land to conduct suitability studies, surveys, and other matters. Code of Alabama, §§ 18-1A-50 through -54. If the owner resists, the agency can get a Circuit Court order allowing entry. Code of Alabama, § 18-1A-51.

Complaint for Condemnation

After the pre-filing procedures have been satisfied, then the agency may file a Complaint for condemnation in the Probate Court for the county in which the property (or any part thereof) is located. Code of Alabama, § 18-1A-71.

The Complaint must contain: (1) the names of the plaintiff and defendants; (2) a legal description of the property and the nature of the interest to be taken; (3) the basis for the plaintiff's legal authority to take property by eminent domain; (4) a statement of the agency's intentions or purpose for taking the property; and (5) a list of all items of equipment or fixtures which the condemnor seeks to acquire and which are attached to the property. Code of Alabama, § 18-1A-72(a). The Complaint must also be accompanied by

a map or diagram showing the property sought to be taken and the remainder of the owner's land, if any. Code of Alabama, § 18-1A-72(d).

While the agency must also file a notice of the pendency of the condemnation action (*lis pendens*) in the probate courts in which the property is located, the failure to do this is not a defense to the condemnation action. Code of Alabama, § 18-1A-75(a).

The Complaint must be served on the defendants as provided in Rule 4 of the Alabama Rules of Civil Procedure. Code of Alabama, § 18-1A-74(b).

Rules of Procedure in Probate Court

The rules of procedure in Probate Court are as provided in the Alabama Eminent Domain Code, not the Alabama Rules of Civil Procedure. Code of Alabama, § 18-1A-70.

Discovery in Probate Court

Some Probate Courts may allow the parties to conduct discovery while others do not. The Alabama Eminent Domain Code does not directly address this issue, and there is authority which both supports and detracts from the right to pursue discovery in Probate Court. Code of Alabama, § 18-1A-93, Commentary (“Nothing in this section directly affects the right to pursue discovery proceedings. Discovery, of course, may be an important prelude to resolution of fact issues raised by one or more objections pleaded in the answer.”); but see, Ala. R. Civ. P. 71A (“These rules [of civil procedure] do not apply to probate courts where condemnation proceedings originate.”); Code of Alabama, § 18-1A-70 (“The procedure [for condemnation] in the probate courts shall be as provided in this chapter.”).

Writ of Mandamus/Temporary Restraining Order

Even after the Court overrules the preliminary objections and orders the condemnation, the owner does not have a right to appeal this order because the judgment is not final until just compensation is determined and a final judgment of condemnation is issued. Code of Alabama, § 18-1A-283. An owner may, however, petition the Circuit Court for a writ of mandamus and/or apply to the circuit court for a temporary restraining order.

Hearing on Just Compensation

Within ten days after entry of the Right to Take Order, the Probate Court must appoint three persons to act as commissioners whose job is to determine the damages and amount of just compensation due to the owner. Code of Alabama, § 18-1A-279. Some jurisdictions allow the parties to have input over the commissioners appointed. The condemnation hearings, including the admission of evidence, are conducted as if the action was a civil case at law, except as provided in the Alabama Eminent Domain Code. Code of Alabama, § 18-1A-277. Neither party has the burden of proof on the issue of just compensation. Code of Alabama, § 18-1A-153.

After hearing all the evidence, the commission will return a report of just compensation to the Probate Court. Code of Alabama, § 18-1A-281. This report must be returned within twenty (20) days of the date of the commissioners' appointment. Code of Alabama, § 18-1A-282. If the commission will not be able to return its report within this time frame, the probate court usually re-appoints the commissioners from time to time as needed.

The Commissioners are supposed to only hear evidence that would be admissible under the Alabama Rules of Evidence as it relates to condemnation actions. Attorney General's Opinion 2004-052 (December 20, 2003).

Judgment of Condemnation

Once the commission returns its report to the Probate Court, the Probate Court must, within seven days, issue a Judgment of Condemnation which states that the subject property be condemned upon deposit into probate court of the amount of just compensation and damages assessed by the commissioners. Code of Alabama, § 18-1A-282.

The agency, the owner, or both may appeal the probate court's Judgment of Condemnation to the circuit court. Code of Alabama, § 18-1A-283. If neither party appeals, the agency may pay the judgment at any time within 90 days of the entry of the Judgment. Code of Alabama, § 18-1A-290. If the agency does not pay the judgment within 90 days, and no appeal is filed, then the owner may move the court to vacate the Judgment and for an award of their damages, including attorney's fees. Code of Alabama, §§ 18-1A-215 and 18-1A-290.

Appeal to Circuit Court

In order to perfect an appeal, a notice of appeal must be filed with the probate court within thirty (30) days of the probate court's signing of the Judgment of Condemnation. Code of Alabama, § 18-1A-283; Boutwell v. State, 2005 WL 3084903 (Ala.Civ.App.2005), reversed 2006 WL 2662244.

Once appealed, the condemnation process essentially starts over. The circuit court does not review the probate court's judgment, but instead sets the matter for a trial *de novo*. Code of Alabama, § 18-1A-283.

Either party may demand a jury trial on the issue of just compensation, but the trial judge will decide whether the agency has the right to take the subject property (if this issue is raised on appeal). Code of Alabama, § 18-1A-151(a); Palughi v. City of Mobile, 526 So. 2d 1 (Ala.), *cert. denied*, 488 U.S. 855 (1988).

Right of Entry

Immediately after the Probate Court enters its Judgment of Condemnation, and without regard to whether either party has filed an appeal to circuit court, the agency may take steps to gain immediate access to the property. When the sovereign is the condemning agency it must first pay the amount of the Judgment into the probate court before it can enter the property. Southern Natural Gas Company v. Ross, 275 So.2d 143 (Ala. 1973); Code of Alabama, § 6-5-1(a). If the agency is not the sovereign, it must not only pay the amount of the Judgment, but it must also post a bond equal to two times the amount of the Judgment before it can enter the property. Code of Alabama, § 18-1A-284.

The agency's right of entry carries with it the right of possession, including the right to begin work on the subject property such as cutting trees, building roads, or whatever work is associated with the project for which the land was taken. Code of Alabama, § 18-1A-289. Any work performed on the subject property is at the agency's peril if it is later found to not have the power to take the subject property by condemnation or if it later elects to abandon the project or dismiss the condemnation action. Code of Alabama, § 18-1A-233; Code of Alabama, § 18-1A-215.

If the agency does not desire immediate access to the property, it does not have to pay any amount into court pending the appeal, but it must pay the final Judgment within 60 days of the resolution of the appeal. Code of Alabama, § 18-1A-290.

Title to Money and to Land

Title, as distinguished from right of possession, to the subject property does not pass to the agency until the condemnation process has been finally adjudicated, including all appeals. Code of Alabama, § 18-1A-289. This means that even though the agency may have entered upon the property and constructed its improvements, the title to the land is still held by the owner for so long as the condemnation action is pending. Likewise, any money paid into probate court by the agency remains the property of the agency until title to the real property passes to it. Code of Alabama, § 18-1A-231.

Just as the agency has a right to enter upon the property prior to title passing, the owner has a corresponding right to the immediate access to a portion of the money paid into court. This process is commonly referred to as “drawing down.” The owner is entitled to draw down the amount of the agency’s pre-complaint offer to purchase from the money deposited into court (if any). Code of Alabama, § 18-1A-110.

If the amount of this offer is less than the Judgment, then the owner or agency should, by motion, request the probate court to invest the remainder of the Judgment in an interest earning account. Code of Alabama, § 18-1A-111.

Priority Trial in Circuit Court

Condemnation actions which are appealed to Circuit Court are entitled to trial priority over most other actions pending before the court. Code of Alabama, § 18-1A-150; Ala. R. Civ. P. 40.

Discovery in Circuit Court

Each party is entitled to the full discovery procedures provided for in the Alabama Rules of Civil Procedure, except as limited by the Alabama Eminent Domain Code. Code of Alabama, § 18-1A-70. Appraisal reports, however, are specifically exempt from discovery. Ex Tuscaloosa County, 825 So.2d 729 (Ala. 2001); State v. Bragg, 710 So.2d 417 (Ala. 1917); Code of Alabama, § 18-1A-130.

Jury Trial

Either party may request a jury to determine the amount of just compensation. Alabama Constitution, Art. XII, Sec. 235; Code of Alabama, § 18-1A-151.

Challenging the Condemnation

Answer and Preliminary Objections

An owner must file an Answer to the Complaint if they challenge the right or authority of the agency to take his property (either on constitutional or statutory grounds) or if he disputes the area to be taken or the area which will remain after the proposed taking. Code of Alabama, § 18-1A-90 (Answer); 18-1A-91 (Answer and Preliminary Objections). Well-plead allegations in the Complaint which are not denied in the Answer may be deemed admitted. Code of Alabama, § 18-1A-91, Commentary.

Preliminary objections are any available grounds for objecting to the condemnation action. Code of Alabama, § 18-1A-91(b). These could be challenges to the agency’s power of eminent domain (based on lack of authority, lack of necessity and/or

intended use is private rather than public) or to the condemnation action itself (based on failure to comply with pre-filing procedures, failure to properly plead Complaint, lack of jurisdiction of court over property or defendants, or any other deviations from the Alabama Eminent Domain Code).

Merit Hearing and Orders

The Probate Court will schedule a merit hearing on the agency's right to take the property. Code of Alabama, § 18-1A-276. At this hearing, the agency generally has the burden of proof on all issues of fact relating to a preliminary objection. Code of Alabama, § 18-1A-94(a). The exception to this general rule is that the owner has the burden of proving by clear and convincing evidence all allegations of fraud, corruption, bad faith, and gross abuse of discretion. Code of Alabama, § 18-1A-94(b).

Preliminary objections which are sustained may result in the following types of relief:

- (1) Dismissal of the action, in whole or in part, if the plaintiff is not authorized to take the property, or some part thereof, or the acts or omissions constituting the basis for the objection will necessarily inflict irreparable injury upon the defendant;
- (2) Conditional dismissal, in whole or in part, unless, within a specified period, the plaintiff takes corrective or remedial action prescribed in the order, including, if appropriate, the adoption of a new or amended condemnation authorization; or
- (3) Any other disposition required by the circumstances.

Code of Alabama, § 18-1A-95(a).

After being raised in an Answer, a preliminary objection may be also asserted in the form of a motion to dismiss. Code of Alabama, § 18-1A-230(1). In addition to the preliminary objections originally raised, the agency's failure to exercise reasonable diligence in prosecuting the condemnation action may be asserted as grounds for dismissal upon motion of the owner. Code of Alabama, § 18-1A-230(2).

If a condemnation action is dismissed, either voluntarily or involuntarily, at any stage, this dismissal will not act as a bar against a subsequent condemnation effort for the same property. Alabama M. Ry. Co. v. Newton, 10 So. 89 (Ala. 1891); see also, Alabama Power Co. v. Thompson, 32 So. 2d 795, 799 (Ala. 1947).

Thus, an agency may appeal a dismissal to circuit court for a trial de novo. Code of Alabama, § 18-1A-286. Alternatively, the agency may re-file its condemnation Complaint in probate court and begin the process anew. Alabama M. Ry. Co. v. Newton,

10 So. 89 (Ala. 1891). It is not a defense to a condemnation action that the agency was previously unsuccessful in taking the owner's property.

If the preliminary objections are overruled (and any motions to dismiss are denied), then the court will enter an order granting the Complaint, sometimes referred to as a "Right to Take Order." Code of Alabama, § 18-1A-276.

Just Compensation Valuation Issues

Evidence

There are special rules relating to the admission of evidence of value which act to supplement, and in the event of a conflict, supersede, the Alabama Rules of Evidence. Code of Alabama, § 18-1A-190(a). For example, only certain witnesses are qualified to testify as to the value of the property. The owner of the property is allowed to give his opinion as to the value of the property, and an expert witness may also be allowed to testify about the value of the property before and after the taking. Code of Alabama, § 18-1A-192(a).

In addition to specifying the persons qualified to give an opinion as to value, the Code also limits these witnesses to considering only certain matters. See, e.g., Code of Alabama, § 18-1A-195; Code of Alabama, § 18-1A-196; Code of Alabama, § 18-1A-193; Code of Alabama, § 18-1A-194; Code of Alabama, § 18-1A-197.

Enhancement

The value of a taking in partial takings cases may be reduced by the benefits to the remaining parcel from the project if the project is a right-of-way, sewer line or water line or if the condemnation is commenced by a water conservancy or water management district. Code of Alabama, § 18-1A-171. Otherwise, the project's positive impact on the remaining parcel does not reduce the damages owed. Code of Alabama, § 18-1A-171; Code of Alabama, § 18-1A-173(a).

Valuation Approaches

There are three statutorily endorsed approaches to valuation. The first is the Sales Comparison approach which involves consideration of the sales of comparable parcels of property. Code of Alabama, § 18-1A-196(2). The court decides whether a particular sale is comparable. The Cost approach includes the Sales Comparison approach for vacant land, but uses a reproduction cost new less depreciation methodology for improvements. Code of Alabama, § 18-1A-196(5). The Income approach focuses on the net rental income of the subject property, which amount is then capitalized. Code of Alabama, § 18-

1A-196(4). The Income approach should not be confused with the capitalized net profit or net income of a business which is operating on the subject property, however. While the net income of the subject property itself is a valid basis for an opinion of value, the net income or net profit of a business being operated on the subject property is not.

The guiding principle is to compensate the owner for the fair market value of his property in an attempt to put the owner in the same position he was in prior to the taking. Williams vs. Alabama Power Co., 730 So.2d 172 (Ala. 1999); Code of Alabama, §§ 18-1A-172 and 18-1A-176.

The market value is the value the property would sell for on the open market in an arm's length transaction. Code of Alabama, § 18-1A-172; Code of Alabama, § 18-1A-173(a).

Property is valued at its highest and best use, even if it is not currently used in that manner. Code of Alabama, § 18-1A-174.

Business Losses

Generally business losses are not recoverable as such, but business income can be relevant on valuation issues. Barber v. State, 703 So.2d 314, 322 (Ala. 1997); State v. Woodham, 264 So.2d 166, 168 (Ala. 1972); Harco Drug, Inc. v. Notsla, Inc., 382 So.2d 1, 4-5 (Ala.1980).

Appeal from Circuit Court

The circuit court will enter a Judgment which may be appealed to either the Court of Civil Appeals or the Supreme Court depending on the amount of money involved. Code of Alabama, § 18-1A-288.

Interest

The owner is constitutionally entitled to pre-judgment interest at a rate to be determined by the court on the amount of the final Judgment from the date of the taking (or the date of the damage). Williams vs. Alabama Power Co., 730 So.2d 172 (Ala. 1999). Alabama's pre- and post-judgment interest statutes and cases are too conflicting and inconsistent to summarize.

Relocation Assistance

If the subject property is someone's primary residence, or if there is personalty to be moved, the resident or owner may be entitled to relocation assistance from the federal

government or from the State of Alabama. Code of Alabama, §§ 18-4-1, *et seq.* (Alabama Relocation Assistance and Real Property Acquisition Policies Act of 1999).

Jury Instructions

The Alabama Pattern Jury Instructions pertaining to direct (non-inverse) Condemnation actions are reproduced below:

APJI 14-00 EMINENT DOMAIN - DEFINITION

Eminent domain is the right of the state, or of those to whom the power has been delegated, to take private property for public use without the owner's consent and to appropriate ownership and possession of the property upon payment of just compensation.

APJI 14-01 CONDEMNATION--DEFINITION

Condemnation is a legal proceeding to acquire private property for a public use in the exercise of the right of eminent domain by an authority possessing such right.

APJI 14-02 RIGHT TO CONDEMN

The question of petitioner's right to condemn the property involved is a question of law with which the jury is not concerned and in this case [*the court has ruled that the petitioner is entitled to an order of condemnation*] [the parties have stipulated that the petitioner is entitled to an order of condemnation as a matter of law].

APJI 14-03 TRIAL DE NOVO

This case is in the circuit court by way of an appeal from the Probate Court of this county. In such cases the law provides that the case be tried de novo; that means anew, without any regard being given to the action taken in the Probate Court. The judgment and decision of that court is not before you and it would be improper to consider it in this trial.

APJI 14-04 SOLE QUESTION FOR THE JURY

[*The Court having ruled that the petitioner is entitled to an order of condemnation.*] [The parties having stipulated that petitioner is entitled to an order of condemnation] leaves for your concern and your consideration, only, the question of the amount of compensation or damages if any to be awarded the landowner.

APJI 14-05 JUST COMPENSATION--DEFINITION

Just compensation means the payment of such sum of money to the property owner(s) that the owner(s) would be saved harmless as near as may be, and put in as near the same condition as such owner(s) would have been but for the taking.

APJI 14-06 DATE OF TAKING

The date of the taking in this case was _____, the day on which the Application for Order of Condemnation was filed in the Probate Court and your valuation should be as of that date.

APJI 14-07 MARKET VALUE--DEFINITION

Market value is the price the property would bring when offered for sale by a willing seller who is not forced to sell and which is sought by a willing buyer who is not required to buy, after due consideration of all the elements affecting value.

APJI 14-08 OPINION OF EXPERTS

There have been witnesses who testified in this case whom the parties contend are qualified as experts and these witnesses were allowed to give their opinions as to value (other matters in question). You are not bound by the opinions of experts as to the matters about which they expressed such opinions. You may draw your own conclusions as to the matters in question upon a consideration of all the evidence in the case.

APJI 14-09 AWARD OF COMMISSIONER

Neither the award of the Commissioners in the Probate Court nor the judgment based thereon is legal evidence in this cause and the fact that a witness who testified as to value, based on his independent judgment, was a Commissioner in the Probate proceedings you should give his opinion no greater weight nor credence because of such fact than any other witness. The weight to be given the testimony of any witness is entirely within your discretion.

APJI 14-10 SINGLE TRACT--UNITY OF USE TEST

Unity of use is the principal test in determining what constitutes a separate and independent parcel or tract of land. To constitute a unity of property within this rule there must be such a connection or relation of adaptation, convenience, and actual permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to

the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which they are used. *[If the separate tracts of which a part of one is taken]* *[If the separate tracts of which all of one is taken]* are not put to a joint use, they cannot be considered as one parcel in assessing damages to the land not taken.

APJI 14-11 HIGHEST AND BEST USE

In determining what is just compensation, you may consider the uses to which the property is reasonably adapted, though the property is not presently so used, as the landowner is entitled to have the value of the property determined, based on its highest and best use. If you are reasonably satisfied that there existed a prospective use affecting the value of the property at the date of the taking, that is an element for your consideration; but you should not consider speculative or imaginary uses of the property or merely speculative plans of the property owner.

APJI 14-12 PROHIBITED USE--ZONING ORDINANCE

The rule that you can consider the value of the subject property for its highest and best use contemplates a lawful use, one not prohibited by laws such as zoning regulations. It would be improper to arrive at the market value of the subject property based entirely on a prohibited or illegal use.

APJI 14-13 PROHIBITED USE--ZONING ORDINANCE--EXCEPTION

Even though an existing municipal zoning ordinance prohibits the use of subject property for the proposed purposes at the time of condemnation, nevertheless, if you are reasonably satisfied from the evidence, that there was a reasonable probability that the ordinance would be amended, or an exception made, in the reasonably foreseeable future, then the value for such use as may be included in the amendment or exception, may be considered. Under no event, even if you are reasonably satisfied such probability existed, must the property be evaluated as though rezoning had been accomplished at the time of the taking. The property must be evaluated as of the time of the taking under the restrictions of the then existing zoning ordinance with consideration given to the impact upon the market value of the likelihood of an amendment or exception in zoning.

APJI 14-14 LIMITED ACCESS

The owners of land abutting on a street or highway have a private right in such highway distinct from that of the public and this is known as the right of access to the highway. This right of access is being condemned and the loss of this right is an element for you to consider in arriving at just compensation to be awarded the owner of the land.

APJI 14-15 DAMAGES--TOTAL TAKING

The landowners are entitled to recover the reasonable market value of the property taken as of the date of the taking.

The terms "reasonable market value," "cash market value," "fair market value," or "fair cash market value" are considered substantially synonymous.

APJI 14-16 DAMAGES--PARTIAL TAKING

The final inquiry as to the compensation to be awarded, if any, is the difference between the value of the entire tract immediately before the taking and the value of the part remaining after the taking *[giving effect to any enhancement in value of the part remaining resulting from the construction of the public highway]*.

If the part remaining is worth as much or more after completion of the project than the entire tract was worth immediately before the taking, the landowner has sustained no damage and is not entitled to any compensation.

APJI 14-17 DAMAGES--ELEMENTS OF CONSIDERATION

You may take into consideration in determining just compensation, the value of the land taken, the actual acreage or lots taken, any injury to the remaining part of the tract of land, taking the entire tract as a unit, and the adaptability of the land for a special purpose affecting its value.

The proper way to arrive at the diminished value of the tract of land is the difference in market value just before and just after the taking.

These other elements are factors that you may use and take into consideration in arriving at what would be just compensation.

APJI 14-19 BURDEN OF PROOF--COMPENSATION

Neither party to this cause of action has the burden of proof on the issue of the amount of compensation to be awarded. The amount of compensation (if any) to be awarded is in the sound discretion of the jury based on the evidence presented in the case.

Partial takings cases are valued under the before and after rule whereby the total before- the taking value and the total after value are calculated and the difference between the two is just compensation.

Treatment of Various Ownership Interests

Undivided Fee Rule

When there are several different persons or entities with interests in the subject property, the “undivided fee” rule is applicable. This rule states that the subject property is to be valued as a whole instead of having different values attached to each of the various interest holders. Harco Drug, Inc. v. Notsla, Inc., 382 So.2d 1 (Ala.1980). Thus, only one sum of money is awarded to compensate all the various interest holders in the property (e.g., tenant and landlord; present interest and reversion interest). Each person owning an interest in the property, however, is allowed to testify as to the value of their interest. Drummond Coal Co. vs. State of Alabama, 548 So.2d 430 (Ala. 1989); E-Z Serve Convenience Store, Inc. vs. State of Alabama, 686 So.2d 351 (Ala. Civ. App. 1996).

Apportionment Hearings

If there is a dispute over who is entitled to the proceeds of the condemnation action, or if there is a dispute over the division of the money between different interest holders, the court may schedule an apportionment hearing to hear evidence on this subject. Code of Alabama, § 18-1A-291. The court will then enter an Order dividing the money between the various interest holders.

Post Kelo Legislative Action:

§ 11-47-170. Acquisition of lands, easements, etc., by municipality; limitations on condemnation.

(a) Except as otherwise provided in subsection (b), whenever in the judgment of the council, commission, or other governing body of a city or town it may be necessary or expedient for the carrying out and full exercise of any power granted by the applicable provisions of this title or any other applicable provision of law, the town or city shall have full power and authority to acquire by purchase the necessary lands or rights, easements, or interests therein, thereunder, or thereover or, for the purposes for which private property may be acquired by

condemnation, may proceed to condemn the same in the manner provided by this article, or by the general laws of this state governing the taking of lands or the acquiring of interests therein for the uses for which private property may be taken, and such proceedings shall be governed in every respect by the general laws of this state pertaining thereto or by the provisions on the subject contained in this article when the same are followed.

(b) Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity. Provided, however, the provisions of this subsection shall not apply to the use of eminent domain by any municipality, housing authority, or other public entity based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, but just compensation, in all cases, shall continue to be first made to the owner. Nothing in this article shall limit the exercise of eminent domain by or for the benefit of public utilities or other entities engaged in the generation, transmission, or distribution of telephone, gas, electricity, water, sewer, or other utility products or services. Nothing in this article shall be interpreted to prohibit a municipal or county governing body from exercising the power of eminent domain for the purpose of constructing, maintaining, or operating streets and roadways, government buildings, or park and recreation facilities.

(c) Property condemned pursuant to the authorizations as described in subsections (a) and (b), if not ever used for the purpose or purposes for which it was condemned or for some other public use, that is subsequently determined to be sold, shall be first offered for sale to the person or persons from whom the property was condemned, or his or her known or ascertainable heirs or assigns, at the price which was paid for the property, less such amount, if any, as the person or persons from whom the property was condemned shall show by good and sufficient documentation to be the amount of income and transaction taxes, if any, actually paid in connection therewith, and if the offer shall not be accepted within 90 days from the date it is made, the property may be sold to any other person, but only at public sale after legal notice is given.

§ 11-80-1. Condemnation of lands for public building sites, roads, streets, construction materials, etc.

(a) Counties and municipal corporations may condemn lands for public building sites or additions thereto, or for enlargements of sites already owned, or

for public roads or streets or alleys, or for material for the construction of public roads or streets or for any other public use.

(b) Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity. Provided, however, the provisions of this subsection shall not apply to the use of eminent domain by any municipality, housing authority, or other public entity based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, but just compensation, in all cases, shall continue to be first made to the owner. Nothing in this article shall limit the exercise of eminent domain by or for the benefit of public utilities or other entities engaged in the generation, transmission, or distribution of telephone, gas, electricity, water, sewer, or other utility products or services. Nothing in this article shall be interpreted to prohibit a municipal or county governing body from exercising the power of eminent domain for the purpose of constructing, maintaining, or operating streets and roadways, government buildings, or park and recreation facilities.

(c) Property condemned pursuant to the authorizations as described in subsections (a) and (b), if not ever used for the purpose or purposes for which it was condemned or for some other public use, that is subsequently determined to be sold first, shall be offered for sale to the person or persons from whom the property was condemned, or his or her known or ascertainable heirs or assigns, at the price which was paid for the property, less such amount, if any, as the person or persons from whom the property was condemned shall show by good and sufficient documentation to be the amount of income and transaction taxes, if any, actually paid in connection therewith, and if the offer shall not be accepted within 90 days from the date it is made, the property may be sold to any other person but only at public sale after legal notice is given.

§ 18-1B-1. Statement of legislative intent.

In light of the decision and certain opinions recently announced by the United States Supreme Court interpreting the extent of the power of government to take property for public use as described in the Fifth Amendment to the United States Constitution and providing that individual states may restrict the exercise of that power, the Legislature intends in enacting this chapter and amending Sections 11-47-170 and 11-80-1, to ensure that governmental bodies in Alabama vested

with all or any part of the power of eminent domain may not, the aforesaid recent interpretation of the Fifth Amendment to the contrary notwithstanding, use the power to take the private property of any person for the private use of another, as opposed to the use thereof by the public generally, except as and in the limited circumstances set out in this chapter and Sections 11-47-170 and 11-80-1.

§ 18-1B-2. Limitations on condemnation.

(a) Neither the State of Alabama, nor any of its departments, divisions, agencies, commissions, corporations, boards, authorities, or other entities, nor any agency, corporation, district, board, or other entity organized by or under the control of any municipality or county in the state and vested by law to any extent whatsoever with the power of eminent domain may condemn property for the purpose of nongovernmental retail, office, commercial, residential, or industrial development or use; provided, however, the foregoing provisions of this subsection shall not apply to the exercise of the powers of eminent domain by any county, municipality, housing authority, or other public entity based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, or to the exercise of eminent domain by or for the benefit of public utilities or other entities engaged in the generation, transmission, or distribution of telephone, gas, electricity, water, sewer, or other utility products or services. Nothing in this section shall be interpreted to prohibit the state or a municipal or county governing body from exercising the power of eminent domain for the purpose of constructing, maintaining, or operating streets and roadways, government buildings, or park and recreation facilities.

(b) Property condemned by an entity described in subsection (a), if not ever used for the purpose or purposes for which it was condemned or for some other public use, that is subsequently determined to be sold, shall be first offered for sale to the person or persons from whom the property was condemned, or his or her known or ascertainable heirs or assigns, at the price which was paid for the property, less such amount, if any, as the person shall show by good and sufficient documentation to be the amount of income and transaction taxes, if any, actually paid in connection therewith, and if the offer shall not be accepted within 90 days from the date it is made, the property may be sold to any other person or persons but only at public sale after legal notice is given.

§ 24-2-2. Powers of housing authorities or municipalities -- Acquisition and redevelopment of blighted property; limitations on eminent domain; definitions.

(a) Any housing authority now or hereafter established pursuant to this title, or any incorporated city or town may carry out any work or undertaking, hereafter called a "redevelopment project":

(1) To acquire blighted property as defined in subsection (c).

(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors, or the causes of blight, but this authority to acquire such other property shall not be construed to grant the power of eminent domain to acquire property that is not blighted without the consent of the owner.

(3) To clear any areas acquired and install, construct, or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan.

(4) To sell or lease land so acquired for uses in accordance with the redevelopment plan.

(5) To accomplish a combination of the foregoing to carry out a redevelopment plan.

(b) Notwithstanding any other provisions of this chapter, a redevelopment project may include property that is not blighted, but the power of eminent domain may not be exercised to acquire property that is not blighted without the consent of the owner.

(c) For the purposes of this section and Section 24-3-2, the term "blighted property" means property that contains any of the following factors:

(1) The presence of structures, buildings, or improvements, which, because of dilapidation, deterioration, or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision for ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy.

(2) The existence of high density of population and overcrowding or the existence of structures which are fire hazards or are otherwise dangerous to the safety of persons or property or any combination of the factors.

(3) The presence of a substantial number of properties having defective or unusual conditions of title which make the free transfer or alienation of the properties unlikely or impossible.

(4) The presence of structures from which the utilities, plumbing, heating, sewerage, or other facilities have been disconnected, destroyed,

removed, or rendered ineffective so that the property is unfit for its intended use.

(5) The presence of excessive vacant land on which structures were previously located which, by reason of neglect or lack of maintenance, has become overgrown with noxious weeds, is a place for accumulation of trash and debris, or a haven for mosquitoes, rodents, or other vermin where the owner refuses to remedy the problem after notice by the appropriate governing body.

(6) The presence of property which, because of physical condition, use, or occupancy, constitutes a public nuisance or attractive nuisance where the owner refuses to remedy the problem after notice by the appropriate governing body.

(7) The presence of property with code violations affecting health or safety that has not been substantially rehabilitated within the time periods required by the applicable codes.

(8) The presence of property that has tax delinquencies exceeding the value of the property.

(9) The presence of property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition.

§ 24-3-2. Authority to plan and undertake urban renewal projects; limitations on eminent domain.

(a) In addition to its authority under this title, any housing authority created under this title is hereby authorized to plan and undertake urban renewal projects.

(b) The governing body of any incorporated city or town is likewise hereby authorized to plan and undertake urban renewal projects and shall have and possess the same powers and authority granted to or conferred on any housing authority.

(c) As used in this chapter, an urban renewal project may include undertakings and activities for the elimination and for the prevention of the spread of blighted property as defined in subsection (c) of Section 24-2-2 and may involve any work or undertaking for such purpose constituting a redevelopment project authorized by Chapter 2 of this title, or any rehabilitation or conservation work or any combination of such undertaking or work. For this purpose, "rehabilitation or conservation work" may include:

(1) Carrying out plans for a program of voluntary or compulsory repair and rehabilitation of buildings or other improvements;

(2) Acquisition of real property and demolition, removal or rehabilitation of buildings and improvements thereon, where necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare, or to otherwise remove or prevent the spread of blight or deterioration or to provide land for needed public facilities;

(3) Installation, construction or reconstruction of streets, utilities, parks, playgrounds and other improvements necessary for carrying out the objectives of the urban renewal project; and

(4) The disposition, for uses in accordance with the objectives of the urban renewal project, of any property or part thereof acquired in the area of such projects; provided that such disposition shall be in the manner prescribed in Chapter 2 of this title for the disposition of property in a redevelopment project area.

(d) Notwithstanding any other provisions of this chapter, an urban renewal project may include property that is not blighted, but the power of eminent domain may not be exercised to acquire property that is not blighted without the consent of the owner.

Attorney Fees and Costs

Attorney's fees are not recoverable in a direct condemnation action unless the Condemning agency either fails to acquire the property it sought or abandons its condemnation action after it has commenced. White v. State, 319 So.2d 247 (Ala. 1975), certiorari denied, 96 S.Ct. 1428, 424 U.S. 954, 47 L.Ed.2d 359; Code of Alabama, §§ 18-1A-3(12), 18-1A-95, 18-1A-290.

In the event a preliminary objection is sustained, the court has the discretion to order the agency to pay the defendant's litigation expenses, including attorney's fees, expert fees, and costs. Code of Alabama, § 18-1A-95(b). The court must award litigation expenses to the defendant in the event the court finds that the agency "acted or failed to act without justification". Code of Alabama, § 18-1A-95(b). If the agency does not pay the probate court's judgment of condemnation within 90 days, and no appeal is filed, the owner may move for an award of damages, including attorney fees.