

EMINENT DOMAIN PROCESS

STATE OF NEW JERSEY

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Who is Eligible to Condemn?

Power Generally

The State is vested with the power of eminent domain as an attribute of sovereignty. The exercise of the power is within the exclusive province of the legislative branch of government. The Legislature may delegate the power to others. The New Jersey Constitution provides for delegation of the power and provides for the nature of the estates or interests which may be acquired under the power. N.J. Const. Art. 1, Sec. 20; N.J. Const. Art. 4, Sec. 6, par. 3. The authority to acquire private property for redevelopment of blighted areas is the subject of a specific constitutional provision. N.J.S.A. Const. Art. 8, § 3, ¶ 1. The provisions of the Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. N.J.S.A. Const. Art. 4, § 7, ¶ 11.

The Legislature has delegated the power of eminent domain to a broad range of sub-agencies and public bodies and public utilities too numerous for listing. Public utilities are generally provided with the power of eminent domain pursuant to N.J.S.A.48:3-17.6.

What Can Be Condemned

All types of property, real and personal, tangible and intangible, are subject to the power of eminent domain provided a valid public purpose exists for the proposed use of such property. The courts have held that property of various character other than real estate may be acquired by eminent domain including shares of stock and corporate franchises, contracts, leases, fishing rights, and water supply systems.

The mere grant of the power of eminent domain by the State to a subordinate entity does not include the power to condemn property owned by the State.

Non-governmental condemners are restricted under the Eminent Domain Act, primarily with respect to their ability to take possession of the property sought to be acquired.

N.J.S.A. 20:3-15. Entry upon the property prior to the commencement of the action for purposes of conducting testing is not authorized. *N.J.S.A. 20:3-16.* Declarations of taking are not authorized. *N.J.S.A. 20:3-17.* Possession of the condemned property prior to the filing of the report of commissioners and payment of the award to the persons entitled thereto not authorized. *N.J.S.A. 20:3-33.*

What Constitutes Property?

The Eminent Domain Act defines property in terms of what can be loosely characterized as “real estate” although any type of property interest can conceivably be the subject of appropriation for a public use:

“Property” means land, or any interest in land, and (1) any building, structure or other improvement imbedded or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed, or specially adapted to the purpose for which such property is used that a) it is an essential accessory or part of such property; b) it is not capable of use elsewhere; and c) would lose substantially all its value if removed from such property. *N.J.S.A. 20:3-2(d).*

If land burdened with an easement is taken by eminent domain, the owner’s measure of damage is the market value of the land as affected by the easement. The easement itself attaches to the land of the owner of the dominant fee and is appurtenant to his land, and must be valued with reference to it and not as though the easement constituted a separate entity. The owner of the dominant estate must be compensated for the value of the easement taken from him and the measure of damage is the difference in the market value of the dominant estate with the easement and its value without the easement. Where property subject to a restrictive covenant is taken, the owner of land in whose favor the covenant runs is not entitled to share in the award for the value of the condemned servient property.

Agricultural or Horticultural Lands.

The condemnor of agricultural or horticultural land which is eligible for valuation, assessment and taxation under the “Farmland Assessment Act of 1964”, *N.J.S.A. 54:4-23.1 et seq.*, must compensate the condemnee for any loss of income resulting from the interference of the condemnation proceeding with the harvesting of any standing crops or other agricultural commodities in an amount determined according to their appropriate time of harvest and for the remainder of their average productive life. This item of compensation is separate and apart from compensation from the fair market value of the land taken in the condemnation. *N.J.S.A. 20:3-29.1; N.J.A.C. 16:5-1 et seq.* (DOT regulations related hereto).

The Condemnation Proceedings:

The Eminent Domain Act of 1971, *N.J.S.A. 20:3-1 et seq.* governs actions to acquire property. The Act provides a four-step condemnation process: 1) An attempt to resolve the acquisition outside of litigation through bona fide negotiations between the condemnor and the property owner; 2) in lieu thereof, final disposition by judgment of the authority and due exercise of the power of eminent domain by the condemnor; 3) Non-binding arbitration of the issue of just compensation by commissioners appointed by the court; 4) Trial of the issue of just compensation.

The Act applies to all legal proceedings in which: property is being condemned or required to be condemned; the amount of compensation to be paid for such condemnation is being fixed; the persons entitled to such compensation and their interests therein are being determined; and all other matters incidental to or arising therefrom are being adjudicated. *N.J.S.A. 20:3-2(g); N.J.S.A. 20:3-4.*

Pre-Litigation Property Evaluations and Bona Fide Negotiations Requirements.

No action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated. *N.J.S.A. 20:3-6.*

Compliance with the prelitigation requirements is jurisdictional. No complaint may be filed unless and until there is compliance with the requirements of the statute. *N.J.S.A. 20:3-6.*

The Eminent Domain Act requires that the owner be notified of the appraiser's intention to visit the property and be given an opportunity to accompany the appraiser at the time of inspection. *N.J.S.A. 20:3-6.* The statutory offer must be served by certified mail. *N.J.S.A. 20:3-6.* The property owner must be offered an amount not less than the amount of the condemnor's approved appraisal. *N.J.S.A. 20:3-6.*

The requirement for "bona fide negotiations" and a "reasonable disclosure" of the manner in which the condemnor appraised the property includes delivery to the condemnee of all appraisals or other information which the condemnor obtained in an effort to arrive at its good faith determination of full fair market value. Supplying a copy of the appraisal is merely the minimum threshold to good faith negotiations. The reasonableness of disclosure centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent negotiations. The condemnor is obligated to provide the owner with any material that can be reasonably shown to be relevant in calculating the offer, *i.e.*, the approved appraisal, a second appraisal on the property, or a response to obvious deficiencies in the appraisal.

The condemnor must be responsive to information provided by the owner. There is no obligation upon the condemnee to produce data during the negotiation stage.

A rejection of the offer or failure to accept the same within the period fixed in written offer, which shall in no case be less than 14 days from the mailing of the offer, shall be conclusive proof of the inability of the condemnor to acquire the property or possession

thereof through negotiations. *N.J.S.A.* 20:3-6. Neither the offer nor the refusal thereof shall be evidential in the determination of compensation. *N.J.S.A.* 20:3-6.

The statutory requirement of prelitigation reasonable disclosure extends only to the owner of record, not a tenant. When the holder of the title is unknown, resides out of the State, or for other good cause, the court may dispense with the necessity of negotiations.

Commencement of Action.

The Superior Court has jurisdiction of all matters in condemnation, and all matters incidental thereto and arising therefrom. A condemnation action is brought in a summary manner by order to show cause pursuant to *R.4:67. R. 4:73-1*. The verified complaint, the order to show cause, and order for deposit may be presented to the court *ex parte*. *R. 4:67-2*. The complaint is filed in the Superior Court, Law Division. *R. 4:73-1; R. 4:73-11(b); R. 4:3-1*. Venue is laid in the county in which the condemned property is situated. *R. 4:3-2(a)*.

The complaint demands judgment that: the condemnor is duly vested with and has duly exercised its authority to acquire the property being condemned, and for an order appointing commissioners to fix the compensation required to be paid. *N.J.S.A.* 20:3-8. The complaint must be verified. *N.J.S.A.* 20:3-8; *R. 1:4-1*. The verification is typically executed by the executive of the condemning agency.

The plaintiff may join in one action not more than 10 separate parcels of land, except by leave of court. *N.J.S.A.* 20:3-7(b); *R. 4:29-1(5)*. A separate (commissioners) award, judgment and appeal (trial de novo) must be made, entered, and taken with respect to each parcel. *N.J.S.A.* 20:3-7(b). Those parties whom the plaintiff must join in the action in order to acquire good title and the right to possession include all parties with an interest in the property. *R. 4:73-2(a)*. Only those parties who are joined have their interest foreclosed by the proceedings. *N.J.S.A.* 20:3-20; *N.J.S.A.* 20:3-10.

Joinder Requirements.

The following persons or entities are required to be named as parties defendant: The record owner; the occupant(s) of the property; such other persons appearing of record to have any interest in the property (e.g., mortgagees, tenants, lien holders; holders of an encumbrance, etc.); such persons claiming an interest therein as are known to the plaintiff. *R. 4:73-2(a)*.

Lis Pendens.

Within 14 days after the filing of the complaint, the condemnor is required to file and record in the county recording office a notice of lis pendens in the form and content specified by the rules. *N.J.S.A.* 20:3-10; *N.J.S.A.* 20:3-2(k). In default of the notice provided by the lis pendens, persons acquiring an interest in or lien upon the property without actual notice of the action, shall not be bound thereby.

The failure to comply with the provisions of the statute respecting the filing of the lis pendens will not otherwise affect the proceedings. *N.J.S.A. 20:3-10*. The lis pendens must be served upon the condemnee within three days of filing. *N.J.S.A. 2A:15-7b*.

Service.

The order to show cause may be personally served by any person 18 or more years of age or in the manner prescribed by *R. 4:4-3* or *R. 4:4-4*; *R. 4:67-3* or *R. 4:4-5*. *R. 4:73-3(a)*.

If a defendant resides outside the State or if the plaintiff does not know his residence address, notice shall be given to him by publication once in a newspaper published in the county or counties in which the land or property to be taken is located and by mailing to him, if his address is known, a copy of the notice at least 10 days before the return date of the order to show cause. If the name of a defendant is unknown the published notice shall be addressed to "Unknown Owner" or "Unknown Claimant." *R. 4:73-3(b)*.

Notice given and process served or published in accordance with the rules is be effective to bind all condemnees. *N.J.S.A. 20:3-9*.

Answer.

The condemnee may file an answer or other responsive pleading pursuant to the requirements of the Order to Show Cause. Failure to deny the authority of the condemnor to condemn in the manner provided for by the rules constitutes a waiver of the defense. *N.J.S.A. 20:3-11*. The answer must be served and filed not later than 3 days before the return date or within such further time as the court may allow. *R. 4:67-4(a)*.

Possession.

Individuals and private corporations vested with the power of eminent domain may take possession of the condemned property for the purposes for which the same was authorized to be taken only after the filing of the report of the commissioners and upon payment, to the parties entitled thereto or into court, of the amount awarded by the commissioners. *N.J.S.A. 20:3-33*. The report of the commissioners, together with the order or judgment appointing them, or a copy thereof certified by the clerk of the court, and proof of such payment of the amount awarded is plenary evidence of the right of the condemnor to have, hold, use, occupy, possess and enjoy the land and other property. *N.J.S.A. 20:3-33*.

All condemnors are entitled to possession of the property acquired for the purposes for which it was authorized to be taken after payment of the amount of the judgment on appeal. *N.J.S.A. 20:3-44*.

Commissioners Hearing.

The Eminent Domain Act provides for an initial determination of just compensation by commissioners appointed by the court. The commissioners' hearing is intended to provide a relatively speedy and inexpensive resolution to the issue of just compensation. *R. 4:73-11*.

Three commissioners are selected by the court at the time of entry of the order adjudicating the right to take. One of the commissioners must be an attorney, actively engaged in the practice of law in the county of venue. All of the commissioners must be residents of the county in which any part of the property being condemned is located, except that the attorney commissioner may be a non-resident actively engaged in the practice of law in the county. The attorney (or first-named attorney) commissioner presides at all hearings and rules on all questions of evidence and procedure, subject to review by a majority of the commissioners. *N.J.S.A. 20:3-12(b)*.

Required pre-hearing discovery consists of the following: the names, addresses, and written appraisal reports of any person who will be called to testify as a valuation expert; and a list of comparable sales and leases intended to be established by proof which list shall set forth as to each comparable sale and lease the following information: names of seller and purchaser or landlord and tenant; location of property by block, lot, street, street number and municipality; date of sale or date and duration of lease; the consideration for the sale or amount of rent; and book and page number of the recording of the deed. *R. 4:73-11(b)*.

Valuation expert reports are required to be exchanged fifteen (15) days in advance of the hearing. *N.J.S.A. 20:3-12(d)*; *R. 4:73-11(b)*. Neither the making of the prelitigation offer nor the refusal thereof is evidential. *N.J.S.A. 20:3-6*. The compulsory attendance of witnesses and production of records at the hearing may be compelled by the commissioners. *N.J.S.A. 20:3-12(c)*.

The notice of hearing must advise the property owner and other interested parties that should they fail to appear at the commissioner's hearing, personally or through counsel, they will not be permitted to appeal from the commissioner's report. Failure to provide such notice will result in loss of the benefits of appeal preclusion as against non-appearing parties provided in *N.J.S.A. 20:3-13(a)*.

Any party who appeared before the commissioners either personally or through an attorney and who is dissatisfied with the award of the commissioners may appeal. *N.J.S.A. 20:3-13(a)*

The report must be filed within four months next following the appointment of commissioners, unless the court extends the time. *R. 4:73-4*; *N.J.S.A. 20:3-12(g)* If the commissioners fail to file their report within the time permitted and no proper reason appears, the court may discharge the commissioners and any of them and appoint a substitute commissioner or commissioners. *R. 4:73-4*. The court, upon application of any party, including the commissioners, fixes the reasonable fees, costs and expenses of the commissioners, clerks and other persons performing any of their duties, all of which are payable by the condemnor. *N.J.S.A. 20:3-12(i)*; *R. 4:73-5*. The amount of the allowance is discretionary and must be based upon a proper showing, typically by affidavit of services. *R. 4:73-5*; *R. 4:42-9*.

Appeal.

Any award as to which no appeal is taken in accordance with the rules becomes final as of course, and constitutes a final judgment. If not paid within 60 days after final judgment, execution may issue as in other actions at law. *N.J.S.A. 20:3-12(h)*. The

amount of the award is enforceable as a lien upon the land and any improvements thereon from the filing of the report. *N.J.S.A.* 20:3-43. The report of commissioners together with the order or judgment appointing them is plenary evidence of the right of the owner to recover the amount of the award with interest and costs which may be recovered in the pending action or in a separate action instituted after failure to pay the award for 20 days after the filing of the report. *N.J.S.A.* 20:3-43.

Any party, who has appeared at the hearings of the commissioners, either personally or through an attorney, may appeal from the award of the commissioners. *N.J.S.A.* 20:3-13. On appeal, the matter proceeds to trial de novo in the Superior Court, Law Division. *N.J.S.A.* 20:3-13(b). The award of commissioners is not evidential at trial. *N.J.S.A.* 20:3-13(b).

The appeal must be filed within 20 days after the date of service of the award. *R.* 4:73-6; *N.J.S.A.* 20:3-13(a). The court for good cause shown may extend the time for appeal for a period not to exceed 30 days. *R.* 4:73-6. The court has no discretion to enlarge the time for appeal beyond the 30 day extension set forth in *R.* 4:73-6(a). *R.* 1:3-4(b). The notice of appeal shall be served only on persons in possession and parties appearing before the commissioners who have an interest in the property. *R.* 4:73-6. The necessary parties to the appeal are only such parties who have appeared at the commissioners' hearings. *N.J.S.A.* 20:3-13(a).

Pretrial Discovery.

Rules of court relating to depositions, interrogatories, discovery and inspection of documents and property are not applicable to the trial of condemnation actions except by leave of court. *R.* 4:73-11.

On appeal to the Law Division from the award of commissioners, the parties must exchange the name, address and written report of any expert, including but not limited to appraisers, who will be called to testify at least 40 days prior to trial or, if the case is pre-tried, at the time of service of pretrial memoranda, whichever is earlier. *R.* 4:73-11(b). Unless the parties consent or the court otherwise orders, no party shall be permitted to offer testimony of any expert witness whose name and report has not been provided or evidence of any comparable sale or lease for which the information required by the rule has not been timely exchanged. *R.* 4:73-11.

The court may on motion and for good cause shown order a party to produce for deposition pursuant to *R.* 4:14 an expert witness intended to be called at trial who has not testified at the hearing before the commissioners. *R.* 4:73-11(b). The party taking the deposition is responsible to pay the expert a reasonable fee, to be determined by the court if the parties cannot agree on the amount. *R.* 4:73-11(a).

Any party intending to offer rebuttal testimony must furnish the name, address and written report of the rebuttal expert within 20 days after service upon that party of the report or deposition being rebutted. *R.* 4:73-11(b).

Trial.

The only issue in the trial of a condemnation action subsequent to the entry of judgment that the condemnor has duly exercised its power of eminent domain is the amount of just compensation for the property and rights acquired.

On appeal to the Superior Court from the award of commissioners, the proceedings are *de novo* and the award of commissioners rendered nugatory. *N.J.S.A. 20:3-13*. The amount of the commissioners award is not evidential before the fact finder. *N.J.S.A. 20:3-13*.

The condemnor is required to proceed first at trial, regardless of which party filed the notice of appeal. Neither party bears a burden of proof in a direct condemnation trial, the sole issue being just compensation.

The right to a jury trial is provided for by statute. *N.J.S.A. 20:3-13(b)*. If a jury has been demanded in the notice of appeal, the action is tried by a jury drawn from the general panel. *R. 4:73-6*. The jury must view the land and property taken, unless the court orders otherwise. *R. 4:73-7*. No evidence is to be given on either side at the time of the view. *N.J.S.A. 2B:23-16*

All damages, present and prospective, which affect a property as a result of the taking must be alleged during the initial condemnation proceedings. There cannot be successive proceedings.

The “unit rule,” “undivided fee rule,” or “single value rule” requires that a single award be made for the property as a whole, including all partial legal interests less than a fee, which constitutes a summation of all the values of all the separate interests in the property.

The condemnation award takes the place of the property with respect to all rights and interests dependent on and incident to it. Allocation of the single award for the entire bundle of legal rights among the competing legal interest holders, e.g., between landlord and tenant, easement holder and fee holder, tax claimants, dower interests, life tenants, remaindermen, contractual vendees or owners of other future interests is determined by the court in a separate allocation proceeding.

Time of Valuation

Just compensation is determined as of the date of the earliest of the following events: a) the date possession of the property being condemned is taken by the condemnor in whole or in part; b) the date of the commencement of the action; c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee; (d) the date of a declaration of blight. *N.J.S.A. 20:3-30*. Subsection (d) should be read in conjunction with *N.J.S.A. 20:3-38* which provides that the value of any land or other property being acquired in connection with development or redevelopment of a blighted area shall be no less than the value as of the date of the declaration of blight by the governing body upon a report by a planning board.

Increases or decreases in value attributable to the very project for which property is sought to be acquired, sometimes referred to as “project enhancement,” may not be considered in calculating just compensation. The general rule is that any enhancement in

value which is brought about in anticipation and by reason of the proposed improvement is to be excluded in determining the market value of land acquired for the project.

Procedure to Challenge Condemnation:

All issues other than those related to value and damages must be determined by the court prior to the appointment of commissioners. Counterclaims may not be filed without leave of court. *R. 4:67-4(a)*.

The statute requires that where the authority to condemn is denied, all further steps in the action are stayed until the issue of the right to take has been finally determined. *N.J.S.A. 20:3-11*. The pendency of an appeal with respect to any issue other than the authority to condemn, shall not affect the right to possession and vesting of title in the condemnor. *N.J.S.A. 20:3-22*.

There is no discovery on the issue of the right to condemn except by leave of court. *N.J.S.A. 20:3-12(d)*.

Just Compensation:

Compensation for the Property Acquired.

“Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take property for public use without just compensation first made to the owners.” *N.J.S.A. Const. Art. 1, Sec. 20*.

The condemnee is entitled to compensation for the property, and damages, if any, to any remaining property, together with such additional compensation as provided for in the Eminent Domain Act, or as may be fixed according to law. *N.J.S.A. 20:3-29*

Just compensation means the payment of a sum of money to the owner of the property taken or damaged as will make him whole; that is, upon receipt by him of the compensation and damage awarded he will not be any poorer by reason of his property being so taken or damaged. Compensation implies full indemnity to the owner.

In making a determination as to value for purposes of condemnation proceedings, all factors which would influence a willing buyer and a willing seller should be laid before the trier of fact. Any evidence which is reasonably probative of fair market value is admissible in a condemnation action.

The owner is entitled to receive the fair market value of the property for its current use or for any use which it has a commercial value in the immediate present or in reasonable anticipation in the near future. Evidence of value is not restricted to the current utilization of the property. The determination of fair market value requires the antecedent finding as to the highest and best use of the condemned property.

Where the highest and best use is dependent upon changes in use permissions or developmental approvals, the proponent of such use must demonstrate that the changes are reasonably probable. To satisfy the threshold requirement that the proponent show a reasonable probability, the proponent must come forward with “reliable evidence” that development handicaps will be overcome. Only proofs which would warrant a finding of reasonable probability should be admitted and inherently vague or tenuous proofs should be excluded.

Except as to real estate with an appraised value of \$150,000 or less, no person other than a State licensed real estate appraiser, a State certified real estate appraiser or a person who assists in the preparation of an appraisal under the direct supervision of a State licensed or certified appraiser shall perform or offer to perform an appraisal assignment in regard to real estate located in New Jersey including, but not limited to, any transaction involving a third party, government or quasi-governmental body, court, quasi-judicial body or financial institution. *N.J.S.A. 45:14F-21.c.*

Interest.

Where the award or judgment exceeds the condemnor’s estimate of just compensation or where the condemnor is tardy in depositing its estimate of compensation into court, interest is payable on any deficiency. The allowance of interest on an award or judgment for just compensation is a requirement of constitutional magnitude where payment to the condemnee is not contemporaneous with the taking of the property. Interest is not allowable on relocation assistance.

Interest is payable from the date of the commencement of the action or the date the condemnor takes possession, whichever is earlier, until the date of payment of the compensation. The condemnor receives credit for all amounts deposited into court from the date of each deposit. Interest accrues on the funds deposited while in the custody of the Clerk of Superior Court and is payable to the condemnee entitled to the funds, separate and apart from the interest for which the condemnor is responsible.

If the parties are unable to agree, the amount of interest is determined by the court in a summary manner after final determination of compensation, and that amount is added to the amount of the award or judgment, as the case may be. *N.J.S.A. 20:3-14.* The court should select that rate or rates which will best indemnify the condemnee for the loss of use of the compensation to which the owner has been entitled. The rate or rates of interest, especially during times of changing economic conditions, should be determined after considering expert evidence of prevailing commercial and legal rates of interest.

Environmental Contamination.

Contaminated property that is the subject of condemnation is to be valued for condemnation purposes as if it has been remediated. Valuing property as if remediated assures just compensation insofar as it relates to the notion of “highest and best use.”

Environmental issues should be handled in separate cost-recovery proceedings under the relevant State or Federal legislation. Such proceedings allow for third-party claims against insurers, title companies, and prior owners, none of whom have a place at the condemnation table, and make available to the condemnee any statutory defenses.

Where property is contaminated, the condemnor should appraise the property as if remediated and deposit that amount into a trust-escrow in court. When the condemnee makes a motion pursuant to R. 4:73-9(c) to withdraw the money paid into court, the condemnor may seek an order requiring a portion of the award to be set aside to satisfy the condemnee's clean-up and transfer obligations. In the event of a dispute over the amount of the condemnor's estimate of costs, a trial-type hearing will be held and the condemnor will bear the burden of supporting the estimate of the transaction costs. In addition, the condemnor should reserve its right in the condemnation proceeding to initiate a separate cost-recovery action to recover remediation costs.

Partial Takings.

Where the whole of a property is taken, the measure of damages is the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act. The measure of damages in a partial taking is either the difference in the property's value before and after the taking or, the value of land taken plus the diminution of value to the remainder land. Either method may be employed.

Where only a portion of a property is condemned, the measure of damages includes both the value of the portion of land actually taken and the value by which the remaining land has been diminished as a consequence of the partial taking. The diminished value of the remaining property constitutes the severance damages visited upon that property as a result of the taking.

To be compensated for damages to remaining property, such damages must proximately result from the portion of the original tract condemned rather than from the condemnor's use of other land or from another person's use of their land.

Uneconomic Remnant.

The Eminent Domain Act provides that in cases where the remainder is a remnant with little or no economic value, that the condemnor, in its own discretion or at the request of the condemnee, must acquire the entire parcel. *N.J.S.A. 20:3-37.*

Visibility.

Compensability for loss of visibility turns on whether the damage results from the use of the part taken or the use of lands of others. The owner is not entitled to compensation for loss of visibility resulting from the use of lands of others.

Construction Impacts.

Ordinary inconveniences from work in the existing right of way are generally non-compensable as it does not result from the taking and can occur even in the absence of a taking. Damages which flow from use of the property taken are compensable. A temporary construction easement is a taking and the damages which flow from the taking are compensable.

Noise.

Compensability for noise damage remains an unsettled question.

Cost to Cure as Measure of Damage.

Evidence of a cost to cure is admissible only when the cost to cure is no greater than the decrease in market value if the condition is left uncured.

Attorneys Fees and Costs:

Reimbursement of Expenses and Payment of Damages in Certain Cases.

Under certain circumstances, the condemnee is entitled to reimbursement for expenses or damages. Generally, indirect costs not specifically authorized for reimbursement, are unrecoverable.

Upon acquisition, recording fees, transfer taxes and similar expenses incidental to conveyance to condemnor are reimbursable. *N.J.S.A. 20:3-26(a)(1)*. The owner is entitled to reimbursement for taxes paid allocable to the period subsequent to the earlier of vesting of title or possession by the condemnor. *N.J.S.A. 20:3-26(a)(2)*. Where the property owner has paid real estate taxes in advance for a period after the date the condemnor vests in title or obtains the right to possession, the owner is entitled to reimbursement by the condemnor for the taxes paid allocable to the period following that date. The owner may recover mortgage prepayment penalties. *N.J.S.A. 20:3-26(a)(3)*.

Attorney, Appraisal and Engineering Fees and Expenses.

The Eminent Domain Act does not require that upon completion of a proceeding the condemnor must pay the condemnee's legal fees and other expenses in the proceeding as an additional element of damage. Nor is there any provision in the court rules providing for allowance of attorney's fees to the condemnee.

Payment of the owner's counsel fees is authorized where: Judgment is entered that the condemnor cannot acquire the real property by condemnation; Where the action is abandoned by the condemnor; Where the action is dismissed following the filing of a declaration of taking; Upon settlement or judgment of an inverse condemnation action in the discretion of the court or representative of the defendant agency. *N.J.S.A. 20:3-26*.

Upon entry of a judgment that the condemnor cannot acquire the real property by condemnation, the condemnor is liable for the expenses of the condemnee consisting of reimbursement for reasonable costs, disbursements and expenses actually incurred including reasonable attorney, appraisal and engineering fees. *N.J.S.A. 20:3-26(b)*.

Upon abandonment of the action, the condemnor is liable for the expenses of the condemnee consisting of reimbursement for reasonable costs, disbursements and expenses actually incurred including reasonable attorney, appraisal and engineering fees. *N.J.S.A. 20:3-35; N.J.S.A. 20:3-24; N.J.S.A. 20:3-26(b)*.

In connection with a (successful) judgment in an inverse condemnation action, the defendant is liable for reasonable costs, disbursements, and expenses, including

reasonable appraisal, attorney and engineering fees actually incurred regardless of whether the action is terminated by judgment or settlement. *N.J.S.A. 20:3-26(c)*.