

**MOBILE COUNTY PROBATE COURT
LAND CONDEMNATION COMMISSIONERS
February 2007**

I INTRODUCTION

"Eminent Domain" is one of the "rights" a sovereign government has - to take private property for public use. The Alabama Constitution [1901 *Ala. Const.* Art. I, § 23] provides that just compensation must be paid to the landowner. The Alabama Constitution also provides for the exercise of eminent domain by cities, counties and other corporations and individuals vested with the right to take property for public use [1901 *Ala. Const.* Art. XII, § 235]. Jurisdiction to condemn privately owned property rests in the Probate Court. The Judge of Probate receives petitions for condemnation, conducts the necessary proceedings and issues the final condemnation order. In addition to condemnation for public uses, this jurisdiction extends to the erection of dams for mills, gins or factories, and to rights-of-way for private owners.

II PROCEDURE PRIOR TO COMMENCEMENT OF CONDEMNATION ACTION

To better inform land commissioners as to the entire land condemnation process, the following summary of the procedure preceding the commencement of a condemnation action is offered.

A. Appraisal

Before beginning a condemnation action, a condemnor must have the property appraised to determine the amount that would constitute just compensation for the taking. The owner or the owner's representative must be given a reasonable opportunity to accompany the appraiser during the inspection of the property.

B. Offer

Before beginning a condemnation action, a condemnor must offer the owner an amount believed to be just compensation. The condemnor shall provide the owner with a written statement and a written summary showing the basis for the amount determined to be just compensation.

C. Payment Or Deposit Before Surrender Of Property

An owner is not required to surrender possession of the property before the condemnor either pays the agreed purchase price or deposits the amount awarded.

D. Notice

Except in an emergency, a condemnor may not require an occupant of the condemned property to move prior to a 90 day notice of the move.

E. Uneconomic Remnant

If the acquisition of part of the property would leave the owner with an uneconomic remnant, the condemnor must offer to buy the remnant.

F. Entry

A condemnor and its agents may enter the property for a reasonable time to make suitability studies unless good cause to the contrary is shown.

G. Offer As Prerequisite

The condemnor must offer to acquire the property at its approved offer before commencing the condemnation action.

III COMMENCEMENT OF CONDEMNATION ACTION

If the condemnor and landowner reach an agreement, there is no need for a condemnation action. A condemnation action is only required where the parties can NOT reach an agreement. Condemnation in Probate court is a two (2) step process. In the first phase, the Probate Court must determine if the complaint should be granted. If the complaint is granted, the second phase commences. In the second phase, the amount of damages owed to the landowner must be established. The Probate Court is required to appoint three (3) persons to serve as commissioners (discussed in greater detail below). The commissioners determine the amount of damages. In essence, the commissioners can be analogized to the role of a jury in civil litigation.

A. Filing Complaint

A condemnation action is begun by filing a complaint in the Probate Court in the county in which the property is located.

B. Service of Process

When the complaint has been filed, the Probate Court must set a date for the hearing and issue notice to the owner unless notice has been waived.

C. Owner's Response

The owner may respond to the complaint, but is not required to do so unless he challenges the right to condemn, disputes the area to be acquired or to remain, or wishes to raise preliminary objections to the condemnor's procedure.

D. No Formal Discovery Is Permitted

Land condemnation matters are supposed to be handled on an expedited basis. In furtherance of this concept, no formal discovery between opposing parties is permitted in actions pending in the Probate Court.

IV DETERMINATION OF VALUE OF PROPERTY/DAMAGES SUSTAINED BY OWNER - PROCEDURE RELATING TO PAYMENT - APPEAL OF DECISION

Once the Probate Court has granted the relief requested in the condemnation lawsuit, the second phase of the litigation begins, to determine the amount of damages due to the landowner. The land commissioners appointed pursuant to the procedure outlined below, must hold a hearing to receive evidence relating to compensation. The commissioners will conduct a hearing in a conference room at the Probate Court. This hearing is informal. All interested parties should be afforded an opportunity to make their presentation to the commissioners in the presence of the other interested parties.

A. Appointment of Commissioners

Within 10 days after granting the complaint, the Judge of Probate must appoint 3 citizens to serve as commissioners. Commissioners must be eligible to serve as jurors in Mobile County and must be disinterested in the case. In other words, the commissioners can not have a relationship with the condemnor or the owners. The appointment is made on a rotational basis from a list prepared by the Judge of Probate.

B. Commissioners' Report Due In 20 Days

Within 20 days from their appointment, the commissioners must make a written report to the Probate Court stating the amount of damages and compensation ascertained. Within 7 days of receipt of the commissioners' report, the Probate Court must issue an order recording the report and condemning the property upon payment or deposit into Probate Court of the damages and compensation assessed by the commission.

C. Chairman Of Commission

The Probate Court will appoint one of the commissioners to serve as chairman of the commission. The Chairman is responsible for making the arrangements with the other commissioners, and advising the condemnor (or its attorney of record) about the date, time and location for the viewing of the property and the time and date of the commissioners' hearing. Upon notice of appointment, the chairman of the commission should immediately contact the other commissioners and confirm their availability to serve on the commission and ascertain dates on which the commissioners are available to conduct their hearing. **DO NOT RELY UPON VOICE MAIL MESSAGES OR MESSAGES LEFT ON ANSWERING MACHINES.** If the chairman has not made contact with a commissioner within 3 days of notice of appointment, the chairman should contact the Clerk of the Probate Court for instruction. If a commissioner has not been contacted by the designated chairman of the commission within 3 days of notice of appointment, the commissioner should contact the Clerk of the Probate Court for instruction. Once the chairman has ascertained dates and times the commissioners are available to meet, the chairman should contact the lawyer for the condemnor and using said information, set a date for the commission's hearing. Upon setting a date for the commission hearing, the chairman should immediately contact the commissioners and advise them of the hearing date and furnish any other pertinent information. **DO NOT RELY UPON VOICE MAIL MESSAGES OR MESSAGES ON ANSWERING MACHINES AS CONSTITUTING NOTICE.** If the chairman has not made *actual* contact with a commissioner within 3 days after initiating efforts to notify the commissioner of the hearing date and time, the chairman should contact the Clerk of the Probate Court for instruction.

D. Commissioners' Hearing And Assessment Of Damages

The commissioners must hold a hearing to receive evidence relating to compensation. Upon notice of appointment, the chairman of the commission should immediately contact the other commissioners and confirm their availability to serve on the commission and ascertain dates on which the commissioners are available to conduct their hearing. **DO NOT RELY UPON VOICE MAIL MESSAGES OR MESSAGES LEFT ON ANSWERING MACHINES.** If the chairman has not made contact with a commissioner within 3 days of notice of appointment, the chairman should contact the Clerk of the Probate Court for instruction. If a commissioner has not been contacted by the designated chairman of the commission within 3 days of notice of appointment, the commissioner should contact the Clerk of the Probate Court for instruction. Once the chairman has ascertained dates and times the commissioners are available to meet, the chairman should contact the lawyer for the condemnor and using said information, set a date for the commission's hearing. Upon setting a date for the commission hearing, the chairman should immediately contact the commissioners and advise them of the hearing date and furnish any other pertinent information. **DO NOT RELY UPON VOICE MAIL MESSAGES OR MESSAGES ON ANSWERING MACHINES AS CONSTITUTING NOTICE.** If the chairman has not made contact with a commissioner within 3 days after initiating efforts to notify the commissioner of the hearing date and time, the chairman should contact the Clerk of the Probate Court for instruction.

E. Notice of Commissioners' Hearing

Notice of the hearing must be given to the parties. Once the date is set, the chairman of the commission should contact the attorney of record for the condemnor, so that said attorney can send notice of the hearing to all other interested parties. The attorney needs to give a **MINIMUM** of 3 days notice of the hearing.

F. Viewing of Property

The commissioners will physically go to the property in question and view it **prior** to their hearing. The landowner, the landowner's legal counsel (if any), the landowner's real estate appraiser (if any), a representative of the condemning authority, the condemning authority's legal counsel, and the condemning authority's engineer and/or real estate appraiser (if any) are permitted to be present at the time the commission views the property. The viewing can only occur as scheduled with the representative of the condemning authority (usually its lawyer) and the landowner.

It is **not** appropriate for commissioners to discuss the matter with one party or one party's representatives, without the other party having notice and the opportunity to be present. There should be no discussions between commissioners and parties or their representatives about the matter, while waiting on the opposing party or its representatives, if any, to arrive for the viewing.

G. Swearing In Of Commissioners

The commissioners will be sworn in by the Judge of Probate, Chief Clerk, or designee of the Chief Clerk, before the hearing commences.

H. Format Of Commissioners' Hearings

The rule prohibiting "ex parte" communications (see comments above about viewing the property) applies to the commission hearings you conduct and participate in. You should not discuss the merits of the case with any party or the representatives or witnesses of any party until the hearing is formally commenced by the chairperson.

The commission you are serving on, is practically speaking, a three (3) person jury. It is very important that each commissioner be neutral as to any party or any party's position, until all proper evidence has been submitted to the commission and the commission as a whole has the opportunity to reach a decision.

1. Chairman of the commission calls the meeting to order and introduces the other commissioners to all interested parties.
2. The condemnor or the lawyer for the condemnor presents expert testimony as to the property being taken, the estimated value of the property and whether an uneconomic

remnant exists. At this time the condemnor's damage award offer is disclosed. The commissioners and the interested parties may ask questions of the testifying witnesses.

3. The Alabama Attorney General has advised the Court that evidence submitted by the parties (or their lawyers) should be evidence which is admissible under the Alabama Rules of Evidence, statute, case law or Constitutional provision. See discussion below regarding evidence that can be received by the commission.
4. The owner or lawyer for the owner presents testimony as to the property to be taken, the estimated value of the property and whether an uneconomic remnant exists. The owner or his lawyer can comment about the condemnor's damage award offer.
5. After all evidence and testimony is obtained, all parties exit and the commissioners meet in private to determine the award to be given to the owner.
6. The condemnor (or its lawyer) prepares and furnishes a written report for the commissioners to use in reporting to the Probate Court their findings and decision as to the award.
7. The commissioners present their report to either the Judge of Probate or the Chief Clerk and are "sworn out" The oath utilized is "In the matter of [style of case], each of you have been previously sworn as commissioners, you now render unto the Court your report of money damages due to the defendant (or parties) which is based upon the evidence and testimony presented to you, that such damages are (state each parcel or tract by name or number and the amount entered in the report); so say each of you?" (Each commissioner should respond affirmatively).
8. At the time the report is submitted to the Judge of Probate or Chief Clerk, the commissioners should be prepared to advise as to how much time they have expended with regard to that particular matter.

I. Evidence That Can Be Considered

The Alabama Attorney General has advised the Probate Court that the evidence submitted by the condemnor, owner or interested party at a commissioner hearing should be evidence that is admissible under the *Alabama Rules of Evidence*, statute, case law, or Constitutional provision. If the condemnor, owner or party in interest objects to a question being posed to a witness or objects to information being furnished to the commission on the ground that such evidence is not admissible under applicable law, the chairman of the commission should recess the commission hearing and contact the Judge of Probate for a ruling on the evidentiary issue. If any commissioner has a question or concern as to whether evidence presented to the commission is legal evidence the commission can receive and consider during the commission's deliberations, the commissioner

should contact the Judge of Probate.

It is difficult to succinctly outline what evidence constitutes admissible evidence in a land condemnation commissioners' hearing. Generally speaking, however, the following types of evidence is **NOT ADMISSIBLE**:

1. Hearsay evidence (what someone WHO IS NOT PRESENT AT THE HEARING told someone else). For example, the owner cannot state what some other person (lay or professional) told the owner as to the value of the owner's property. For that third person's testimony to be considered, the third person must be present and offer their opinion directly to the commission.
2. A copy of the condemnor's appraisal report, *when offered by the owner*.
3. The price or other terms and circumstances of an acquisition of comparable property, where the property was or could have been acquired in that transaction under the power of eminent domain.
4. The price at which property was optioned, offered, mortgaged or listed for purchase, sale or lease.
5. The assessed value of property for purposes of taxation.
6. Any elements of loss of value that are legally noncompensable under Alabama law.
7. The written evaluation report of the opposing party.

J. Amount Of Damages

1. "Fair Market Value"

The term "fair market value" has been defined "as 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."

2. Before And After Value

In a partial taking, the owner is entitled to the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking.

3. Incidental Benefits

The amount of compensation a landowner may be entitled to receive may not be reduced

because of any incidental benefits which may accrue to the remaining land. However, in condemnation of lands for rights-of-way for public highways, water or sewer lines, the value of the enhancement to the remaining lands of the landowner must be considered in fixing the amount of compensation to be awarded the owner.

4. Highest and Best Use

The owner is entitled to consideration for condemnation on the basis of the highest and best use to which the property could be put, even though not presently being so used.

5. Taking

An owner is not required to surrender possession of property before the condemnor (a) pays the agreed purchase price, or (b) pays or deposits the amount awarded by the condemnation order together with interest thereon as prescribed in the order.

6. Maximum Amount Of Damages

The amount of damages awarded to the owner **cannot exceed** the value testimony received by the commission. If the owner presents no testimony regarding the value of the property, the amount of damages cannot exceed the value testimony offered by the condemnor. Under Alabama law, an owner of real property is competent to offer an opinion as to the value of the owner's property, even if the owner does not have formal training in land values. If an owner offers the owner's opinion as to the value of the owner's property, the commission has the discretion to determine how much weight to accord to said opinion as compared to other opinions offered to the commission. Likewise, the commission has the discretion to determine how much weight to accord to a value opinion of a professional person.

V. PAYMENT OF DAMAGES AND COMPENSATION - APPEAL

A. Payment Of Damages And Compensation

The condemnor may pay the damages and compensation assessed at any time within 90 days after the assessment thereof, or, in case an appeal is taken, within 60 days after the appeal is determined. If the condemnor fails to pay on a timely basis, such assessment shall cease to be binding on the owner of the lands or other interested parties and the complaint should be dismissed, with the condemnor being liable to the owner of the lands for all damages the latter may have sustained by the institution of the proceedings, including a reasonable attorney's fee for defending the same.

B. Appeal To Circuit Court

Within 30 days of the order of condemnation, any party may appeal the order to the Circuit Court for a new trial.

VI LAND COMMISSIONER COMPENSATION

Compensation for the commissioner is based upon the time expended by the commissioner as to the particular condemnation matter. The current rate utilized is \$80.00 per hour, with a \$200.00 minimum fee. If the commissioners have any extraordinary expenses, they should present written documentation to support the same to the Judge of Probate or Chief Clerk of the Probate Court.