

State of Kansas

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Recent Developments:

During the 2006 legislative session, the Kansas Legislature passed Senate Bill 323. The legislation was signed by the Governor and becomes effective July 1, 2007. The one-year delay in the effective date was designed to allow existing tax increment projects currently in progress to be completed under provisions of the current law.

Senate Bill 323 provides that on and after July 1, 2007, the taking of private property by eminent domain for the purpose of selling, leasing or transferring it to another private entity, including takings under the tax increment financing law, will not be permitted unless the taking meets any of the following:

The property is deemed excess real property that was taken lawfully and incidental to the acquisition of right of way for a public road, bridge, or public improvement project of the Kansas Department of Transportation or a municipality;

The taking is by any public utility;

The taking is by any gas gathering service, pipeline company or railroad;

The private property owner has acquiesced in writing to the taking by any municipality;

The property has defective or unusual conditions of title or unknown ownership interest in the property and is taken by any municipality; or

The property is unsafe for occupation by humans under the building

codes.

Any taking of private property for the purpose of transferring it to any private entity, except as authorized above, must be expressly authorized by the legislature on or after July 1, 2007, by an enactment of a law that identifies the specific tract or tracts to be taken. The legislature is required to consider providing extra compensation to the person whose land will be taken of at least 200% of the fair-market value.

Who Is Eligible To Condemn?

CHAPTER 2. AGRICULTURE

K.S.A. § 2-135; State Fair Board, Community Fair Associations and County Fair Associations.

K.S.A. § 2-2701; State Highway Commission.

CHAPTER 3. AIRCRAFT AND AIRFIELDS

K.S.A. § 3-113; Municipal airfields and airports; safety zones.

K.S.A. § 3-115; Municipal airfields and airports.

K.S.A. § 3-123; Municipalities operating airports jointly.

K.S.A. § 3-162; Airport authority in certain cities.

K.S.A. § 3-305, 3-402; Board of County Commissioners. Aircraft supply depots in counties over 125,000.

K.S.A. § 3-405; National Defense Operation Depots.

K.S.A. § 3-803; Cooperation with Adjoining State.

CHAPTER 12. CITIES AND MUNICIPALITIES

K.S.A. § 12-622; Sewers and drains outside city.

K.S.A. § 12-631q; Counties and cities may unite in construction of outlets for drainage of storm water.

K.S.A. § 12-635; Authorization of improvements within or without city limits; protection from flood waters.

K.S.A. § 12-672; Docks, wharves, and river terminals.

K.S.A. § 12-686; Designating traffic way connections with main traffic ways.

K.S.A. § 12-694; Water course improvements.

K.S.A. § 12-808a; Electric or gas utility outside city limits.

K.S.A. § 12-809; Damming of river or condemnation of land and water for waterworks.

K.S.A. § 12-845; Cities – second and third class.

K.S.A. § 12-867; City combined waterworks and sewage disposal system.

K.S.A. § 12-895; Municipal energy agencies.

K.S.A. § 12-1401; Establishment or acquisition in cities or townships; cemeteries.

K.S.A. § 12-1616a; Construction and operation of dams across streams or

rivers by cities.

K.S.A. § 12-1764; Public building commission.

K.S.A. § 12-1770; 12-1773; Development and redevelopment of areas in and around cities.

K.S.A. § 12-17,104; Self-supported municipal improvement districts.

K.S.A. § 12-17,154; Neighborhood revitalization.

K.S.A. § 12-2514; Mo-Kan metropolitan development district and agency compact.

K.S.A. § 12-2524; Kansas City area transportation district and authority compact.

K.S.A. § 12-3104; Right of eminent domain outside of the limits of the municipality in order to acquire right of way for a sewer or sewer systems.

K.S.A. § 12-3406; Port authorities.

K.S.A. § 12-4908; For homes for aged.

K.S.A. § 12-5247; Kansas Rural Housing Incentive District.

K.S.A. § 12-2805, 12-2806; Metropolitan Transit Authority.

CHAPTER 13. CITIES OF THE FIRST CLASS

K.S.A. § 13-1209; Purchase, construction or extension of waterworks.

K.S.A. § 13-1014; Right-of-way for sewerage.

K.S.A. § 13-1029; Sewer districts for pumping stations and sewers.

K.S.A. § 13-1030; Bonds and assessments for sewer right of way.

K.S.A. § 13-1326; Change of grade board of park commissioners.

K.S.A. § 13-1388; Off-street parking facilities.

K.S.A. § 13-2418; Water Works Department.

K.S.A. § 13-3107; For Public Transportation.

K.S.A. § 13-1114b; Development of master plan outside city limits, when; acquisition of rights-of-way and lands.

K.S.A. § 13-1223; Public utilities.

K.S.A. § 13-1353; Board of Park Commissioners may acquire lands outside of cities.

CHAPTER 14. CITIES OF THE SECOND CLASS

K.S.A. § 14-423; Improving and vacating streets and alleys.

K.S.A. § 14-714; Extension of sewer or water mains outside cities.

K.S.A. § 14-1007a; Acquisition of cemetery and additions or lands therefore

CHAPTER 15. CITIES OF THE THIRD CLASS

K.S.A. § 15-427; Street and alley improvements.

CHAPTER 17. CORPORATIONS

Kan. Const. Art. 12, § 4 CORPORATIONS.

K.S.A. § 17-618; Eminent domain, exercise by sundry corporations .
K.S.A. § 17-1315; Cemetery corporations.
K.S.A. § 17-2345; Development credit corporations.
K.S.A. § 17-2361; Acquisition of property housing law cities.
K.S.A. § 17-4747; Urban Renewal Law.

CHAPTER 19. COUNTIES AND COUNTY OFFICERS

K.S.A. § 19-1932; Jails.
K.S.A. § 19-2109; Home for the aged.
K.S.A. § 19-27,136; Public parking facilities in counties between 175,000 and 210,000; acquisition.
K.S.A. § 19-2801; Parks, museums and recreation grounds.
K.S.A. § 19-2803c; Establishment and maintenance of county lake and recreational grounds.
K.S.A. § 19-2816; Eminent domain counties between 80,000 and 175,000.
K.S.A. § 19-2821; Eminent domain. Counties over 135,000.
K.S.A. § 19-2843; Certain adjoining counties necessary lands, water and water rights.
K.S.A. § 19-2889; Park district in urban area counties.
K.S.A. § 19-2899; Counties between 175,000 and 250,000 acquisition of additional park land.
K.S.A. § 19-3104; Cemeteries.
K.S.A. § 19-3302; Counties and County Officers, Flood Control.
K.S.A. § 19-3542; Water Supply and Distribution Districts in Certain Counties Under 100,000.
K.S.A. § 19-3552; Public wholesale water supply districts.
K.S.A. § 19-3801, 19-3808; Counties and County Officers, Industrial Districts.
K.S.A. § 19-4613; Hospital and related facilities.

CHAPTER 24. DRAINAGE AND LEVEES

K.S.A. § 24-125; Drainage and levees.
K.S.A. § 24-132; Certain drainage districts traversed or touched by Kansas river authorized to provide for flood control works and improvements.
K.S.A. § 24-407; Powers of drainage districts.
K.S.A. § 24-512; Drainage district.
K.S.A. § 24-639; District to be body politic and corporate.
K.S.A. § 24-1209; Watershed districts, general powers and duties of District. Corporate powers and duties.

CHAPTER 26. EMINENT DOMAIN

K.S.A. § 26-101; Condemnation by corporations and partnerships.
K.S.A. § 26-201; Cities; authority to condemn.

K.S.A. § 26-210; Condemnation by board or commission.
K.S.A. § 26-206a; Application to urban renewal law.

CHAPTER 27. FEDERAL JURISDICTION

K.S.A. § 27-101; Consent given to United States to acquire land.
K.S.A. § 27-331; Airport authority in certain counties.

CHAPTER 32. WILDLIFE, PARKS AND RECREATION

K.S.A. § 32-840; Department of Wildlife and Parks, land.

CHAPTER 42. IRRIGATION

K.S.A. § 42-120; Powers of canal corporations.
K.S.A. § 42-317; Condemnation of lands for site or way.
K.S.A. § 42-705; Irrigation, districts.
K.S.A. § 42-711; Powers of directors.

CHAPTER 49. MINES AND MINING

K.S.A. § 49-433; Acquisition of abandoned mined-land.

CHAPTER 55. OIL AND GAS

K.S.A. § 55-1003; Disposal of oil-field or gas-field brines and mineralized waters.
K.S.A. § 55-1204; Natural gas public utility.

CHAPTER 66. PUBLIC UTILITIES

K.S.A. § 66-501; Powers of railway corporation.
K.S.A. § 66-908; State lands public utilities.
K.S.A. § 66-911; Condemnation by electric railways.

CHAPTER 68. ROADS AND BRIDGES

K.S.A. § 68-114; Board of County Commissioners Proceedings for change in roads.
K.S.A. § 68-117; Board of County Commissioners; access to public highway from land-locked property.
K.S.A. § 68-412a; Secretary of Transportation Acquisition of right-of-way for streets as connecting links in cities.
K.S.A. § 68-413; Acquisition of title or easement by secretary of transportation.
K.S.A. § 68-423e; Acquisitions of rights-of-way.
K.S.A. § 68-703, 68-730; County Commissioners, improvement of roads in benefit districts.

K.S.A. § 68-1903. Highway authorities.
K.S.A. § 68-2006, 68-2034, 68-2074, 68-2097; Turnpike Authority.

CHAPTER 71. SCHOOLS COMMUNITY COLLEGES

K.S.A. § 71-201; Boards of Trustees.
K.S.A. § 72-8212; Board of Education.
K.S.A. § 72-8212a; Unified School Districts.
K.S.A. § 73-409; Board of County Commissioners, memorials, monuments and grave markers.

CHAPTER 74. STATE BOARDS, COMMISSIONS AND AUTHORITIES

K.S.A. § 74-99d08; Kansas Electric Transmission Authority, state departments; public officers and employees.

CHAPTER 75. STATE DEPARTMENTS; PUBLIC OFFICERS AND EMPLOYEES

K.S.A. § 75-2714; State Historical Society.

CHAPTER 76. HISTORIC PROPERTY

K.S.A. § 76-344; University of Kansas.

CHAPTER 80. TOWNSHIPS AND TOWNSHIP OFFICERS

K.S.A. § 80-2009; Construction and maintenance of certain sewers along streets or highways.

CHAPTER 82A. WATERS AND WATERCOURSES

K.S.A. § 82a-101; Erection and maintenance of dams, ditches or races over land of another.
K.S.A. § 82a-102; Management Districts Power Plant dams.
K.S.A. § 82a-201; Acquisition by state of new channel where stream altered.
K.S.A. § 82a-619; 82a-622 Powers of rural water districts.
K.S.A. § 82a-1028; Groundwater Management District.

What Can Be Condemned?

IN ALMOST every grant listed above, the power of eminent domain is granted to the acquiring agency the right to acquire fee title, rights of way, franchises, easements and other property rights. Additional rights that may be condemned are listed below:

K.S.A. § 3-711; Acquisition of air rights; eminent domain.
K.S.A. § 42-309; Appropriation of water for industrial uses.
K.S.A. § 42-315; Right of use of water irrigation and irrigation districts.
K.S.A. § 42-316; Right of way and site for works for diverting, storing or conveying water.

The Condemnation Proceedings:

The procedure for exercising the power of eminent domain in Kansas is controlled by the provisions of the Eminent Domain Procedure Act, K.S.A. 26-501, *et seq.* (the “Act”).

Pre-condemnation offers to landowners, negotiations, and acquisitions by private contract are common practice. Pre-condemnation offers are not required by the Act.

Petition:

An eminent domain proceeding is commenced by the filing of a verified petition in the district court of the county in which the real estate is situated. K.S.A. 26-501. Where the boundaries of the land encompass more than one county, the action may be brought in any county where any part of the affected property is located. *Id.*

Certain contents of the petition are mandatory. The petition must include allegations regarding the authority for and purpose of the taking, a description of each tract to be taken and the interest to be acquired, and the names of all owners and lienholders of record and any party in possession insofar as their interests are affected. K.S.A. 26-502. The petition is to be verified by affidavit and the court is required to direct by order when the petition will be considered. *Id.*

Particular care must be given to the description of the interests to be acquired. “The property rights taken by a condemnor are to be determined by the language in the petition for eminent domain and the appraisers’ report [and a] condemnor bears the burden of drafting its petition to show the limitations in its taking.” Hudson v. City of Shawnee, 246 Kan. 395, Syl. No. 1, 790 P.2d 933 (1990) modifying 245 Kan. 221, 777 P.2d 800 (1989). Under Kansas law, the landowner is entitled to compensation for the interests acquired in the petition irrespective of the intended use by the condemnor. Hudson, *supra*.

The condemnor has the duty to give notice of the initial hearing by publication at least 9 days in advance of the hearing date set by the court, and must mail a copy of the publication at least 7 days in advance to all those named in the petition. K.S.A. 26-503.

Consideration Hearing/Appointment Of Appraisers:

The district court is required to examine the petition and to determine from the face of the petition whether the condemnor has the power of eminent domain and whether the taking is necessary and for a public purpose. K.S.A. 26-504. If these findings are made, the court must appoint three appraisers, at least two of whom shall have experience in the valuation of real estate, to view the property and ascertain the compensation due. *Id.* The court's order must also mandate that the appraisers' report be filed no more than 45 days thereafter. *Id.* An extension of time can be granted by later order. *Id.*

This section also authorizes a direct appeal to the Kansas Supreme Court from any final order in an eminent domain proceeding. *Van Horn v. City of Kansas City*, 249 Kan. 404, 819 P.2d 624 (1991)

Appraisers' Oath And Duties:

Upon appointment, the appraisers must take an oath to faithfully discharge their duties and the court must instruct them in writing concerning the legal principles to guide their appraisal. K.S.A. 26-505.

Appraisers Hearing And Viewing Of The Property:

The appraisers must actually view the tracts to be taken and receive oral or written testimony from all interested parties at a public hearing. K.S.A. 26-506. Notice of the hearing must be mailed at least 10 days in advance to the condemnor, landowners and other interested parties and published at the same time. *Id.* The notice must be in substantially the form specified in the statute. *Id.*

Following the hearing, the appraisers must file their report with the clerk of the district court and notify the condemnor which, within 3 days thereafter, must mail notice of the filing of the report to all known interest owners. K.S.A. 26-505.

Proceedings before the court-appointed appraisers have been described as administrative, non-judicial, and in the nature of an inquest. *Urban Renewal Agency of Kansas City v. Decker*, 197 Kan. 157, Syl. ¶ 1, 415 P.2d 373 (1966); *State Highway Comm. v. Ballard*, 208 Kan. 558, Syl. ¶ 1, 493 P.2d 196 (1972); *Miller v. Bartle*, 238 Kan. 108, Syl ¶ 3, 150 P.3d 1282 (2007). Thus, prior to appeal from the award of appraisers filed with the clerk of the district court, pursuant to K.S.A. 26-505, the Code of Civil Procedure, including the rules of evidence and discovery have no application. *Id.*

Payment Of Award And Costs/Passage Of Title:

The condemnor must pay the amount of the court-appointed appraisers' award plus appraisers' fees and court costs to the clerk of the district court within 30 days after filing of the appraisers' report. Upon such payment being made, the title, easement or interest condemned vests in the condemnor. K.S.A. 26-507(a). Payment of the award is without prejudice to the condemnor's right to appeal from the court-appointed appraisers' award.

The award will be disbursed, upon order of the court, to the landowner and other interested parties. K.S.A. 26-510(b). Disbursement will not be made until any appeal taken from the court-appointed appraisers' award is completed where the condemnor is the Kansas Turnpike Authority. K.S.A. 68-2006.

If the condemnor fails to make the payment described above, the condemnation is abandoned and judgment for costs, including court-appointed appraisers' fees, together with judgment in favor of the landowner for its reasonable expenses incurred in defense of the action is entered against the condemnor. K.S.A. 26-504(b).

Following payment of the award under K.S.A. 26-507(a), the proceedings as to those tracts as to which payment has been made can only be abandoned by mutual consent of the condemnor, landowner and other parties interested in the award.

Appeal From Award:

Any party dissatisfied with the appraisers' award may appeal therefrom by filing a notice of appeal with the clerk of the district court within 30 days after the filing of the report. K.S.A. 26-508. An appeal by any party brings the issue of damages to all interests before the district court for trial de novo. *Id.* The taking of a valid appeal from the award places the other parties in the position of cross-appellants, and the appeal cannot be dismissed over the objection of any party having an interest in the tract. Board of Sedgwick County Comm'rs v. Kiser Living Trust, 250 Kan. 84, 825 P.2d 130 (1992). The party appealing the appraisers' award is the plaintiff and the other party is the defendant. Miller v. Glacier Development Co., L.L.C., 285 Kan. 476, 161 P.3d 730 (2007). The appeal is thereafter tried like any other civil action and the evidentiary presentation is accordingly governed by the Code of Civil Procedure. K.S.A. 26-508; City of Wellington v. Miller, 200 Kan. 651, 438 P.2d 53 (1968). However, where conflict exists between the provisions of the Act and the Code of Civil Procedure regarding pleading practice on other matters, the Act controls. City of Wellington v. Miller, 200 Kan. at 652.

The Act specifies that the only issue before the court on appeal is that of just compensation, K.S.A. 26-508. The Kansas Supreme Court, however, has held that this provision does not foreclose the landowner from raising statutory defects in the proceeding which would render it void. City of Wichita v. Meyers, 262 Kan. 534, 939 P.2d 926 (1997).

K.S.A. 26-508 does not require that copies of the notice of appeal be mailed to all parties involved in order to establish jurisdiction for the appeal. The appealing party is, however, directed to mail copies of the notice of appeal to all parties involved. City of Wichita v. 200 South Broadway, Ltd. Partnership, 253 Kan. 434, 438, 855 P.2d 956 (1993).

Post-trial Appeals:

Appeals from the result achieved in the trial court by-pass Kansas' intermediate appellate court, the Kansas Court of Appeals, and go directly to the Kansas Supreme Court. K.S.A. 26-504. Such appeals are, otherwise, prosecuted as are any other post-trial appeals.

Procedure To Challenge Condemnation:

The eminent domain proceeding provides no forum for the litigation of the condemnor's authority to exercise the power of eminent domain nor the necessity for, or extent of, the taking. Murray v. Kansas Dep't of Transportation, 239 Kan. 25, 716 P.2d 540 (1986); In re Condemnation for State Highway Purposes, 235 Kan. 676, 683 P.2d 1247 (1984). Any challenge by the landowner on such issues must be separately litigated in another civil action, usually by the landowner's suit for injunction. *Id.* See also Kansas Gas & Electric Co. v. Winn, 227 Kan. 101, 605 P.2d 125 (1980); Urban Renewal Agency of Kansas City v. Decker, 197 Kan. 157, 415 P.2d 373 (1966).

A school district may acquire real property for school purposes by exercising its power of eminent domain. However, if within 10 years after entry of final judgment, the school district fails to construct substantial improvement that are used for school purposes, the original owners of the property, or their heirs or assigns, shall have the option to purchase the property from the school district for an amount equal to the amount awarded as compensation under the Eminent Domain Procedures Act. K.S.A. 72-8212a. However, if the property is conveyed to the school district under the threat of condemnation, K.S.A. 72-8212a does not apply and the school district can resale the property for a substantial profit. Knop, et al. v. Gardner Edgerton Unified School Dist. No. 231, 205 P.3d 755. (Kan.App., April 10, 2009) (No. 100,054).

Inverse Condemnation:

A property owner may file an inverse condemnation when an agency, possessing the power of eminent domain, occupies or damages property without initiating formal condemnation proceedings. Inverse condemnation is based upon the theory that there is an implied contract that the agency occupying the property will pay the fair and reasonable value of the property taken and any damages caused by the taking. Bonanza, Inc. and Mobile Homes Resort, Inc. v. E. Dean Carlson, Secretary of Transportation of the State of Kansas, 269 Kan. 705, 9 P.3rd 541. A claim of adverse possession does not lie unless there is a physical taking. Damaging an adjoining property may constitute a tort, but is not a compensable taking unless the damage was necessary to the completion of the public project. Estate of Kirkpatrick v. City of Olathe, KS, 39 Kan.App.2d 162.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 requires that if Federal money is involved in a project, and the property owner prevails in his claim in an inverse condemnation, the agency is **required** to reimburse the landowner for attorney fees and costs of litigation. If the Uniform relocation Assistance and Real Property Acquisition Policies Act of 1970 does not apply, but the action of a state agency is found to constitute a taking of an owner's private property, the court **may** award reasonable attorney fees and expenses to the property owner who successfully establishes a taking. K.S.A. 77-709. However, state agency does not include the legislative or judicial branches for the State of Kansas or any political or taxing subdivision thereof. K.S.A.77-703(d). The Statute of Limitations applicable for inverse condemnation actions is 15 years pursuant to K.S.A. 60-507. Hiji v. City of Garnett, 248 Kan. 1, 804 P.2d 950.

Just Compensation / Valuation Issues:

As stated previously, pre-condemnation offers to landowners, negotiations, and acquisitions by private contract are common practice. Such pre-condemnation offers are not, however, required by the Act. Similarly, the Act does not require that the condemnor offer "appraised value"; provide the condemnees with a copy of an appraisal; or, have the property appraised prior to initiating the condemnation proceedings.

The Standard:

The general standard for determining just compensation is set forth in the Act, codifying common law and constitutional principles of long duration. In those instances where the condemnor takes the entire tract, K.S.A. 26-513(b) provides the measure of compensation:

"If the entire tract of land or interest in such land is taken, the measure of compensation is the fair market value of the property or interest at the time of the taking."

Where, as in most cases, only a part of the landowner's tract is taken for public purposes, K.S.A. 26-513(c) provides the measure of compensation:

"If only a part of a tract of land or interest is taken, the compensation and measure of damages is the difference between the fair market value of the entire property or interest immediately before the taking and the value of that portion of the tract or interest remaining immediately after the taking."

Subsection (d) then proceeds to set forth a list of factors, not meant to be exclusive, which are to be considered by the factfinder in determining damages:

Factors To Be Considered:

In ascertaining the amount of compensation and damages, the following nonexclusive list of factors shall be considered if such factors are shown to exist. Such factors are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damage under the provisions of subsections (b) and (c) of this section. Such factors are:

The most advantageous use to which the property is reasonably adaptable.

Access to the property remaining.

Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.

Productivity, convenience, use to be made of the property taken, or use of the property remaining.

View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.

Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.

Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.

Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.

Destruction of a legal nonconforming use.

Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.

Proximity of new improvement to improvements remaining on condemnee's land.

Loss of or damage to growing crops.

That the property could be or had been adapted to a use which was profitably carried on.

Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.

Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.

Because the list is non-exclusive, any competent evidence bearing upon market value generally is admissible, including those factors that a hypothetical buyer and seller would consider in setting a purchase price for the property. City of Mission Hills v. Sexton, 284 Kan. 414, 160 P.3d 812 (2007).

Fair Market Value Defined:

The Act provides a statutory definition of fair market value, K.S.A. 26-513(e) provides:

“Fair market value” means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without

undue compulsion.

While the issue of just compensation is deceptively simple to state, its application to individual cases often produces wide divergences of opinion, particularly where a partial taking is involved.

Date Of Taking/Enhancement Or Deflationary Impact Of Project Excluded:

Under the Act, the date of taking is the date of the payment of compensation, awarded by the Court Appointed Appraisers, to the Clerk of the District Court. Union Gas System, Inc. v. Carnahan, 245 Kan. 80, 88, 774 P.2d 962 (1989). K.S.A. 26-507. Upon such payment, "The title, easement or interest appropriated in the land condemned shall thereupon immediately vest in the plaintiff" and the condemnor "shall be entitled to the immediate possession of the land." *Id.* Fluctuations in the value of the land after the designation of the project to the date of taking must be taken into account where such fluctuations are due to market forces unassociated with the project. Urban Renewal Agency of Wichita v. Spines, 202 Kan. 262, 447 P.2d 829 (1968). However, a landowner is not entitled to be compensated for an enhancement in the value of his land before the date of taking attributable to the public improvement itself. *Id.*; Van Horn v. City of Kansas City, 249 Kan. 404, 819 P.2d 624 (1991). Nor is the condemnor entitled to the benefit of a depression in land values directly caused by the project prior to the actual taking. Board of County Comm'rs v. Kiser Living Trust, 250 Kan. 84, 825 P.2d 130 (1992). Lapham v. Urban Renewal Agency, 211 Kan. 869, 508 P.2d 507 (1973).

The corollary to Spines' holding that enhancement in the value of property caused by unrelated projects can be shown by the landowner, is that the condemnor may legitimately show a deflation in value due to unrelated projects up to the date of taking. Thus, in Hudson v. City of Shawnee, 246 Kan. 395, 790 P.2d 933 (1990) it is stated: "A loss in value caused by an unrelated project may be considered in determining fair market value." *Id.* at 406. (Emphasis by the Court).

Best And Most Advantageous Use:

As shown above, the firmly established rule in Kansas is that the landowner is entitled to compensation based upon the most advantageous use of his property. Although the landowner is not confined to valuation based upon the present use of the land, the prospective use which he claims to be the highest and best use of the property must be reasonably probable.

The requirement that a prospective use be so "reasonably probable" as to have an effect on the market value of the land before it may be considered has been stated in a number of cases including: Board of

Sedgwick County Comm'rs v. Kiser Living Trust, 250 Kan. 84, 825 P.2d 130 (1992), Vic Regnier Builders, Inc. v. Lindwood School District No. 1, 189 Kan. 360, 369 P.2d 316 (1962). Other cases outlining the rule of most advantageous use include Humphries v. State Highway Commission, 201 Kan. 544, 442 P.2d 475 (1968); Cline v. Kansas Gas & Electric Company, 182 Kan. 155, 318 P.2d 1000 (1957); Mai v. City of Garden City, 177 Kan. 179, 277 P.2d 636 (1954).

The fact that the most advantageous use would require a change in zoning does not preclude evidence of the proposed use if a change in the zoning is reasonably probable. Board of County Commissioners of Johnson County v. Smith, 280 Kan. 588, 123 P.3d 1271 (2005).

Similarly, most advantageous use may be predicated upon the condemned land's combination with land owned by others if the joinder of the parcels is reasonably probable. Cain v. City of Topeka, 4 Kan. App. 2d 192, 603 P.2d 1031 (1979)

Thus, the standard of reasonable probability governs the consideration of prospective future uses of the property.

Nature/Extent Of The Taking:

Among the requirements of K.S.A. 26-502 is that the petition must state "a description of each lot, parcel or tract of land and the nature of the interest to be taken." K.S.A. 26-502(2). Accurate and precise description of the extent of the property rights acquired by the condemnor is vitally important in the eminent domain process. Unlike general civil practice where the petition merely serves as general notice of the plaintiff's claims, the eminent domain petition [and the appraisers' report] actually determines the property rights acquired by the condemnor. Thus, a careless, inartful, or over broad pleading which does not properly show the limitations regarding the interest acquired will result in enhanced compensation to the landowner in the proceedings. Thus, the condemnor takes what is described in the petition and at trial the landowner is entitled to demand full compensation for everything acquired, even if the condemnor does not intend the full use described therein.

This important principle was articulated, most recently, by the Court in City of Mission Hills v. Sexton, 284 Kan. 414, 160 P.3d 812 (2007), as follows:

"The property rights taken by a condemnor are to be determined by the language in the petition for eminent domain and the appraisers' report. A condemnor bears the burden of drafting its petition to show the limitations in its taking."

Access/Taking And Regulation:

Kansas decisions addressing the compensability of a restriction or taking of a landowner's access by the condemnor are, to say the least, inconsistent. Nevertheless, the basic rule can be clearly stated, although it is often difficult to apply:

“[The] owner of land abutting on a street or highway has a private right in such street or highway, distinct from that of the public, which cannot be taken nor materially interfered with without just compensation. However, the rights of an abutting owner must be subordinated to the right of the public to the proper use of the highway and the right of governmental agencies to enforce proper police regulation. The right is subject to reasonable regulation and restrictions for the purpose of providing reasonably safe passage for the public, but the regulations or limitations cannot be enforced where they unduly limit or unreasonably interfere with the rights of the abutting owners. The established easement which has been used for access purposes cannot be taken without compensation, but, while the entire access may not be cut off, an owner is not entitled to access to his lands at all points in the boundary between it and the highway. If the owner has a free and convenient access to his property and to his improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has sustained no compensable loss. *Brock v. SHC*, 195 Kan. 361, 367-68, 404 P.2d 934 (1965). See also 195 Kan. at 369 (court says ‘[t]here is no general rule’ regarding when access has been taken or merely restricted).

See *Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221 (2006).

When the government actually blocks or takes away existing access to and from property, the landowner is generally entitled to compensation. Restricting a landowner's access to and from the highway through the regulation of traffic flow raises police power questions. As used in statute governing awards of damages in eminent domain actions, the phrase “[a]ccess to the property remaining” refers to a right of access and not to the regulation of traffic flow. *City of Wichita v. McDonald's Corp.*, 266 Kan. 708, 971 P.2d 1189 (1999).

It is uniformly acknowledged that the placement of a median, median strip, or medial area is a proper exercise of the police power and does not constitute a compensable taking. *Eberth v. Carlson*, 266 Kan. 726, 971 P.2d 1182 (1999).

The question of whether or not there has been a compensable taking is a

question of law for the court. Kau Kau Take Home No. 1 v. City of Wichita, 135 P.3d 1221 (2006).

Methods For Determining Fair Market Value:

Just compensation in an eminent domain proceeding is governed by the standard of fair market value. There are three generally recognized and accepted methods of determining fair market value in an eminent domain action. Prior to codification in 1999, the Kansas courts recognized: (1) the comparable sales (market data) approach; (2) the cost approach; and, (3) the income approach. Board of Sedgwick County Comm'rs v. Kiser Living Trust, 250 Kan. 84, 92, 825 P.2d 130 (1992); In re Application of City of Great Bend for Appointment of Appraisers, 254 Kan. 699, Syl. ¶ 6, 869 P.2d 587 (1994). These three methods are adopted by statute. K.S.A. 26-513(e). Foundation for the use of any one or combination of such methods must, of course, be demonstrated in an individual case.

Any competent evidence bearing upon market value is generally admissible to determine fair market value. Board of County Commissioners of Johnson County v. Smith, 280 Kan. 588; 123 P.3d 1271 (2005).

Evidence of value consists mostly of opinions of witnesses who are sufficiently well informed on the subject to be helpful and informative to the jury. City of Wichita, Kansas v. Eisenring, 269 Kan. 767, 7 P.3d 1248 (2000). The property owner is always competent to testify as to the value of his property without other qualifications. Taylor v. State Highway Commission, 182 Kan. 397, 320 P.2d 832 (1958). However, as with all expert testimony, the landowner's testimony must be helpful to the jury. Mooney v. City of Overland Park, 283 Kan. 617, 153 P.3d 1252 (2007).

When the owners of land subject to an eminent domain proceeding hire an appraiser to estimate the fair market value of the condemned land and submit the ensuing written appraisal to the court-appointed appraisers, the valuation opinion is a statement attributable to the landowners and is admissible as an admission in a subsequent trial de novo in the eminent domain proceedings. Mooney v. City of Overland Park, Supra.

Special Valuation Issues:

Substitute Facilities Distinguished From Cost Approach:

The substitute facilities principle is limited to the taking of facilities operated by another public body. In such a case, compensation for the taking is to be based on the cost of acquiring replacement facilities with no deduction for

depreciation.

The substitute facilities principle was first discussed in City of Wichita v. Unified School District No. 259, 201 Kan. 110, 439 P.2d 162 (1968).

Unique Properties:

Where a property is truly unique and not of a kind ordinarily traded in the marketplace, or has been improved in such a manner that it serves a useful and special purpose to its owners and could not be sold for its special value to the owner, then the property has no measurable market value and should be valued according to its value to the owner for its special purpose. Eisenring v. Kansas Turnpike Authority, 183 Kan. 774, 779, 332 P.2d 539 (1958).

Tax Value:

Assessed valuation of property for tax purposes is not admissible to establish the fair market value of the condemned property. City of Wichita v. Sealpak Co., 279 Kan. 799, 803, 112 P.3d 125 (2005); Metee v. Urban Renewal Agency, 213 Kan. 787, 789, 518 P.2d 555 (1974). A landowner's prior inconsistent statements as to the value of his property, made in the course of the tax valuation process, may be admitted to impeach his testimony in the condemnation proceeding. City of Wichita, Kansas v. Sealpak Co., *supra*.

Unit Rule Of Valuation:

It is well established in Kansas that the valuation of realty is determined as a whole without placing separate values on the separate contributory items. Thus, buildings or other valuable components of the realty are considered only insofar as they contribute to the value of the premises in their entirety and are not to be separately valued and added together to reach a total value. This principle is the so-called "unit rule" which was discussed by the Court in Rostine v. City of Hutchinson, 219 Kan. 320, 323, 548 P.2d 756, 760-61 (1976).

The unit rule applies to land which contains valuable deposits of minerals. In Reiter v. State Highway Commission, 177 Kan. 683, 281 P.2d 1080 (1955), the Supreme Court reversed an award which had valued sand and gravel separately by multiplying the

number of tons in place by the price per ton. The Court emphasized that the prohibition against the separate valuation of items contributing to the value of the land equally applied to the minerals in place. “The question for determination was the value of the land, not the value of the sand beneath the surface.” 177 Kan. at 688, 281 P.2d at 1084.

The award of just compensation cannot assign separate values to component parts of the property, evidence of a component’s separate value is admissible, however, to demonstrate how it contributes to and enhances the value of the property as a whole. Creason v. Unified Government of Wyandotte County, 272 Kan. 482, 33 P.3d 850 (2001).

Remainder Damage/Unity Of Use And Ownership:

Sometimes the question arises whether tracts physically separated from one another should be considered together in determining potential damage done to the remainder, i.e., whether lands not taken should be deemed as part of the remainder of the tract which was taken. In Ives v. Kansas Turnpike Authority, 184 Kan. 134, 334 P.2d 399 (1959), the Kansas Supreme Court answered this question stating that the question was whether there was a unity of use and ownership of the tracts and that actual contiguity was not required as a matter of law.

The necessary corollary to this rule is that a landowner “cannot recover for injury to separate and independent parcels of land which he may happen to own in the same neighborhood, where unity of use is not shown. *Id.*

A landowner claiming remainder damage to land must demonstrate that he is the owner of all the land involved. Where the remainder land allegedly damaged by the taking is in a separate ownership, the landowner will not be permitted to prove remainder damage to the other tract. McIntyre v. Board of County Commr's, 168 Kan. 115, 211 P.2d 59 (1949).

Valuation of Temporary Easements

Fair rental value of the tract acquired for a temporary construction easement is an appropriate method to be used for calculating the amount of compensation due the landowner. City of Mission Hills v. Sexton, 284 Kan. 414, 160 P.3d 812 (2007).

Enhancement In Value To The Remainder As A Result Of A Partial Taking:

Special/General Benefits Distinguished:

Where only part of a tract is taken, the condemnor is entitled to show that the remainder has been enhanced in value by the project. The burden of proving that the landowner's property has been specially benefitted by the project is on the condemnor. The question usually presented in such cases is whether the increase in value to the remainder is the result of a benefit common to all property owners in the area (general benefit) or is one particularly related to the landowner's proximity to the project (special benefit). Enhancement due to a general benefit may not be offset against the award by the condemnor and it is thus incumbent upon the condemnor's experts to demonstrate particular benefits accruing to the remainder not shared with area owners whose land has not been taken. City of Wichita v. May's Company, Inc., 212 Kan. 153, 510 P.2d 184 (1973); Collins v. State Highway Commission, 145 Kan. 598, 66 P.2d 409 (1937).

Set-off or reduction in compensation for special benefits is not permitted when the condemnor is a non-governmental corporation. Constitution of the State of Kansas, Article 12, Sec. 4. See Comm'rs of Pottawatomie County v. O'Sullivan, 17 Kan. 58 (1876).

Treatment Of Ownership Interests:

Who Is Considered An Owner To Whom Compensation Is Due?

The petition filed by the condemnor must name, so far as their interests are to be taken, the owner of the land, all lienholders of record, and any party in possession. K.S.A. 26-502. See Morgan v. City of Overland Park, 207 Kan. 188, 483 P.2d 1079 (1971); Dotson v. State Highway Commission, 198 Kan. 671, 426 P.2d 138 (1967). City of Wichita v. Meyer, 262 Kan. 534, 544, 939 P.2d 926 (1997). The term "owner" refers to more than simply the fee title holder of the land. It is clear under Kansas law that the term includes tenants, mortgagees, lessees, or other interest holders where their interests are affected by the condemnation.

Where leased property is taken by eminent domain, it is ordinarily valued as though held in a single ownership. This is the unified fee rule followed in Kansas. City of Roeland Park v. Jason Trust, and the amount

awarded as compensation for the property taken or damaged is later apportioned by the District Court between the lessor and lessee according to their respective interests. City of Overland Park v. Jenkins Rev. Trust, 263 Kan. 470 (1997). Apportionment, by the District Court, of an appraisers award or a judgment is governed by K.S.A. 26-517.

What If The Condemnation Is Abandoned?

If the condemning authority does not make payment of the award and costs within 30 days from the filing of the appraisers' report, the condemnation is abandoned as to the tracts of land for which payment has not been made, and the property owners are entitled to judgment for reasonable expenses, including attorneys fees, incurred in the defense of the action, K.S.A. 26-507. The trial court has jurisdiction to fix the reasonable value of the attorneys' fees, giving consideration to the factors identified in the Model Rules of Professional Conduct, Rule 1.5. If the plaintiff dismisses the petition before the court appointed appraisers file the report, the property owners are not entitled to recover expenses incurred in the defense of the action.

If the award is paid by the condemning authority, the clerk must notify the property owners within 15 days. The owners may withdraw the award, by order of the court, without prejudice to their right of appeal. K.S.A. 26-510.

Once the award is paid, the condemnation may be abandoned only upon the mutual consent of the condemner and condemnees.

Mere nonuse of land condemned for public purposes without any intention of abandonment does not constitute abandonment. Matlock v. City of Wichita, 195 Kan. 484, 407 P.2d (1965).

Once abandoned, the condemnation may be refiled. There is no specific statutory or common law limitation on how soon after abandonment the new proceeding may be initiated.

Attorney and Witness Fees and Costs:

The general rule applicable to all civil litigation in Kansas is that attorney's fees of the prevailing party are not recoverable in the absence of specific statutory authority permitting such recovery. McGuire v. McGuire, 190 Kan. 524, 376 P.2d 908 (1962). This rule applies as a general proposition to proceedings in eminent domain. Gault v. Board of County Comm'rs, 208 Kan. 578, 493 P.2d 238 (1972); Schwartz v. Western Power & Gas Co., Inc., 208 Kan. 844, 494 P.2d 1113 (1972). Although attorney's fees may be awarded pursuant to K.S.A. 26-507(b), the primary statutory provision regarding attorney's fees in eminent

domain proceedings is K.S.A. 26-509, enacted shortly after these decisions in 1972, which provides, in part:

“Whenever the plaintiff condemner shall appeal the award of court appointed appraisers, and the jury renders a verdict for the landowners in an amount greater than said appraisers' award, the court may allow as court costs an amount to be paid to the landowner's attorney as attorney fees.”

From the language of the statute, it is apparent that attorney's fees may only be recovered by landowners where an appeal by the condemnor results in a verdict greater than the appraisers' award. In re Central Kansas Electric Co-op, Inc., 224 Kan. 308, 319, 582 P.2d 228 (1978); Board of Sedgwick County Commr's v. Kiser Living Trust, 250 Kan. 84, 825 P.2d 130 (1992).

Attorney fees may also be recovered when the condemner abandons the condemnation proceeding. City of Wichita v. B G Products, 252 Kan. 367, 855 P.2d 956 (1993).