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Eminent Domain Procedure of North Carolina: The Need for Legislative Action

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THE EMINENT DOMAIN PROCEDURE OF NORTH CAROLINA: THE NEED FOR LEGISLATIVE ACTION

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The eminent domain law of North Carolina is a confusing, often contradictory, collection of statutes that have been enacted one on top of another with little, if any, consideration for the impact on the existing body of the law. The general eminent domain law is scattered through twenty-six chapters of the North Carolina General Statutes. They authorize over seventy condemnors to condemn private property for one or several purposes by proceeding in accordance with one of over eighteen procedures.[1] Supplementing the general law, local legislation has authorized additional eminent domain powers and procedures. Many larger cities[2] and a number of counties[3] possess special powers that have been granted through this medium. This local-law authority has added to the already large number of eminent domain grants and procedures authorized by the general law and consequently has increased the confusion that exists in eminent domain law.

Much of this law, some of which predates the Revolutionary War,

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[1] Eminent domain law can be broken down into two areas. One is the "granting law," which authorizes some seventy condemnors to condemn property. The other is the "procedural law," which sets out the way and manner that the grant of authority may be effectuated.

[2] Municipalities are the most common recipient of eminent domain power granted by local legislation. The power, and usually a procedure for the use of that power, is most often granted in the city charter, but it may also be given in a special act concerned only with eminent domain. Consequently, a city may have been given different eminent domain authority over a period of many years, most of which is no longer used and may have been forgotten. Because new charters often do not repeal prior local acts, many laws may exist that are obsolete, or the particular need for which they were intended may have ceased to exist. For one of the more complete and involved condemnation procedures that has been authorized by local legislation, see N.C. Sess. Laws 1959, ch. 1137, § 6.101.

[3] See, *e.g.*, N.C. Pub. Loc. Laws 1911, ch. 431, which grants the Guilford Board of County Commissioners the power to create a drainage district and to condemn property for its use. The Law sets up a special procedure quite different from the article 2 procedure that the county might otherwise use.

is antiquated and unused; it needs to be updated and obsolete portions repealed. In addition, the general law needs to be recodified and reorganized into one chapter of the General Statutes. Because the present law is scattered through so many chapters of the General Statutes, one seeking to determine whether the general law has conferred condemnation authority for a particular purpose on a particular body and what procedures are available to it has great difficulty in locating his answer.[4]

Another of the difficulties that needs statutory correction is the confusion and lack of uniformity in the procedural aspect. Part of this confusion and lack of uniformity is a result of the multiplicity of procedures for condemning property. The general law provisions establish over eighteen separate condemnation procedures. Consequently, the case law that has evolved in interpreting the various procedures has not been uniform and has in many ways contributed to the confusion in knowing what law applies to which procedure.[5] An additional factor in this confusion is that some of these procedures, such as that authorized for the condemnation for water mills,[6] are no longer used, and many of them are used only rarely.

Confusion and lack of uniformity in the procedural law also result from the general eminent domain procedure of article 2 of chapter 40 of the North Carolina General Statutes, much of which

[4] Contrary to reasonable expectations, the index to the General Statutes does not list all citations to these powers. As a result, many condemnors are unaware of all the powers and procedures authorized by the general law for condemnation purposes. In addition to this general law authority, the condemnor may also have eminent domain power granted by local legislation that is even more difficult to find. Anyone attempting to determine whether such power has been granted or to locate all the special act authority must check the session laws, session by session, in his search.

[5] Inevitable confusion results when courts must interpret different procedures. What might be true for one procedure may not be true for another, but understandably, attorneys, clerks of court, and lower court judges sometimes think that a pronouncement of the Supreme Court on one procedure applies to another, and the Supreme Court's decision itself may not make clear whether a ruling in one condemnation case is to apply only to that one procedure or to all condemnation procedures.

One result of the uniform federal practice, under FED. R. CIV. P. 71(a), has been the development of an excellent body of federal case law relating to condemnation procedure. As one practitioner observed, "Guidelines have been laid down which have taken much of the guessing out of procedural questions in federal cases." See Ward, Condemnation Proceedings Before the Clerk of the Superior Court (paper presented to the Forty-third Conference of Superior Court Clerks at Morehead City, N.C., July 1962) [hereinafter cited as Ward]. A copy is in the library of the Institute of Government, University of North Carolina at Chapel Hill.

[6] See N.C. GEN. STAT. § 73-5 to-13 (1960).

is antiquated, misleading, or ambiguous. As the North Carolina Supreme Court said in 1908 in referring to the article 2 procedure, "The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure."[7] Today, almost sixty years later, this same procedure, still "indefinite and obscure," continues in use.

Although space does not permit an examination of all the procedures authorized, this article will consider some of the reasons for the large number of them. It will then examine in some detail the basic condemnation procedure of chapter 40, including some of the difficulties it creates for the condemnor, the condemnee, and the courts, some of the problems with the policy it effectuates, and a few of the alternatives that might be considered if the procedure were to be altered. This discussion should make clear why this writer thinks that a complete overhaul of the eminent domain law needs to be undertaken by the legislature. Such an undertaking should include a review of the procedures now used; the repeal of those statutes now obsolete; the clarification of the intent and policy of those statutes under which the state will then operate; and the establishment of one uniform procedure, codified with the rest of the law into one chapter. These changes are sorely needed if order and clarity are to be brought to the law of eminent domain.

Explaining why the legislature has chosen to enact so many different types of procedures is not easy. Probably the basic reason is inherent in the condemnation process itself. Condemnation represents a conflict between the protection of the owner's property rights on the one hand and the public's need for administrative convenience and expediency on the other. Thus the multitude of different procedures is largely a reflection of dissimilar judgments as to what is more important—protection of personal property or administrative expediency—in a specific type of condemnation.

An examination of the condemnors authorized to exercise eminent domain illuminates some of the factors that may have influenced the legislature when it established these procedures. The first such factor that might have been considered by the General Assembly is the type of public interest that a particular condemnor may represent when it seeks to condemn public property. Although each condemnor—from the municipality to the railroad—represents some

[7] Abernathy v. South & W. Ry., 150 N.C. 97, 103, 63 S.E. 180, 183 (1908).

public interest, the degree of that public interest varies from condemnor to condemnor. For example, the railroad, like other quasi-public condemnors, represents a more limited public interest than the municipality, a public condemnor. Consequently, the legislature is likely to place different procedural burdens on the two, weighing the procedure more in favor of the landowner when the quasi-public condemnor seeks to condemn than when the public condemnor brings the action.

Another factor that distinguishes condemnors and thus tends to produce a multiplicity of procedures is the factor of speed or urgency with which a condemnation must be made. For example, the special procedure authorizing the governor to seize property as he deems necessary when a state of civil emergency exists indicates a legislative judgment that speed is sometimes more important than providing procedural safeguards for property owners.[8] For a metropolitan sewer district, however, the condemnation is not so immediately necessary, and the sewer district must use the slower procedure of article 2.[9]

Still another difference between condemnors that may be reflected in the procedure authorized is the purpose for which the property is sought. To illustrate, the State Highway Commission is authorized to condemn for highways, a purpose usually thought of as a necessity. On the other hand, the Department of Conservation and Development is granted the power to build fisheries or recreational areas, a purpose most often classified as beneficial but not necessary. Such differences in purpose have resulted in different value judgments as to which property is more important for the condemnor to have without delay, and this has resulted in different procedures for the two condemnors. Consequently the manner of proceeding and the allocation of the procedural burdens among the condemnors and condemnee has often been made on the basis of the purpose for which the condemnor seeks the property.

Although the reasons just suggested help to explain the multiplicity of procedures authorized by both general and local legislation, they do not fully explain the local-legislation situation. Procedures and authority stemming from local legislation are primarily the

[8] See, *e.g.*, N.C. GEN. STAT. § 166-6 (1964), which gives the Governor, if a state of civil defense emergency has been declared, the power to condemn, without resorting to any procedure, property needed to meet that emergency.

[9] See N.C. GEN. STAT. § 153-300(10) (1964).

result of a municipality or county seeking to make its procedure easier than that authorized by the general law.[10] For example, Greensboro added a lengthy eminent domain procedure in its 1959 charter revision that exempted the city from the article 2 requirement of proving an unsuccessful effort to purchase and also gave the city "quick take" powers.[11] Besides adding to the plethora of general law procedures, the local-act procedure creates still another problem. When a condemnor, usually a city or county, has been given condemnation power and procedures by both the General Statutes and special legislation, the two procedures may conflict. If they do, the charter provision takes precedence over the general law provision. In *Clinton v. Johnson*,[12] a case in which the right to condemn for identical purposes was given by both the charter and the general law, the court held that the power of eminent domain granted to a municipality can be exercised only in the manner provided by the statute conferring it, but when the method prescribed by the municipal charter is inconsistent with or repugnant to the express terms of the general law, the procedure specified by the municipal charter takes precedence.

Many other reasons may have been responsible for the multiple condemnation procedures. Perhaps unfamiliarity with the existing eminent domain law and a natural reluctance to attempt an overhaul of the current law are explanations as nearly accurate for the multiplicity of procedures as the reasons given above: it is usually easier to add a new procedure than to adapt a new condemnor to the existing law. Whatever the reasons, the General Assembly has enacted over eighteen different procedures in the general law and many others by local legislation among which the condemnor and the condemnee resort for a determination of just compensation.

Although our legislature has authorized the use of almost thirty different condemnation procedures, practically all condemnations

[10] Not all public laws have general application. A public statute or amendment may specify that it applies to only one or several counties. The codifier has arbitrarily decided that when such is the case, if the statute and/or amendments to the statute affect nine counties or less, they are labeled a "local modification" and thereby excluded from the codified law. Of all the grants of eminent domain found in the General Statutes, only one provision of the General Statutes did not apply to all similar bodies. It is N.C. GEN. STAT. § 139-41 (1964), concerning watershed-improvement programs, which affects only 10 of 100 counties.

[11] See the Greensboro charter, N.C. Sess. Laws 1959, ch. 1137, § 6.101.

[12] 174 N.C. 286, 93 S.E. 776 (1917).

today are brought under the article 2 procedure of chapter 40.[13] The procedure had its origin in a 1871 law authorizing the formation of railroad companies.[14] One part of that law contained a condemnation procedure to be used by railroads, and today that railroad procedure is the procedure known as article 2.[15]

Forty-six different types of condemnors are authorized by the General Statutes to proceed under article 2. (These condemnors, the source of their authority, and the purposes for which it is granted are listed in the table following the conclusion of this article.) The majority of this number derive their power from article 1 of chapter 40. Some, however, are granted eminent domain power in other chapters but are required to use the article 2, chapter 40, procedure. Although the procedure might be expected to be the same for all condemnors, regardless of the source of their authority, some variations exist. The statute granting the authority may exempt its condemnor from a limitation imposed on others, or it may add an additional burden that the condemnor must either satisfy or submit to when it seeks to condemn property.

The first variation, exemption from a limitation imposed upon others, is illustrated by condemnors whose authority is granted in article 1 of chapter 40 and thereby are limited in their condemnation by N.C. GEN. STAT. § 40-10 (1966), a section within the article that forbids the condemnation of dwelling houses and burial grounds. At the same time, condemnors who derive eminent domain authority from a statute outside article 1 but are required to proceed according to the procedure of chapter 40 are exempted from the limitation of N.C. GEN. STAT. § 40-10 (1966). They may condemn dwelling houses or burial grounds while proceeding under the article 2 procedure.[16]

[13] N.C. GEN. STAT. §§ 40-11 to -29 (1966). The major exception to the use of this procedure are condemnations by the State Highway Department under article 9 of chapter 136 of the General Statutes.

[14] N.C. Pub. Laws 1871, ch. 138.

[15] Of the nineteen sections that comprise the present article 2, all but four were part of the 1871 law. Because of its origin, the article 2 procedure has been referred to, until recent years, as the railroad condemnation procedure. See, *e.g.*, N.C. GEN. STAT. § 131-15 (1964), which grants cities and counties the power to acquire property for hospitals "under the provisions of law for the condemnation of land for railroads." Such language needs to be updated.

[16] In Town of Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952), the court rejected the argument that the limitations of article 1 must be applied to a condemnor whose authority comes from another chapter of General Statutes. The Court stated: "[I]n our opinion the limitation

This variation of procedural burden creates an interesting situation in the case of condemnors that are given condemnation power for the same purpose by both article 1 of chapter 40 and a statute outside this article. For example, cities and counties have been conferred eminent domain power both in chapter 40 and in another chapter for the same purpose. (Examples are electric power systems, hospitals, and sewer and water systems for municipalities; hospitals and schools for counties.) The power granted is for the same purpose; the procedures are different. Since the city or county is not subject to the article 1, chapter 40, limitations (or substantive limitations of article 2)[17] when the condemnation suit is brought on authority outside article 1, it will most likely cite the authority that is outside chapter 40. Quaere, what justification is there for having in effect two different procedures for the same condemnor condemning for the identical purpose?

Another type of difference in procedure for condemnors authorized to use article 2 results when the statute granting the authority requires the condemnor first to satisfy a preliminary procedure not required by article 2.[18] Examples of such condemnors are state agencies that must first get approval from the Department of Administration[19] or public utilities that are required to obtain a cer-

contained in G.S. § 40-10 is a limitation only upon such corporations as are defined and named in the preceding sections in the article [article 1], when exercising the power of eminent domain granted in the act, or the amendments thereto. . . ." *Id.* at 263, 69 S.E.2d at 529.

In some instances the legislature has specifically exempted a condemnor from this prohibition. See, *e.g.*, N.C. GEN. STAT. § 130-130 (1964), which exempts sanitary district boards from the application of N.C. GEN. STAT. § 40-10 (1966). The statute also exempts them from N.C. GEN. STAT. § 40-19 (1966) which requires a deposit of a sum equal to the appraisal in the event the property owner decides to take an appeal from the order of the commissioners of appraisal.

[17] In Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960), the Court freed all condemnors proceeding according to article 2 on authority granted elsewhere from any substantive limitations of the article 2 procedure, in this case from the limitation of condemning only an easement right as had been required by N.C. CONS. STAT. § 1723 (1919) and is now part of the article 2 procedure, N.C. GEN. STAT. § 40-19 (1966). Consequently, today the reference to the chapter 40 condemnation procedure is a reference "merely for procedural purposes." Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960).

[18] With one exception, additional burdens are imposed by grants other than chapter 40. The exception is N.C. GEN. STAT. § 40-2(10) (1966) that authorizes corporations and bodies politic of public sewerage systems but only after they have been granted a certificate of public convenience and necessity by the North Carolina Utilities Commission.

[19] The condemnation is actually brought in the name of the Department of Administration.

tificate of public convenience and necessity from the North Carolina Utilities Commission before they can proceed with the condemnation under article 2.

Sometimes for such condemnors a limitation (such as that imposed by N.C. GEN. STAT. § 40-10 (1966) regarding graveyards and dwelling houses) and an additional procedure (such as obtaining a certificate) may both significantly affect the condemnation.[20] In this situation, the condemnor's attorney will be forced to make a choice between (a) avoiding some preliminary procedures called for by a grant other than chapter 40, and (b) avoiding some limitations imposed by chapter 40 when article 1 of chapter 40 is cited as the authority for the condemnation.

With the exception of the two modifications noted, condemnors authorized to acquire property under article 2 proceed in a uniform manner. The question arises, however, why the procedural requirements should differ, particularly for the same condemnor when it is condemning for the same purpose. It would appear that the legislature in effect has created different procedures when it requires a preliminary burden to be met first. The result is that different condemnation proceedings under article 2 in some cases vary more than some entirely separate procedures that have been authorized in different chapters. This situation is one of many that contribute to the confusion in the article 2 procedure.

The article 2 assessment process can be initiated by either the condemnor or condemnee[21] by filing a petition with the clerk of the superior court for the county in which the land lies requesting that

[20] For example, cities and counties are authorized in both chapter 40 and in other chapters to condemn for water systems. If the condemnor brings the action under chapter 40, the suit begins with the filing of the condemnation petition. If, however, it decides to bring the action under N.C. GEN. STAT. § 162A-6(10) (1964), a statute that grants both cities and counties the authority to condemn for water systems, it must first procure a certificate of public convenience and necessity from the North Carolina Department of Water Resources before it can file its petition with the clerk.

[21] The petitioner is most often the condemnor. However, the procedure is available to the landowner and, when the petition is filed by him, is known as an inverse condemnation. See, *e.g.*, Yancey v. State Highway Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942). To bring the action, the owner must assert that there has been an eminent domain taking of his property. Usually this type of proceeding is initiated when there is a dispute over whether a "taking" has occurred—the landowner asserting that there has been a taking and demanding compensation from a party who denies any taking. See, *e.g.*, Penn v. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950). See also Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3.

commissioners of appraisal be appointed.[22] The proceeding thus commenced is not a typical judicial one. It is a special proceeding, so denominated by N.C. GEN. STAT. § 40-11 (1966), and is, therefore, governed by the procedural law of special proceedings as set out in N.C. GEN. STAT. §§ 1-393 to -408.1 (1953). Since it is a special proceeding, the clerk of the court has original jurisdiction over the initial appraisal process.[23]

The petition is a prayer for the appointment of commissioners of appraisal, who, if appointed, must determine the amount of damages necessary to compensate the owner for his loss. In order to establish the jurisdiction of the court, the petition must contain certain allegations. If the landowner is the petitioner, N.C. GEN. STAT. § 40-12 (1966) requires that the petition contain the following statements:

1. The names and places of residence of the parties (if they can be obtained with reasonable diligence) who own or have, or claim to own or have, estates or interests in the land;
2. If any of the parties are infants, this fact must be stated along with the ages of the infants;
3. If any of the parties are idiots or of unsound mind, this fact must be stated;
4. If some of the owners are unknown, this fact must be stated;
5. A description of any liens or encumbrances on the land; and
6. A description of the real estate, or interest therein, that is subject to the proceeding.

If the petition is filed by the condemnor, it must contain in addition to those statements listed above, the following allegations:

1. A description of the real estate, to include, when an easement is sought, a description of the easement[24] (a map should be attached

[22] N.C. GEN. STAT. § 40-12 (1966). Upon presenting the petition, the petitioner is also required to present proof of service of the petition and of the summons to all persons whose estates or interests are to be affected by the proceedings. This requirement is awkwardly set out in another section, N.C. GEN. STAT. § 40-16 (1966). These requirements on service of the petition and summons should be transferred to N.C. GEN. STAT. § 40-12 (1966) so that all the requirements of the condemnor's petition are together.

[23] See Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959).

[24] In City of Gastonia v. Glenn, 218 N.C. 510, 11 S.E.2d 459 (1940), the court interpreted the requirement of N.C. GEN. STAT. § 40-12 (1966) that the petition "contain a description of the real estate which the corporation seeks to acquire" to mean not a description of the entire track over

if the condemnation is by a railroad);[25]

2. If the petitioner is incorporated, a statement to that effect;

3. A detailed statement of the petitioner's business;

4. A statement as to the intended use of the property;

5. A statement that the land, or interest in the land, described in the petition is required to conduct and carry on the public business authorized by the condemnor's charter; and

6. A statement that the petitioner has been unable to acquire title to the land, or interest in the land, and the reason for such inability.

These allegations comprise the petition. Unless it is fraudulent on its face, the clerk will accept the petition pending an answer from the other party.

The petition and condemnation affecting multiple landowners and/or multiple pieces of property present a problem at this point. While some question has existed in the past, recent cases indicate that the petitioner may legitimately request the appraisal of several pieces of property belonging to different owners in the same proceeding. The North Carolina Supreme Court, in *North Carolina ex rel. Myers v. Wilmington-Wrightsville Beach Causeway Co.*,[26] upheld a state condemnation for the Intercoastal Waterway from Beaufort Inlet to the Cape Fear River, an action that was brought against multiple owners along the canal route. In a more recent case, *Redevelopment Comm'n v. Hagins*,[27] Justice Higgins, commenting on the single appraisal proceeding against multiple owners, observed that: "Reason does not appear why the condemnation proceedings covering the whole planned area may not be instituted and all interested parties served with process and all defenses heard, leaving only the question of just compensation due each respondent

which the right-of-way privilege or easement is to run, but a description of the property sought to be acquired.

[25] N.C. GEN. STAT. § 62-192 (1965) requires a map to be filed. The map must mark the route and contain a profile that shows the cuts and embankments.

This section was codified as part of article 9 of chapter 62, "Acquisition and Condemnation of Property," rather than with the separate article, article 11, on railroads. Since the other provisions concerning railroad condemnations are in article 11, it would seem that this section should be transferred to article 11.

[26] 199 N.C. 169, 154 S.E. 74 (1930).

[27] 258 N.C. 220, 128 S.E.2d 391 (1962).

to be determined in a separate inquiry."[28] Nevertheless, article 2 does not specify what the court has interpreted it to mean, and some confusion persists on this point.[29] To end such confusion, it would appear desirable to amend N.C. GEN. STAT. § 40-16 (1966) specifically to permit a single condemnation action against multiple landowners or multiple tracts when they are joined to a common plan. Thus a single action would suffice when a proposed sewer line's route runs over several adjacent pieces of property. This method of filing is currently provided for by FED. R. CIV. P. 71(a). Several North Carolina city charter condemnation procedures also permit this type of filing.[30]

If the clerk finds that the petition is properly filed, he issues the summons, and all parties whose interests might be affected by the proceedings are served with the summons and a copy of the petition. The summons is a special-proceeding summons that requires the adverse parties to answer the petition within ten days after service.[31] If necessary, provision is made for appointment of a guardian *ad litem*,[32] the appointment of an agent,[33] or service by publication.[34]

One required allegation of the condemnor's petition merits additional comment.[35] It is the statement that the petitioner has been unable to acquire title to the property sought. This condition is in fact the *raison d'etre* of the procedure; article 2 is basically a

[28] Redevelopment Comm'n v. Hagins, 258 N.C. 220, 225, 128 S.E.2d 394-95 (1962).

[29] See Ward who notes at page 2 the confusion on this point. This paper contains an excellent summary of the article 2 procedure and recommends numerous improvements in the condemnation procedure.

[30] In conjunction with this amendment, N.C. GEN. STAT. 40-16 (1966) should be amended further to permit one appraisal in a proceeding against a single tract of land that crosses county boundaries. There is little merit in requiring two condemnation proceedings in such a situation.

[31] See N.C. GEN. STAT. § 40-13 (1966); N.C. GEN. STAT. § 1-394 (Supp. 1965); and N.C. GEN. STAT. § 1-395 (1953). As the Court noted in Carolina & N.W. Ry. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903), the special proceeding of condemnation begins with the issuance of summons.

[32] N.C. GEN. STAT. § 40-22 (1966).

[33] *Ibid.*

[34] N.C. GEN. STAT. § 40-14 (1966).

[35] For obvious reasons, landowners are not required to make this allegation. Nevertheless, the point was litigated in Hill v. Glendon & Gulf Mining & Mfg. Co., 113 N.C. 259, 18 S.E. 171 (1893). The Court held that it was unnecessary for a landowner to state that the petitioner and condemnor had failed to come to an agreement of terms. See also Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906).

procedure for parties who cannot agree[36]—except for condemnations in the nature of a suit to quiet title.[37]

In recent years, however, the trend has been away from this jurisdictional requirement, as evidenced by the several new municipal charters that have specifically deleted the necessity of making this allegation. The 1959 charter of Greensboro[38] and a 1959 eminent domain amendment to the High Point charter[39] are cases in point. The omission raises the question of the requirement's desirability in a general law procedure.

The reasons why these municipalities preferred to omit the requirement are fairly obvious. First, the city attorneys for the two cities, who probably drafted the charter for introduction into the General Assembly, are the ones that must bear the burden before the clerk of the court. Understandably they prefer to reduce the jurisdictional requirements and to simplify the petition. Second, the cities see the change as eliminating a useless step in those cases when they know the landowner will not sell for what they will offer. Third, deletion of the allegation eliminates the condemnor's burden of proving it.

The first reason suggested for why cities are beginning to delete the "unable-to-acquire" requirement—that it makes their jurisdiction burden easier—undoubtedly is a result of its deletion, and the second reason has merit; in some situations making an offer will be a futile exercise. The third reason also is a result of the deletion, but its significance is questionable. The problem of alleging and proving a bona fide or good-faith attempt to purchase is not, upon examination, the difficulty that it might appear to be. The court, in *Red Springs City Bd. of Educ. v. McMillan*,[40] addressing itself to the problem

[36] The first section of article 2, N.C. GEN. STAT. § 40-11 (1966), is entitled "Proceedings when parties cannot agree." The section states that only if the parties authorized by article 1 of chapter 40 are unable to agree on the purchase of any real estate have they the right to acquire title by condemnation.

The North Carolina Supreme Court has held this requirement is also incumbent upon condemnors whose authority is granted elsewhere but who are required to use the article 2 procedure. See City of Winston-Salem v. Ashby, 194 N.C. 388, 139 S.E. 764 (1927).

[37] Sometimes parties, insofar as they are known, agree on the condemnation and the compensation to be paid and use this procedure in order to clarify title. Proceedings of this nature are most often used when some owners cannot be located.

[38] See N.C. Sess. Laws 1959, ch. 1137, § 6.101.

[39] See N.C. Sess. Laws 1959, ch. 1052. This act amended the 1931 charter of High Point.

[40] 250 N.C. 485, 108 S.E.2d 895 (1959).

of proving an attempt to purchase, held that the statement of the owner that he would not sell was sufficient proof of the condemnor's allegation that he has made a bona fide offer of purchase. In an earlier decision, the court also held that an attempt to negotiate for the property sought is unnecessary if the lands cannot legally be acquired.[41] In that case infants held an interest in the land and allegation of this fact was held sufficient to satisfy this element of the petition. There are few cases on the question, and none were found that sustained a respondent's answer that no attempt had been made. Thus providing proof of attempt to purchase does not appear to be an overly difficult problem.

On the other hand, a number of reasons exist for the requirement, the purpose of which is to minimize condemnation suits. The exercise of eminent domain power is an extreme measure that, being in derogation of the common law,[42] should be discouraged except when no other method of acquiring the property remains. It is also expensive, time consuming, and generally unpleasant for all parties involved. A recent memorandum evaluating the eminent domain procedure for a California county concludes that condemnation without a prior attempt to negotiate has the following effects: (1) it causes resentment and hostility on the part of the property owner; (2) it results in bad publicity for the condemnor; and (3) it constitutes a waste of (public) funds and manpower.[43]

Most of these results occur in every condemnation; they are compelling reasons for minimizing eminent domain suits and for retaining any device that will serve this end. One such device that can be suggested is that condemnors make a clearer distinction between the decision to acquire property by means other than eminent domain and the decision to condemn that property. If it cannot be purchased, the basic decision to acquire usually should be reviewed with cognizance of the increased costs and burdens that are attendant with condemnation.

Furthermore some question exists whether the requirement of an attempt to purchase is responsible for less litigation. Few, if any,

[41] Western Carolina Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926).

[42] See Johnson City So. Ry. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1909).

[43] Moore, Memorandum on the Exercise of the Power of Eminent Domain, Sept. 1965 (unpublished memorandum in Institute of Government Library, University of North Carolina at Chapel Hill).

petitioners are dismissed on this basis, and in the few cases in which the issue has been raised on appeal, the proof required of the condemnor has been minimal. No case was discovered that sustained a challenge to the petition on this basis, but perhaps the fact that the proceeding has reached an appellate state is prima facie evidence of the parties' inability to come to terms.

After the petition has been filed with the superior court, any person whose estates or interests may be affected by the condemnation has ten days in which to file an answer. Usually, the answer is in the form of a general denial that does not actually contest the petitioner's right to condemn.[44] At times, however, the answer will deny specific facts alleged within the petition and attempt to show why the prayer of the petition should not be granted.[45] In such a case a hearing must be held on the challenge.

The procedure of condemnation is a procedure *in rem,* or one that is brought against the property rather than against its owner. There are only two constitutional limitations on the exercise of eminent domain: the taking must be for a public use, and just compensation must be paid for the taking.[46] The considerations involved in determining just compensation are those of the valuation of property; they are considered later.[47] The part of the procedure relevant to the clerk's hearing on the petition is the

[44] According to one commentator on the procedure, it is "customary for answers to be filed in which all, or a part, of a petitioner's allegations are denied even though petitioner's prayer is not really contested and although the respondents do not plan a contest of petitioner's right to condemn." The reason given for this denial is the fear among some attorneys that some right of the landowner will be otherwise lost. Ward 3. The statute would be improved by an amendment to N.C. GEN. STAT. § 40-16 (1966) providing that if respondent does not contest petitioner's right to condemn, filing an answer is unnecessary and instead a notice of appearance may be filed. Federal condemnation proceedings are handled in this manner. See FED. R. CIV. P. 71A(e).

[45] N.C. GEN. STAT. § 40-16 (1966).

[46] Both the state and federal constitutions limit the use of eminent domain in this way. The due process clause of U.S. CONST. amends. V, XIV and the law of the land clause of N.C. CONST. Art. I, § 17 have been held to require that private property be taken under the power of eminent domain only for a public purpose and only upon the payment of just compensation. See Fallbrook Irrigation. Dist. v. Bradley, 164 U.S. 112, 158 (1896) (public purpose). See also West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 671 (1935) (just compensation); and Henrick v. Graham, 245 N.C. 249, 255-56, 96 S.E.2d 129 (1957), in which Justice Parker stated that "Eminent Domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation."

[47] See notes 85-147 *infra* and accompanying text.

legality of the condemnation; it is a consideration of the constitutional requirement that the condemnation be for a public purpose.

N.C. GEN. STAT. § 40-16 (1966) requires the clerk to hear the proofs and allegations of the parties that relate to the petition and, in the absence of sufficient cause against granting the prayer of the petitioner, to order the appointment of three disinterested and competent freeholders as commissioners to appraise the property subject to the condemnation. The hearing is usually informal, and the standard general denial of the respondent is seldom pursued. There are times, however, when the respondent will truly contest the allegations in the petition. In such cases the clerk must conduct a hearing on the issue and then rule upon the challenge.[48] The North Carolina Supreme Court, in interpreting and applying this aspect of the article 2 procedure in *Abernathy v. South & W. Ry.*,[49] a suit brought by a condemnee to recover damages suffered as a result of a railroad appropriation, held that "While in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil docket for trial, in condemnation proceedings the questions of law and fact are passed upon by the clerk."[50] The Court then noted that if either party contemplates an appeal on the clerk's ruling, he may formally except to the clerk's ruling and appeal the suit to the superior court at the completion of the appraisal procedure.

The statement of the *Abernathy* case on the question of appeal from the proceedings before the clerk represents a confused area of the eminent domain law. N.C. GEN. STAT. § 40-16 (1966) says that *"if no sufficient cause is shown* against granting the prayer of the petition" (emphasis added) the court shall appoint the commissioners of appraisal. The only logical interpretation to be drawn from this language is that if "sufficient cause" is shown, the commissioners should not be appointed and the petition should be dismissed. The court, in *Abernathy*, speaking on the right to appeal

[48] In a condemnation suit neither party has a right to have this issue tried by a jury. The clerk hears and decides the issue. Only the question of the amount of damages is an issue for the jury. See Madison County Ry. v. Gahagan, 161 N.C. 191, 76 S.E. 696 (1912).

[49] 150 N.C. 97, 63 S.E. 180 (1908). The *Abernathy* case is in line with a number of cases forbidding appeal except on the failure of the petitioner to substantiate his jurisdictional allegations. Probably the first case so to hold was American Union Tel. Co. v. Wilmington C. & A. R.R., 83 N.C. 420 (1880). See also State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930).

[50] Abernathy v. South & W. Ry., 150 N.C. 97, 103, 63 S.E. 180, 183 (1908).

from the clerk's order, said: "[N]o appeal lies until the final report of the commissioners comes in, when upon exceptions filed, the entire record is sent to the Superior Court, where all of the exceptions are passed upon and questions may be then presented for the first time."[51] Although the court in *Abernathy* considered a ruling by the clerk against the petitioner on a jurisdictional burden (in this case the inability of the petitioner-landowner to prove ownership of the property) to be a basis for dismissing the case, the court's language has been interpreted by later courts as a prohibition against any action that would result in appeal prior to the report of the commissioners. Thus a literal interpretation of the statement in the *Abernathy* case has sometimes resulted in requiring the clerk to proceed with the appointment of commissioners and the completion of the process of appraisal before a party may appeal.[52]

A case in point is *Town of Selma v. Nobles*.[53] The court held that even though the superior court clerk thought the respondent's challenge to the petition was meritorious, he erred when he certified it to the superior court before proceeding with the appraisal:

> [N]otwithstanding the appearance of issuable matters in the pleadings, it is the duty of the clerk, in the first instance, to pass upon all disputed questions presented in the record, and [to] go on to the assessment of the damages through commissioners duly appointed, and allowing the parties, by exceptions, to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law.[54]

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[51] *Id.* at 103, 63 S.E. at 183.

[52] If the clerk, upon finding sufficient cause, dismisses the petitioner, the General Statutes provide for an appeal to the superior court from the dismissal. See N.C. GEN. STAT. § 1-272 (1953).

[53] 183 N.C. 322, 111 S.E. 543 (1922).

[54] *Id.* at 325, 111 S.E. at 544. Although the court in the *Selma* case held that the clerk should have completed the assessment process before permitting appeal, it accepted jurisdiction and rendered an opinion on the superior court decision. In so doing, it noted that the lower court judge was "well within his legal discretion in directing that this vital question should be predetermined by the jury." *Id.* at 327, 111 S.E. at 545. It is submitted that the court need not have upheld the jurisdiction of the lower court. The statute that governs, N.C. GEN. STAT. § 1-276 (1953) states:

> Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered

According to *Selma,* preliminary questions are to be decided by the clerk;[55] regardless of how he rules, appeal is not available to either party until the commissioners have been appointed and their report completed. The court then noted that the rights of the parties "may in the meantime be protected from interference by injunction issued by the judge."[56]

Another case in line with the *Selma* decision is *Holly Shelter R.R. v. Newton.*[57] The landowner defendant had appealed a condemnation challenging the validity of the petitioner's charter as a public railroad. The appeal had been taken to the superior court judge before the appointment of commissioners and their report. The supreme court, in remanding the case for completion of the appraisal process, strongly rejected the right to interlocutory appeal even though it conceded that the proposed use of the track appeared untenable for a public railroad and the petition raised "a strong doubt as to the bona fides of the charter."[58] Despite these jurisdictional deficiencies, continued the court, a question of the legitimate business or proper use of the land condemned cannot be raised collaterally—i.e., cannot be raised in a suit to condemn the property—but "is an issue of fact for a jury in a direct proceeding to attack the charter for fraud."[59]

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by sending the action back to be proceeded in before the clerk, in which case he may do so.

The court could have found that not only did the clerk err in certifying the landowner's objection as an issue to the superior court on the basis that the appeal was premature, but also the superior court judge erred in accepting an appeal because justice would be more cheaply and speedily administered if the clerk completed the appraisal process. Implicit in the supreme court decision is recognition that justice is best served by completing the appraisal before the clerk, but apparently the court was unwilling to find that the superior court judge had exceeded the bounds of his discretion. That he had, however, is the only conclusion to be drawn from the court's decision that the clerk should not have certified the issue to the superior court.

[55] See also Madison County Ry. v. Gahagan, 161 N.C. 191, 76 S.E. 696 (1912); Johnson City So. Ry. v. Southern & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

[56] Town of Selma v. Nobles, 183 N.C. 322, 326, 111 S.E. 543, 545 (1922).

[57] 133 N.C. 132, 45 S.E. 549 (1903).

[58] *Id.* at 135, 45 S.E. at 551.

[59] *Id.* at 135, 45 S.E. at 551. The Holly Shelter Railroad Company was indeed probably a fraud. Its charter, which had been properly granted, was to operate a five-mile track to run from a river to a creek. The landowner alleged that the real object of the condemnor was to operate a lumber road, not a railroad to convey freight and passengers. Nevertheless, the court would not consider the question of fraud and said that it could not be maintained in a condemnation proceeding unless the charter was void and

At least one case ruled to the contrary on the issue of the petitioner establishing the jurisdictional burdens of his petition as set forth in N.C. GEN. STAT. § 40-12 (1966). In *Johnson City So. Ry. v. South & W.R.R.*,[60] the court held, in an attempted condemnation of property belonging to one railroad by another railroad,[61] that the petition must comply with all the requirements of N.C. GEN. STAT. § 40-12 (1966); if any of its allegations are contested and then found by the clerk to be insufficient with the statutory requirement, the right to exercise the power of eminent domain is not established. In this case the clerk, despite the condemnee's denial of the petitioner's right to condemn its property, appointed commissioners, who appraised the property and allowed the condemnor to take possession of the land.[62] The superior court reversed the clerk, and this reversal was affirmed by the supreme court, which held that the burden was upon the petitioner and that in the absence of sufficient proof he should have been nonsuited. From the nonsuit an appeal could have been taken.[63]

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inoperative on its face. *Accord,* Kinston & Carolina R.R. v. Stroud, 132 N.C. 413, 43 S.E. 913 (1903); Wellington & Powellsville R.R. v. Cashie & Chowan R.R., 114 N.C. 690, 18 S.E. 971 (1894).

[60] 148 N.C. 59, 61 S.E. 683 (1908).

[61] The eminent domain procedure has been and continues to be greatly influenced by the needs and demands of the railroad during its expansion period in the late nineteenth century. As noted earlier, the article 2 procedure was enacted for the railroads and was interpreted by the courts to satisfy railroad needs. In fact, most of the precedent for the article 2 procedure dates to the railroad expansion period, when few things received higher priority. The railroad also enjoyed the advantage of coming into court with a law enacted for it and with experienced and able counsel that was usually not available to the average landowner.

It is particularly interesting that the *Johnson City* case was the only North Carolina case discovered that permitted an interlocutory appeal from the article 2 procedure, and the appeal taken was by a railroad condemnee.

[62] An interesting point is that an interlocutory appeal was permitted on the clerk's granting, prior to the appointment of commissioners of appraisal, of the condemnor motion to take immediate possession. The condemnee railroad objected and, on appeal to the superior court, the clerk's ruling was reversed. In the meantime, the commissioners had been appointed and the appraised process completed. The condemnor then paid into court the sum arrived at by the commissioners and retained possession of the condemnee's property.

[63] In Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962), the court reversed the clerk and lower court for not requiring the petitioner to satisfy prerequisites set forth in N.C. GEN. STAT. § 160-463 (1964) before bringing a condemnation action in accordance with the article 2 eminent domain procedure of chapter 40. It would appear that the considerations involved in requiring the condemnor to establish the legitimacy of his condemnations (e.g., a properly approved redevelopment plan, a statement of estimated cost and method of finance, approval of the redevelop-

The apparent conflict between N.C. GEN. STAT. § 40-16 (1966) and some of the case law, and between the cases themselves raises the question of what reasons underlie the court's reluctance in permitting an immediate appeal. An answer is found in the nature of the condemnation suit. In these matters time is often critical, and an appeal of "interlocutory" matters could tie a suit up for months if not years. Under the present court system, appeals from special proceedings to the superior court sometimes take over a year.[64] If several issues developed and were raised at different times, the result could be a litigation of years. The court spoke to this point in the *Holly Shelter* case, in which it held that the clerk should not have permitted an interlocutory appeal. The court stated: "If interlocutory appeals were allowable in such cases, they could be repeated again and again, on diverse pretexts, and great delays to the detriment of the public interest would hamper and impede and render almost impossible the construction [planned]."[65]

Thus to avoid delay that might render the condemnation purposeless by the time the land is acquired, interlocutory appeal is forbidden until the proceeding before the clerk is completed. As some of the cases just noted indicate, this policy has been applied even to those situations that questioned whether the condemnor had satisfied the statutory requirement of his petition as set out in N.C. GEN. STAT. § 40-12 (1966).

The reason for permitting immediate appeal is actually tied to or a consequence of implementing the intent of the "sufficient cause" requirement of N.C. GEN. STAT. § 40-16 (1966), which is that if the petitioner cannot show sufficient cause for the condemnation, he should be nonsuited by the clerk, from which nonsuit an immediate appeal to the superior court should be permitted. The purpose of proceeding in this manner is to make the petitioner establish the legitimacy of his suit before investing the time and expense required in completing the appraisal process. This policy of a clear justification of the condemnation is basic to the entire concept of eminent domain, and statements to that effect permeate the North Carolina

ment plan by the governing body of the community in which the redevelopment project area is located, etc.) are the same as those involved in requiring the condemnor to satisfy the jurisdictional burdens set out in G.S. § 40-12.

[64] See Ward nn. 22 & 23.

[65] Holly Shelter R.R. v. Newton, 133 N.C. 132, 133, 45 S.E. 549, 551 (1903).

statutory and case law. Condemnation of private property is an act fraught with serious consequences and should be allowed only when clearly necessary. The problem is, therefore, to establish a policy of law that discourages easy resort to the condemnation process yet does not delay unnecessarily a legal and proper condemnation. It is the problem of reconciling the needs (1) to assure speed in the condemnation by not allowing premature appeal, and (2) to weed out unwarranted and illegal condemnations at the earliest point in the condemnation procedure. The problem is reconcilable; the cases just reviewed appear not to be.

To find a proper solution to the problem requires examining what is at issue in a condemnation suit. Once the condemnee accepts the right of the condemnor to take his land, the sole issue in an eminent domain case is the amount of compensation. In this situation the objective of both parties is to arrive at a figure that will be considered "just compensation"—the condemnor attempting to obtain the lowest valuation possible and the condemnee the highest. Such factors as intended use of the property, incidental damages, and business profits are raised by the parties in order to maximize or minimize the final figure. Even procedural matters such as proper notice and service of process are often raised for the purpose of increasing or decreasing the valuation. Thus most questions, though they may not appear to affect the amount of the appraisal, should be viewed as part of the one issue at stake—how much should the landowner receive for his property. On such matters neither party should be permitted to appeal until the appraisal process is completed. Since the right to condemn is not in issue, early appeal will only delay the ultimate finding and can serve little beneficial purpose.

One group of challenges that the landowner-condemnee may raise, however, should not be considered a part of the just compensation issue. This type of challenge can be divided into two groups. The first concerns the petitioner's statutory burden as set out in N.C. GEN. STAT. § 40-12 (1966)—that is, it questions whether the allegations of the petition are in order. These allegations should be viewed as the jurisdictional burden that the petitioner must satisfy before he can maintain his suit of condemnation. The allegations that the condemnor is a public body that has been granted statutory authority to condemn the described property for purposes alleged is one example. If the defendant disputes any such allegations of the petition, the clerk should, after a hearing, decide whether the pe-

titioner's allegation is true. If the clerk rules against the condemnor on such a jurisdictional issue, the petition should be dismissed. At this point the petitioner should be permitted either to correct the deficiency and resubmit the petition or to appeal the ruling of the clerk to the superior court. The supreme court described this method of handling jurisdictional issues in *Johnson City So. Ry. v. South & W.R.R.*[66] (an exception to most of the case law) as follows:

> When these essential averments are made and denied, how shall the court (the Clerk) proceed? It is manifest that the pleadings, in this condition, do not raise "issues of fact," requiring the cause to be transferred to the civil issue docket. . . . These preliminary questions are to be decided by the Clerk. If he finds against the petitioner upon them, he dismisses the proceedings, and, if so advised, the petitioner excepts and appeals to the Judge, who hears and decides the appeal. If the Judge affirms the Clerk, an appeal lies to this Court from his conclusions of law. If the Clerk decides the preliminary questions against the defendant, he notes exceptions and makes an order for the appointment of the jury to view the premises and assess the benefits and damages. Upon the coming in of the report, if either party so desires, he may file exceptions to the report . . . and from the judgment rendered thereon appeal to the Superior Court. The appeal takes the entire record up for review.[67]

The justification for this procedure is simply that the policy of the statute is a desirable one, and thus the language of the statute should be interpreted to require full compliance with the burdens it establishes. Notwithstanding the court's language in the *Selma* case,[68] the appraisal process should not be continued when the clerk rules that the petitioner has failed to meet his jurisdictional burdens.

The second type of issue that refutes the condemnor's right to condemn is that which charges that the condemnor has abused his discretion or has acted arbitrarily, capriciously, fraudulently, or in bad faith. In each of these allegations the landowner is asserting that the appraisal process of article 2 is inoperative because condemnation in this specific case would constitute such an abuse of authority that the court will not permit it. When this type of charge is made, the policy suggested above for jurisdictional issues should be followed—i.e., if the clerk rules in favor of the condemnee, the con-

[66] 148 N.C. 59, 61 S.E. 683 (1908).
[67] *Id.* at 64, 61 S.E. at 685.
[68] Town of Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

demnation should be dismissed. From this dismissal the petitioner can amend his petition so that the objection sustained by the clerk is overcome, or he can appeal the clerk's decision to the superior court. Authorization for the clerk to dismiss may require statutory amendment in light of the case law reviewed.[69]

One might think that this policy—one that allows an appeal from an "abuse of discretion" *when the ruling is against the petitioner*—would produce a plethora of appeals before the appraisal process is completed. An examination of the case law, however, reveals that this type of defense is seldom upheld. When the condemnee has challenged the route selected for a street or highway, the site specified for a public building, or the area chosen for a state park as an arbitrary or capricious action, the issue is basically the exercise of discretion by the condemnor.[70] The challenge is not so much a denial of the condemnor's authority to condemn property as an objection to the manner, time, or place that he has chosen to condemn the landowner's property. The clerks on the hearings and the courts on appeal have been almost unanimous in rejecting such challenges.[71]

Although objections to the condemnor's discretion are seldom allowed by either the clerk or the court on appeal, flagrant abuse of discretion, if proved by the landowner, has resulted in a disallowance of the condemnation. The North Carolina Supreme Court stated the rule and its exception in *Town of Selma v. Nobles:*[72]

> [W]here the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion

[69] If the clerk finds bad faith on the part of the condemnor, his first instinct is to dismiss the procedure. However, no article 2 cases were found that resulted in a nonsuit to the petitioner on this basis, and most of the case law tells him to complete the appraisal process before permitting an appeal. He is thus in something of a dilemma under the present law.

The only North Carolina case found in which an allegation of bad faith was sustained is *In re* Housing Authority, 235 N.C. 463, 70 S.E.2d 500 (1952), a condemnation under article 2. In this case the clerk had ruled that the Housing Authority had acted in good faith and that the condemnation was permissible. It was on appeal from this ruling that the allegation of arbitrary and capricious action was sustained.

[70] As the court noted in *In re* Housing Authority, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952), "'Arbitrary' and 'capricious' in many respects are synonymous terms. When applied to discretionary acts, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith."

[71] See, *e.g.*, Pue v. Commissioner, 222 N.C. 310, 22 S.E.2d 896 (1942); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

[72] 183 N.C. 322, 111 S.E. 543 (1922).

> of the company or corporation, and does not become the subject of judicial inquiry [which includes inquiry by the clerk] except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of discretion conferred upon them by the law.[73]

An example of when the exception to the general policy against early appeal should be made is the case in which the condemnor is attempting to take property that cannot possibly qualify for the purpose for which his authority was given.[74] When the condemnee makes this type of defense, however, he has the burden of proving his allegation to the clerk. As the court stated in *In re Housing Authority*[75] (a case under the article 3 procedure in which the landowners, Livingston College, alleged abuse of discretion when the Authority sought to take school property for a housing project), the allegation of abuse of discretion carries the necessity of proof by a preponderance or greater weight of the evidence.[76] The court then found that the condemnee had met this burden and sustained the lower court's dismissal of the proceeding.[77]

Thus allegations of bad faith[78] or abuse of discretion carry a heavy burden and are sustained only in rare cases. It is this rare

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[73] *Id.* at 325, 111 S.E. at 544. See also Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912); OPS. N.C. ATT'Y GEN. (Nov. 30, 1959).

[74] See, *e.g.*, Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

[75] 235 N.C. 463, 470, 70 S.E.2d 500, 505 (1952).

[76] *But see* Carolina & N.W. Ry. v. Pennearden Lumber & Mfg., 132 N.C. 644, 44 S.E. 358 (1903), which held that the burden of proving good faith to construct the railroad was on the petitioner. This aspect of good faith is different from that raised over the selection of a route and should be viewed as part of the condemnor's original burden. As in the *Housing Authority* case, there was a substantial question of the condemnor's purpose.

[77] The unusual aspect of this case was that the clerk ruled in favor of the petitioner, and the landowner was then permitted to appeal. Although the situation appears to fall clearly within the general rule against appeals, there is basis for an interlocutory appeal in the article 3 procedure. See N.C. GEN. STAT. § 40-50 (1966). However, under the article 2 procedure, this type of appeal should not be permitted. The only situation in which an appeal on an issue of bad faith should be permitted is when the clerk finds in favor of the defendant. Otherwise, the proceeding of appraisal should be completed on the assumption that the suit was properly brought. See also, *In re* Housing Authority, 233 N.C. 649, 65 S.E.2d 761 (1951).

[78] Bad faith has been distinguished from bad judgment and abuse of discretion. In United States v. Southerly Portion of Bodie Island, North Carolina, 114 F. Supp. 427, 430 (E.D.N.C. 1953), the federal court held in its application of state law that an allegation of bad faith requires the landowner to introduce facts that "suggest actual malevolence."

case, however, that should result in dismissal; if any appeal is taken, it should be taken from this point.

N.C. GEN. STAT. § 40-16 (1966) requires the clerk to order the appointment of three disinterested and competent freeholders to serve as commissioners of appraisal "if no sufficient cause is shown" against granting this request of the petitioner. The clerk makes his selection from residents of the county wherein the premises lie and then sets the time and place for the first meeting. Once selected, the commissioners subscribe to an oath that they will impartially and fairly appraise the lands specified in the petition. At this point the appraisal process begins.

The appointment procedure just described is not without difficulties. The first problem area concerns a practice followed by some superior court clerks of permitting "each of the parties to name one commissioner and for the clerk to name the third commissioner."[79] This practice is neither legal nor desirable. Although it might be contended that the statute stating that the clerk shall "make an order for the appointment of three disinterested and competent freeholders"[80] to serve as appraisers does not specifically prevent the clerk from choosing candidates recommended by the parties, there is little evidence that this was the intent of the legislature or that a desirable policy is served by the practice. If the legislature wanted each party to nominate an appraiser, it would have stated so in the statute. In several earlier legislative acts in which such a method of appointment was desired, this procedure was specified.

The selection of appraisers by the parties involved dates back to 1777 in the condemnation procedure provided for mills.[81] This method of appointment makes the selection of "disinterested" appraisers almost impossible. When each party designates a commissioner, an appraiser favorable to the individual's case is the one most likely to be selected, if for no other reason than to protect the

[79] Ward at 13.

[80] N.C. GEN. STAT. § 40-16 (1966).

[81] Several municipal charters still provide for a similar type of selection. See, *e.g.*, N.C. Sess. Laws 1959, ch. 1137, § 6.103 (Greensboro), under which the city and the condemnee each select one appraiser. The appraisers then select a third. Another modification of this form of selection is found in the Raleigh charter. N.C. Sess. Laws 1949, ch. 1184, § 104, provides for the city and the property owner each to select an appraiser. If the two cannot agree on a valuation, *then* they select a third appraiser who can vote with one of the other two. Quaere, what happens if he should disagree with both of the original appraisers on the valuation?

party from the possibility—even likelihood—of the selection of a partisan appraiser by the other party. The usual result in counties where this practice has been followed is a board consisting of two appraisers—one representing the interests of the condemnee, and one the interests of the condemnor—while the clerk's appointee serves as an arbitrator between the two. Thus when the clerk allows the parties to nominate appraisers, both the desirability and legislative intent of having disinterested appraisers are nullified.

This practice should be abolished where it is practiced. The clerk should make a preliminary investigation of the persons he thinks best qualified to serve as commissioners before he selects them. During the selection process, consideration should be given to appointing an attorney, or someone who has had experience with the appraisal process, as chairman of the board. An arrangement similar to the Federal Rules provision or the article 3 procedure of chapter 40 for the appointment of a "master," an expert in condemnation procedures, to conduct eminent domain proceedings might be the most desirable arrangement.[82] If this is not done, the clerk should preside himself. Nothing in the statute prohibits the clerk from presiding over the deliberations of the three commissioners, and if the present appraisal system is kept, it might be desirable to require the clerk to preside.

Two other problems exist in the selection of commissioners. The first is that the commissioner's oath set out in N.C. GEN. STAT. § 40-17 (1966) requires them to fairly appraise the "lands" described in the petition. This wording is unfortunate since condemnation can be brought for many objects other than land;[83] it should be amended to read "property." Second, N.C. GEN. STAT. § 40-16 (1966) requires the clerk to appoint the commissioners from "freeholders who reside in the county." The problem with this charge is that it limits the clerk's selection in situations when single tracts of land sought in the condemnation may cross county lines.[84] The restriction may also eliminate from consideration a candidate who is better qualified to appraise the property than any person residing in the county where the land is located. This requisite might therefore

[82] See FED. R. CIV. P. 71A(h).
[83] N.C. GEN. STAT. § 40-25 (1966).
[84] See discussion of condemning multiple tracts at note 26 *supra* and accompanying text.

be deleted and the wording of N.C. GEN. STAT. § 40-12 (1966) clarified specifically to permit the condemnation of any single tract of land in the superior court of any county in which any portion of it lies.

After the commissioners have been appointed and sworn in, they are ready to proceed with the appraisal of the property. If the clerk thinks it necessary, he may instruct the board as to its duties and make any orders he deems necessary for it to "carry into effect the object and intent of this chapter."[85] Although the statute does not require it, the clerk should review with the commissioners the basic condemnation concepts involved in condemnation valuation, particularly those relevant to the property they are to appraise and the evidentiary rules that apply to the admission of testimony. This review is particularly important if the clerk does not expect to be present when the appraisers conduct their hearing.

These suggestions point up the major shortcoming of the article 2 procedure: there is no uniformity of procedure from county to county in the initial appraisal process before the clerk. Because the article does not specify how the commissioners should proceed with their appraisal, custom and practice vary from clerk to clerk.[86] The absence of more explicit statutory direction also has meant that clerks have done less rather than more to assist the commissioners and to insure that only proper evidence is permitted to be introduced. Consequently, an aura of uncertainty hangs over the proceedings at the initial stage. Legal formalities are usually not observed, and the result is that usually the appraisal process is conducted in an informal manner incompatible with the judicial framework in which it is placed.[87] All of these shortcomings in the proceedings before the clerk could be remedied if a uniform set of procedural rules were adopted for the appraisal process by the commissioners. Such corrective action would not only introduce order and uniformity to the initial procedure, but also produce more equitable and respected

[85] N.C. GEN. STAT. § 40-25 (1966).

[86] One former city attorney reports that the basic problem with the article 2 procedure is that it leaves too much discretion with the clerk. He considers this to be the reason for the considerable variation of the procedure from county to county.

[87] Some clerks do not even require that the commissioners conduct formal hearings. Consequently, parties are unable to introduce evidence they consider relevant or cross-examine individuals offering opinions as to value.

appraisals that should result in less frequent appeal to the superior court, an almost automatic step in condemnations today.[88]

Instructed or not, the commissioners are required by statute to view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony taken to writing. To do this they may meet as often as they think necessary, but before each meeting both parties must be given ten days' notice. The board also has the power to issue subpoenas and administer oaths to witnesses.[89]

During these proceedings the landowner carries the burden of establishing the damages to his property.[90] Likewise, the condemnor carries the burden of proving any offsetting benefits when he alleges special or general improvements to a remaining portion of the landowner's property.[91] The procedure in general must "conform as near as may be to the ordinary practice in such courts."[92] When a majority of the commissioners arrive at a figure they consider to represent just compensation, they report it to the clerk. Their report must be made within ten days and conform in substance to the statutory format set out in N.C. GEN. STAT. § 40-18 (1966).

The statute requires the report to contain assessments of both the damages to the landowner and any offsetting special benefits

[88] It is not necessary that the adoption of a uniform set of procedures be done through new legislation. N.C. GEN. STAT. § 40-25 (1966) gives the clerks before whom eminent domain procedures are brought the power to adopt such procedures. It states: "In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter. . . ."

On the basis of this statute and its liberal interpretation by the court in Abernathy v. South & W. Ry., 150 N.C. 97, 63 S.E. 180 (1908), the clerks of the superior court could informally agree upon a uniform set of procedures. It is noted that "court," according to N.C. GEN. STAT. § 1-7 (1953) means "clerk." Thus any action along the line suggested must be done by them.

[89] N.C. GEN. STAT. § 40-17 (1966). One clerk reports that neither the power to issue subpoenas nor the power to administer oaths to witnesses is used by commissioners. It is also rare that the testimony taken by the appraisers is reduced to writing.

[90] See City of Statesville v. Anderson, 245 N.C. 208, 212, 95 S.E.2d 591, 594 (1956).

[91] See Kirkman v. State Highway Comm'n, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962), in which the court held that these benefits must not be conjectural, contingent, or remote and must be proved in detail.

[92] N.C. GEN. STAT. § 40-25 (1966).

resulting from the proposed use of the property.[93] These assessments are the end product of the valuation process of the property. Unlike other areas of law,[94] there are no statutory criteria of value to guide commissioners who make the appraisal nor rules of evidence as to what type of evidence the trier of fact should be permitted to consider and the weight to be given to it when he "values" the property.[95]

Although the issue of admissible evidence goes to the heart of the condemnation procedure, a complete examination of the types of evidence that can and cannot be introduced during the appraisal process is beyond the scope of this work. The law of eminent domain applies to every conceivable type of property—intangibles, tangible personalty, and realty—and multi-volume treaties deal with the

[93] N.C. GEN. STAT. § 40-18 (1966) sets forth the form of the commissioners' report. It provides for a setting-off of the "special benefits which the said owner will receive from the construction" of the planned work.

"Special benefits" are benefits that accrue only to the condemnee and not to surrounding property owners. They are distinguished from general benefits, which are benefits common to all neighboring property owners, and therefore are usually not deducted from the condemnation award. See Stamey v. Town of Burnsville, 189 N.C. 39, 126 S.E. 103 (1925).

The legislature, however, can require a setting-off for both special and general benefits. For example, N.C. GEN. STAT. § 136-112 (1964) provides that in all instances when a portion of a tract of land is condemned for highway purposes, the general and special benefits shall be assessed as offsets against damages. This statute was discussed and applied in Templeton v. State Highway Comm'n., 254 N.C. 337, 118 S.E.2d 918 (1961). See also Elks v. Commissioners, 179 N.C. 241, 102 S.E. 414 (1920), which goes so far as to state the general rule to be the reduction of damages by all the benefits accruing to the landowner, whether special or general, when the condemnation is one of a "purely public nature." *Id.* at 245, 102 S.E. at 416.

[94] In the area of taxation, for example, N.C. GEN. STAT. § 105-295 states that in appraising real property the county tax assessor shall "consider as to each tract, parcel or lot separately listed at least its advantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value."

No such guide is given for similar valuations in eminent domain proceedings.

[95] It is also to be noted that neither the federal nor the state constitution stipulates that the measure of compensation shall be the "value of the property." The North Carolina General Statutes, in implementing the constitutional guarantee of just compensation, have required the commissioners to "appraise the lands" and to "assess the damages" but not to "value" the property. This statutory language has generally been interpreted to mean "value of the property," but the definition is judicial, not statutory. See State v. Suncrest Lumber Co., 199 N.C. 199, 154 S.E. 72 (1930). See also 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 11 (2d ed. 1953) [hereinafter cited as ORGEL].

subject of valuation alone. However, some problems in the area of real property deserve special consideration since real estate condemnation constitutes the large majority of eminent domain suits.

The valuation process employed to determine the just compensation of real property can be divided into two categories—that concerned with making an appraisal for the fee title of a single tract, and that concerned with appraising either a fee title to part of a formally contiguous tract or a property right less than the fee simple title such as an easement. The law requires the commissioners to "fairly and impartially" appraise the lands mentioned in the petition.[96] In the case of title to a single tract, this language has been interpreted to require the commissioners to determine the "fair market value" of the property at the time of the taking.[97] The fair market value is usually defined as the sum that the property would reasonably be expected to sell for in an open market.[98] To arrive at this figure, both parties usually introduce evidence purporting to show what a prospective buyer would be willing to pay at the time of the condemnation. A number of rules have developed concerning what evidence is admissible and what is not. For example, it is generally held that the valuation should be made on the basis of the most advantageous current use of the property.[99] However, evi-

[96] See N.C. GEN. STAT. § 40-17 (1966). In the next section, N.C. GEN. STAT. § 40-18 (1966), the statute requires the commissioners to "assess the damages."

[97] See De Bruhl v. State Highway Comm'n, 247 N.C. 671, 10 S.E.2d (1958). The time of the taking has been held to be the date the petition was filed. See Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927).

[98] 2 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 2371(5) (2d ed. Wilson 1956) defines market value as "the price which the land will bring on the market when offered for sale by the owner who is not obliged to sell, and is brought by one who is under no peculiar necessity to buy." See Gallimore v. State Highway Comm'n, 241 N.C. 350, 85 S.E.2d 393 (1954). But see discussion in 1 ORGEL § 85, in which a distinction is drawn between "actual market value" and "fair market value."

[99] For general discussion of the type of evidence that can be introduced to show value of the property for a particular use, see Barnes v. State Highway Comm'n, 250 N.C. 378, 109 S.E.2d 919 (1959). 4 NICHOLS, EMINENT DOMAIN § 12.3142(1), at 109 (3d ed. Sackman & Van Brunt 1950) [hereinafter cited as NICHOLS], states the general rule that is also followed in North Carolina:

> [T]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as a measure of value but to the full extent that such prospect or demand for such use affected the market value at the time respondents were deprived of their property.

dence that shows remote or speculative uses will not be allowed.[100] These rules, with several others, comprise the concept the courts use as a guide to fair market value. This is not to say that the courts apply the same rules in all cases. There are some situations when market value is either meaningless or unobtainable—for example, in appraising churches, college buildings, or clubhouses. In such cases various indices such as value to the owner[101] are used to appraise the property. In the majority of cases, however, market value is the measure of compensation applied.

A more difficult problem of valuation is encountered when only a part of a larger integral tract of property (or an interest in that property) is condemned. In these "partial-taking" cases, the formula for appraisal in North Carolina is the "before and after" rule. The condemnee is compensated for the difference in the market value of his property as it existed before the taking and as it exists after the taking (which of necessity allows for benefits accruing to him from the construction of the project for which the taking is made).[102] The key to the valuation is, as when the entire fee is con-

See also Williams v. State Highway Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

[100] See, *e.g.*, Carolina Power & Light Co. v. Clark, 243 N.C. 577, 91 S.E.2d 569 (1956).

[101] See discussion at note 116 *infra* and accompanying text.

[102] Compensation for partial takings can be computed in a variety of ways. In his treatise on valuations, Lewis Orgel lists a variety of formulas that are used by state courts. (See 1 ORGEL §§ 48-51). Without discussing them in detail, they are: (1) damages to the remainder included in the value of the part taken, (2) value of the part taken plus damages to the remainder (the majority rule), and (3) difference between the fair market value of the property before and after the taking. (Note that these yield essentially the same end results.) North Carolina uses the "before and after rule," which computes compensation as the difference between the fair market value before the taking and the fair market value after the taking. In Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 399, 137 S.E.2d 497, 504 (1964), one of the most recent cases to restate the partial-taking rule, the court said: "Just compensation, to which the landowner is entitled, is the difference between the fair market value of the property *as a whole* immediately before and immediately after the appropriation (condemnation) of a portion thereof." *Ibid.*

The court has sometimes applied the majority formula: value of the part taken plus damages to the remainder. See Stamey v. Town of Burnsville, 189 N.C. 39, 126 S.E. 103 (1925). This method of computation had not been employed by court decisions prior to the *Stamey* case (see, *e.g.*, Abernathy v. South & W. Ry., 150 N.C. 97, 63 S.E. 180 (1908)), nor has it been followed in more recent cases. Although it has been suggested that the "before and after" rule is simply another way of stating the majority rule as in *Stamey*, Orgel concludes that the North Carolina method is "theoretically more acceptable" because it avoids the artificial dichotomy of as-

demned, the market value of the property rights condemned. Note, however, that the test is not the market value of the property right or piece of property taken but the difference between the market value of the entire property before the taking and the value of the remainder after the taking.

In some cases this differential exceeds the value of the property taken. For example, if a six-foot strip of land were condemned for a telephone or telegraph line across the middle of a piece of property, the value of that strip in the market would be practically nil; in fact, it might carry a negative value since little can be done with it except to pay its taxes. The value of the remaining property, however, probably would be greatly reduced with a strip cut from the middle. The difference in market value to the property before and after the taking of the strip would be much greater than the market value of the condemned land. Thus the owner is being paid partly for a loss not connected with the value of the property condemned. This is a concept of compensation that, although keyed to market value, is quite different from the market-value concept used to appraise the loss in a complete-tract condemnation.[103]

On the other hand, often the value of the remainder is increased by the taking of a portion of the tract. This situation most often occurs when strips of land are condemned for highway construction. The benefits to the remaining property are usually far greater than the detriments, although juries rarely reach this result.[104]

Before proceeding with the step-by-step description of the condemnation procedure, it may be productive to examine in greater detail some of the considerations involved in the process of valua-

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suming that the remainder "may be separately appraised by reference to its market value before and after the taking." 1 ORGEL § 65. The danger of the majority-rule approach is that juries, unable "to apportion the value of the whole between the value of the part taken and the remainder," will often award unjustified damages.

[103] See note 98 *supra.*

[104] For example, in the highway right-of-way condemnations for the Chapel Hill-Durham highway, the value of the tracts partially taken actually exceeded by several times the "before" value of these tracts. Nevertheless, commissioners of appraisal and juries on appeal awarded substantial payments to the property owners. A recent study of the effects on adjacent and nearby property on the construction of an interstate highway in Tennessee reports that recovery rates on remainder parcels tend on the average to be relatively high. Interchange areas, it reports, show substantial and rapid increase in value. See Pipkin & Hendrix, *Some Findings on the Impact of Interstate Highways in Tennessee Severance Studies,* Tennessee Survey of Business, Oct. 1966.

tion—whether it concerns real, personal or intangible property, a single tract or only part of a tract. This process, for most eminent domain cases, is what the dispute is all about: How much must the condemnor pay for the property he takes?

Although the process of valuation may appear to be basically a simple determination of what a buyer in an open, competitive market will pay for the property, it is a system fraught with complexities. To understand the process one must first understand what is meant by value. As noted earlier, the constitutions, both state and federal, require the payment of "just compensation," which is defined as a payment in money equal to the "value" of the property condemned. Value in this context is a monetary representation of what society thinks the property is worth. And any society's concept of property value is a product of its culture. "It is culture which makes a diamond valuable and a pebble worthless."[105]

When legislatures and courts attempt to devise rules for the admission and exclusion of evidence on property value, an almost impossible hurdle is thrown up when they must adopt rules of law that will apply equally to multiple cultures, some of which are separated geographically and some of which coexist within the same geographical area, but all of which come within the same jurisdiction—in the present case, that of the State of North Carolina.[106] Since different cultures will value most, if not all, property differently[107] (often this may be an insignificant variation), the problem

[105] Reich, *The New Property*, 73 YALE L.J. 733 (1964). Professor Reich raises a question relevant to the condemnation procedure. He asks, "What is property?" and then argues that many intangible rights such as franchises, social security, and licenses to do business should be considered property rights. If they were so denominated, the power of eminent domain and the constitutionally protected right to just compensation would be extended to these types of property. Since other types of intangibles, such as good will and minority-stockholder rights, have in some cases been held to be property, it can be argued that the concept of property should be extended to cover such intangibles as franchises and licenses.

[106] While North Carolina usually does not consider itself a state with different cultures, differences do exist—most notably between Negro and white cultures—and these different cultures coexist in the same geographical area. Differences also occur among the three basic regions of the state—coastal, piedmont, and mountain—all of which have different cultures with correspondingly different values. Within each of these geographical areas, many subculture breakdowns exist. There are not only differences produced by the different races but also those created by such factors as urban or rural residence and class of society. The breakdowns are almost limitless.

[107] For example, the value of sharks' teeth is much greater to a primitive Polynesian than to the average Parisian. This type of comparison can be made at any level at which cultural differences can be identified—e.g.,

is to devise a single body of law that (1) will function in different areas of the state so as to permit culturally derived differences in judgments of value to be reflected in the condemnation awards of similar types of property, and (2) will result in closely approximate condemnation awards for similar types of property in the same geographical area.[108] This problem is compounded by the fact that cultures and subcultures are constantly changing, and with these changes the concept of property values changes.

Like many problems, this one has no perfect solution. Of the two functions that the law must serve, that of adopting a system of evidentiary rules that will enable appraisers from different cultural backgrounds (appraising in the same area) to produce equal valuations is the most difficult. The extreme situation in North Carolina would be represented by boards of appraisal composed in one suit of urban, professional, white commissioners and in another of rural, illiterate Negro commissioners. It is doubtful that legal guidelines can be devised that are adequate or sufficiently flexible to accommodate to the differences posed by these two sets of appraisers. The subjective evaluations—sometimes called the determinations of fact—that are an integral part of all property valuations are operating at polar extremes in this example. Recognizing the problem and allowing for sufficient flexibility in the procedure in order that the presiding judge may minimize those subjective judgments of appraisers that tend to distort valuations in one geographical area, while permitting such judgments to be operative when they reflect differences of an area, is probably the best approach to this problem.

With this recognition of the subjective and ever changing nature of the concept of value, the question may be asked whether market value of the property at the time of condemnation—the basic standard for real property appraisals in North Carolina—is the best standard. Are alternative standards available that could be used

occidental and oriental, English and American, and even North Carolina coastal plain and piedmont. Each of these comparisons reveals different cultural values given to a particular object.

[108] The requirement of the condemnation law that the appraisal of land be performed by residents of the county in which the land lies tends to stabilize property values within the county unit. This rule reduces the likelihood of culturally derived value differentials within the county, although it emphasizes the likelihood from one county to another. For discussion of why this rule is unreasonably restrictive because of a different type of effect, see notes 85-95 *supra* and accompanying text.

and, if so, should they be substituted for the currently used market-value concept?

The question as to what standard of value should be used in appraising property involves the selection of a philosophy or approach to the valuation process. The fundamental difference between possible approaches is the type of loss that the law will recognize as reimbursable. Indeed, in many respects, the question concerns not so much value as what should be valued, i.e., how far should the appraisal process be extended once it is invoked?

First, then, what are the alternative standards that could be selected? The market-value approach to compensation is but one of three basic methods that Anglo-American courts have considered for computing just compensation. The other two are value to the taker and value to the owner. The first of these, value of the property to the taker or condemnor,[109] can be illustrated by a situation in which a railroad, seeking to condemn farmland in order to build a train depot, is required to pay compensation on the value of the property as a depot rather than as farmland. In most cases, the adoption of this standard would make "just compensation" a windfall to the landowner. It would also undermine the basic premise of eminent domain. Instead of representing the right of government to acquire property for a public purpose, eminent domain would, in effect, become a right of the property owner to enrichment because of the necessities of government. The residual effect would be disastrous to effective government; governmental property acquisitions would be confined to cases of absolute need.

However this concept has sometimes been partially recognized. For example, payments have been made for anticipated future use (e.g., land expected to be converted to water property) when the use coincided with the condemnor's intended use (e.g., city reservoir and power plant). Another example of this concept in operation is the payment made when a special demand for the property had been created because of the anticipated condemnation.[110] Though

[109] See Hale, *Value to the Taker in Condemnation Cases,* 31 COLUM. L. REV. 1 (1931).

[110] The inclusion of a market increase due to a pending condemnation in eminent domain awards is best illustrated by cases in which the taking has been prolonged and the property has changed ownership. Most communities have witnessed speculation in land value because of a rumored highway or a street proposal. One of the best cases on this point arose in New York where the state court permitted evidence of the inflation of land values due to an anticipated condemnation. The property was a natural

seldom labeled as such, compensation for these factors is in part a payment for the value that the condemnor has created. In general, however, the concept is little used or recognized.[111] In a statement that sounds in some ways like a New Frontier aphorism, Holmes summarized the consensus of the American judiciary toward this approach to compensation: "The question is, what has the owner lost? not, What has the taker gained?"[112] The North Carolina Supreme Court has followed the general rule. In *Nantahala Power & Light Co. v. Moss*,[113] a proceeding to condemn waters of a stream for a hydroelectric project, the court held: "Neither the value to the condemnor nor his necessity can be taken into consideration when fixing the value."[114] The court then observed that if this were not the case, the owner could "hold up" the state because of the urgency or necessity of the taker. It is to prevent this situation, the court states, that the power of eminent domain exists; it is to "prevent the owner who is aware of the necessity of the taker from making the most of such necessity and from demanding the highest price such necessity impels."[115] Thus value to the taker, with the exceptions noted, seldom has been applied by either English or American courts.

The second alternative approach, compensation based on the value to the owner, like that of value to the taker, has generally been rejected in favor of the market-value concept. The values that would

watershed land of lakes and ponds that would in time have to be taken by the City of New York to satisfy its increasing need for water. Recognition of this fact, and the expectation that when the city took it the property would command a good price, produced a turnover of property. This type of evidence the court admitted, saying that the value had grown over the years and should have been considered. The original decision, Matter of Simmons, 58 Misc. Rep. 581, 109 N.Y.S. 1036 (1907), was affirmed in two New York state appellate decisions and finally by the United States Supreme Court in a decision by Justice Holmes under the title McGovern v. New York, 229 U.S. 363 (1913). But see United States v. Cors, 337 U.S. 325 (1949), a later case in which value to the taker as a standard upon which to appraise the condemnee's loss was clearly rejected. See generally 1 ORGEL, ch. IV, for an excellent discussion of the value-to-the-taker approach.

[111] 3 NICHOLS § 8.61, states the general rule: "The condemnor should not be required to pay a premium added by its own activities."

[112] Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910).

[113] 220 N.C. 200, 17 S.E.2d 10 (1941).

[114] *Id.* at 205, 17 S.E.2d at 14.

[115] *Id.* at 206, 17 S.E.2d at 14. The extreme case that prompted this statement concerned a holdout in an acquisition from several landowners. The condemnor had already acquired all the pieces of property needed except one parcel, and the owner of this land was holding out for a value ten to twenty times the value of his parcel as a separate entity because he now held the key to the entire project. Specially created value of this kind should never be compensated.

be compensated if this approach were adopted can, for convenience, be grouped into three general classes: (1) business losses, (2) personal losses, and (3) neighborhood-shared value losses. The first group would include such things as moving expenses, loss of good will, lost profits from interruption of business, cost of securing adequate new premises, and loss of favorable financing.[116] These losses are usually associated with the condemnation of a business, although some, such as moving expenses, are also losses to a homeowner. The second group, losses of a personal nature, is typified by loss of security, emotional uprooting, and sentimental attachment. The third group covers losses of "property" that are not individually owned but are common to the neighborhood. Accessibility of schools and parks is illustrative.[117]

The first standard examined, value to the taker, was rejected because it had no legal or policy basis to support it. This writer suggests that the law requires and good social policy recommends that the second standard, value to the owner, be considered in cer-

[116] These losses, generally grouped as incidental losses, are discussed in 1 ORGEL ch. V.

[117] Property rights that are held in common with other property owners have generally been refused compensation on the basis of an unstated idea that property rights shared with neighboring property owners are public property rights; and what the public owns, it need not pay for. See, *e.g.*, Virginia & Carolina So. R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912). The result appears to be a subsidy to the condemnor, since the property owner in most cases will have paid for the increased property value reflected by the shared property value. For example, property in a housing development that is close to schools and public parks would sell for more than comparable property in a development that was not so located. Why should the owner not be compensated for this loss? See also Cromwell, *Some Elements of Damages in Condemnation,* 43 IOWA L. REV. 191 (1958).

On the other side of the coin, set-offs for benefits conveyed to the remaining property because of the anticipated condemnor's use of the property taken often are rewarded. In a partial taking, set-offs from the award are usually made for benefits conferred on the landowner's remaining property by the condemnor's activity if they are special to his property, while general benefits or ones that result to the community as a whole are often not deducted unless the legislature has provided therefor. (See N.C. GEN. STAT. § 136-112 (1964) and the discussion of it at note 93 *supra.*) Thus no compensation is specifically given for property values that are shared by the neighborhood or community as a whole, although deductions sometimes are made. See 2 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 2372 (2d ed. Wilson 1956). See also Elks v. Commissioners of Pitt County, 179 N.C. 241, 245, 102 S.E. 414, 416-17 (1920). This case, in considering whether a set-off should be made for the community-type benefit, recognized a difference between condemnors: for a quasi-public condemnor (railroad or power company) the general deduction should not be made; it should be deducted from the award when a public body (state, city, or county) is the condemnor. Why this distinction should be made is difficult to see.

tain situations as the standard for computing compensation for property condemned. Thus payment would be made for many of the personal losses noted above.

The first consideration is what legal basis there is for using a value-to-the-owner standard to compute just compensation. Courts, both state and federal, have (except for the third category of property rights held in common with other property owners) adopted a theory that just compensation is the right to be reimbursed for loss of property, and that such elements as good will, lost profits, and personal attachment to the property, as personal rights, are outside the constitutional requirement.

The distinction between property rights and personal rights in defining just compensation dates to a 1893 opinion of Justice Brewer in the classic case of *Monongahela Nav. Co. v. United States.*[118] His statement has become the accepted rationale for eminent domain payment:

> And this just compensation, it will be noticed, is for the property and not the owner. Every other clause in the Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent of the property taken.[119]

This distinction has resulted in labeling condemnation suits as proceedings in rem, or actions that are brought for the payment or recovery of property losses rather than personal losses. The distinction has been followed by most states,[120] including North Carolina.[121] As a result, personal losses, with few exceptions, are not recoverable—are held not to be within the constitutional requirement of just compensation.

While the *Monongahela* conclusion *may* be good constitutional law with respect to condemnations by the federal government, it would appear that state courts have been wrong to transpose Justice Brewer's limited concept of just compensation to the state context

[118] 148 U.S. 312 (1893).
[119] *Id.* at 326.
[120] Comment, *Eminent Domain Valuations in An Age of Redevelopment: Incidental Losses,* 67 YALE L.J. 61, 68 (1957).
[121] See, *e.g.,* Redevelopment Comm'n v. Hagins, 258 N.C. 220, 225, 128 S.E.2d 391, 395 (1962).

as the rationale on which to deny compensation for personal losses.[122] The *Monongahela* case involved a federal condemnation for river improvements, and thus a fifth amendment concept of just compensation was involved. As Chief Justice Marshall said in 1833, the fifth amendment is a limitation of federal power alone.[123] The states, on the other hand, are dealing with very different constitutional law—the fourteenth amendment of the United States Constitution and limitations on the power that are set forth in state constitutions. Consequently, the rationale of the *Monongahela* decision is not transferable unless the constitutional limitations upon the states are the same as that imposed by the fifth amendment upon the federal government.

The question is whether the analysis of the fifth amendment in the *Monongahela* case is a constitutional rationale transferable to the state's requirement to pay just compensation for personal loss. The requirement that the State of North Carolina pay just compensation is found in both the federal and state constitutions.[124] In 1896 Justice Harlan stated that "compensation for private property taken for public uses" by a state constitutes an essential element of the due process clause of the federal constitution's fourteenth amendment.[125]

[122] Not only is the court's concept of just compensation one that probably should not be used in defining the state's requirement of just compensation, but also it needs to be re-examined to see whether it is still a valid interpretation of the federal requirement to make compensation when private property is condemned. The first difficulty with Brewer's view of the fifth amendment is that it makes no mention and apparently failed to consider the historical background of the payment of just compensation. Historically, the protection of property by requiring just compensation has been directed at protecting personal rights from governmental power. This emphasis on protection of a person from being disseized of his freehold is traceable to the origin of the just-compensation concept, article 39 of the *Magna Charta*, which states: "No freeman ought to be taken, or imprisoned, or disseized of his freehold. . . ." The emphasis is on losses to the individual, the freeman; the concept of just compensation has historically been one that protects the person, not the property itself, from unjust takings.

Second, the court's analysis breaks down when it conceives of property in terms of its intrinsic value rather than its value to its owner. The concept of property has no relevance except in its relationship to the owner. Private property means private ownership. Viewed in this way, property values should be defined to mean values that the property has for the owner. Thus loss of profits during the period of relocation of a business from property that has been condemned results from the loss of property and is therefore a loss of the value of the property to the property owner. This loss and others like it, it is suggested, should be compensated.

[123] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[124] See note 127 *infra*.

[125] Chicago B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 239 (1897).

This does not necessarily mean, however, that the fourteenth amendment's requirement of compensation is the same as that required by the fifth amendment upon the federal government. The fourteenth amendment's requirement "nor shall any state deprive any person of . . . property, without due process of law" should be interpreted to require payment for losses to the person occasioned by the loss of property rather than limited to the "equivalent of the property taken."[126] This is a logical and more equitable interpretation of what just compensation as part of the fourteenth amendment's due process clause means than that given by Justice Brewer to the due process clause of the fifth amendment.

It is not necessary, however, to structure a requirement for the payment of personnel losses upon the due process clause of the fourteenth amendment. Although it appears that the concept of just compensation as part of the due process clause should be more broadly defined, the rationale of Justice Brewer in the *Monongahela* case is still the basis for construing the fourteenth amendment's due process clause as it is applied to North Carolina. The state constitutional requirement, however, should clearly not be limited to Justice Brewer's interpretation of the fifth amendment's language "property shall not be taken without just compensation." The North Carolina Constitution provides that "*no person* ought to be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land."[127] This phrase, held to guarantee just compensation when property is condemned,[128] can be construed as a protection of a person's rights (or of his losses) when property is taken by eminent domain rather than as a protection of his property only. Thus the constitutional guarantee of just compensation in both the federal and state constitutions need not be defined in the circumscribed manner of the *Monongahela* case; they can be broadened to include the so-called "incidental damages."[129] Such

[126] Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893).
[127] N.C. CONST. art. 1, § 17 (Emphasis added).
[128] Staton v. Norfolk & C. R.R., 111 N.C. 278, 16 S.E. 181 (1892).
[129] The primary reason that the concept of just compensation used by the courts today does not give much recognition to incidental damages resulting from a condemnation is historical. At the time the concept was developed in this country, most property taken was unclaimed and unimproved and that involved little loss to private owners, and incidental damages, if any existed, were insignificant. Thus little, if any, consideration of incidental damages in computing just compensation was made. Today, however, many condemnations involve substantial incidental losses for which no compensation is made. We are using a concept that was just in its day but in 1967

losses can be considered as constitutionally protected by the requirement of just compensation in the same manner that property values are presently protected.

The resolution of the constitutional issue in favor of compensation raises a problem of devising rules for payment. The courts have often stated that the appraisal of incidental losses is too speculative and remote for a jury to decide.[130] How, they have asked, can an objective appraisal be made for such deprivations as loss of emotional security resulting when a man's homestead is taken or loss of good will that follows the condemnation of a business enterprise? While this type of loss does indeed create a difficult problem of proof, the problem is not insoluble.

Two of the three classes of incidental losses,[131] property values shared with neighboring property owners and losses of a personal nature (e.g., security, sentimental attachment, etc.), presently are being recouped, it is suggested, in the average condemnation award. The currently used market-value formula, which is defined in terms of the value of the property in the market place, usually includes payment for a number of these incidental losses that the courts now hold to be noncompensable.[132] In truth, the market-value concept represents a balance between what the property would sell for in the market at the time of condemnation and the value of the property to the owner. This writer suggests that, although not acknowledged by the courts, the elements in the landowner's property loss that are shared by other property owners in the vicinity—such as sidewalks, paved roads, easily accessible schools and churches—are considered by appraisers when the market-value standard is applied, for disassociating these constituents of value in an appraisal is almost impossible. Thus the tendency of juries to overappraise (as Orgel calls it—the jury bias for the condemnee)[133] is largely, it is sug-

needs substantial revision. For a discussion of the early use of eminent domain powers in this county, see 1 NICHOLS 39-40.

[130] See, *e.g.*, United States *ex. rel.* Tennessee Valley Authority v. Powelson, 319 U.S. 266, 285 (1942).

[131] See notes 116-117 *supra* and accompanying text.

[132] One commentator states that the method of arriving at compensation "in the normal case . . . may correspond, with sufficient accuracy, to value to the owner. 1 ORGEL § 15. The market-value concept cannot, he continues, "mean the price at which the owner could have sold his property on the day of the taking. *Id.* at § 36.

[133] 1 ORGEL § 14. Orgel later observes that one should take into account the juries' "proverbial bias in favor of the owner." *Id.* § 83. See also,

gested, payment for these two classes of incidental losses—personal losses and neighborhood-shared value losses.

The only type of loss for which no compensation is probably made, although it may to some extent be part of the "bias bonus," is the so-called business losses, i.e., lost profits,[134] good will,[135] and favorable financing. These are the unpaid losses for which some adjustment should—in fulfillment of constitutional law as just interpreted—be made. The courts have said that these losses are too speculative for a court to appraise. If by "speculative" the court means "of uncertain quantity," or that the appraisal process is too subjective for a jury to reach a figure, the objection can be overruled. Juries in personal injury suits place a monetary value on losses, such as mental anguish,[136] that are more uncertain or subjective than the business losses just mentioned.[137] Special evidentiary rules or criteria may be needed for appraising, for example, loss of favorable financing, but the development of special rules to apply to specific types of losses is in keeping with the system of

Note, 29 HARV. L. REV. 427, 429 (1916). However, a North Carolina superior court clerk who has presided over many condemnation appraisals states that boards of commissioners and juries are very close in their appraisals, and their appraisals usually represent what he considers the property to be worth. If this is true, the difference between what the condemnor states the property is worth and the final appraisal may actually reflect an underappraisal by the condemnor rather than jury bias for the owner.

[134] Lost profits may result from either a partial or a total taking. In Riverside Milling Co. v. State Highway Comm'n, 190 N.C. 692, 130 S.E. 724 (1925), a mill owner lost business because of a newly erected state bridge that directed traffic away from his mill. Part of the land condemned for the bridge had belonged to the mill owner, who now sought incidental damages resulting from lost patronage. This claim was rejected as being too uncertain and speculative for the court to measure.

The claim for lost profits that was rejected in the Riverside case should be distinguished from those that result from a total cessation of business resulting from a forced move to a new location. Lost profits in the partial-taking cases are indeed a highly remote and speculative contingency. When the business stops completely, however, the loss is much more easily measured; the appraiser is concerned with loss of all profits for a specified time, not a reduction in some profits for an indefinite period. The past year's reported income on income tax returns would provide a good index to measure the loss.

[135] For a model act to provide compensation for loss of good will resulting from eminent domain proceedings, see 3 HARV. J. LEGIS. 445 (1966).

[136] See PROSSER, TORTS § 11 (2d ed. 1955).

[137] Some recognition of incidental losses and at least an acknowledgment of a moral responsibility to make recompenses for them have become evident. The 1965 General Assembly enacted a law that provides for payment of a set fee to cover moving costs for displaced occupants of buildings condemned by the North Carolina State Highway Commission. See N.C. GEN. STAT. § 136-19.2 (Supp. 1965). It is interesting to note that the

evidentiary rules employed in eminent domain valuation; the very nature of condemnation, which involves so many kinds of property, requires a multitude of special evidentiary rules to make the required valuations. (For example, when an appraiser *assesses* the market value for loss of quiet enjoyment caused by low-flying airplanes,[138] or for shares of stock of dissenting stockholders,[139] or for deprivation of the common law right of access to a public highway,[140] the valuation process is adjusted so that it adapts to the type of property being valued.)[141] Thus special rules for computing the values of these incidental losses would be a natural development in the eminent domain law.

These recommendations concerning compensation of incidental damage would produce changes. Condemnation awards would be higher as they came closer to full indemnity. This change, however, would likely produce more negotiated settlements and fewer condemnations. For these improvements in the eminent domain process, condemnors probably would have to pay larger sums per condemnation, but the total cost of acquiring property by condemnation (or threat of condemnation) might be reduced, with fewer cases appealed and more acquisitions negotiated.[142] Compensation for incidental losses does not mean, however, the rejection of the market-value formula for the valuation of most losses. For valuation in the majority of all condemnations, the market-value concept is the best approach available to determine just compensation. When properly applied, it avoids grossly excessive or inadequate judgments and, in the words of one commentator, "can produce equitable results—a reasonable balance between the conflicting interests of condemnor and condemnee—which is, after all, the end sought."[143]

payment is made to "occupants," which sometimes will be a lessee, or one who owns no "property" except his leasehold.

[138] See, *e.g.*, United States v. Causby, 328 U.S. 256 (1946).

[139] See, *e.g.*, Spencer v. Railroad, 137 N.C. 107, 49 S.E. 96 (1904).

[140] See, *e.g.*, Hendrick v. Graham, 245 N.C. 249, 96 S.E.2d 129 (1957).

[141] See 2 ORGEL § 204, for a discussion of the different rules of valuation in rate making and condemnation value.

[142] If the end result of paying incidental damages is increased cost to local and state governments for their condemnation, this cost should be viewed as a necessary part of their doing business. The loss can be absorbed with greater equity when it is distributed over the tax base of these condemnors than when it is placed on one person, the property owner.

[143] Cromwell, *Some Elements of Damage in Condemnation*, 43 IOWA L. REV. 191, 230 (1958). Cromwell notes that the shortcomings of this formula for determining value "are often merely the result of failure to relate to the market, and of determining the value question upon the basis of con-

The problem of the valuation process as originally set forth—that of devising evidentiary rules that will adequately accommodate conflicting cultural value judgments—is not subject to a completely satisfactory solution. Different boards of commissioners and juries will continue to value similar properties differently, and this is not necessarily undesirable if awards for similar types of property are relatively equal within the same area, thus if a rural community places a higher value on farmland than does an urban community, there seems little reason why the law should attempt to achieve equal payments for what are otherwise identical types of property. Community attitudes make these properties unequal even though, if brought into the same market place, they would bring identical prices. It would appear, therefore, that just compensation, from both a constitutional and policy standpoint, can be interpreted to permit different awards when cultural attitudes create different values. This conclusion, with the admission of incidental losses into the constitutional concept of just compensation and the acceptance of the currently used market value as the best standard for measuring compensation, goes a long way, it is suggested, toward making the process of valuation an understandable and fair procedure in the condemnation of private property.

At the completion of the valuation process, a majority of the commissioners must set a dollar figure to represent the amount of compensation that must be paid the property owner for the property to be taken. This figure and, if applicable, a second one to reflect the commissioners' estimation of special benefits that the property owner may receive from construction to be done by the condemnor, is entered in a written report of their proceedings.[144] This report should follow in substance the form set out in N.C. GEN. STAT. § 40-18 (1966). The report need not be sealed,[145] nor must it state the type or value of any benefits that the commissioners found will

siderations which are better related to the part of the determination which decides 'is this a valid taking?'" *Id.* at 230.

[144] The appraisal report should break down the appraisals made for various items. For example, special benefits such as new sidewalks or roads and incidental damages such as business expenses, good will, and moving expenses—if they were awarded—should be distinguished from the appraisal made for the basic property taken. If various property values are distinguished in this manner, the court, if the commissioners' award is appealed, can separate the issues with the appraisal made and remand only those parts of the appraisal in which error is found. This will avoid having the entire appraisal redone.

[145] See Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

accrue to the property owner.[146] If the property is realty, the commissioners also need not describe the property,[147] but they probably should do so if the property is personalty or intangible. Once completed (and it should be completed within 10 days after the commissioners are appointed), the report is certified to the clerk of the superior court wherein the property lies. In the great majority of condemnations, the commissioners' role has ended at this point.

When the report of the commissioners of appraisal is complete and filed with the court, either party has twenty days in which to file exceptions to it.[148] After the twenty-day period has lapsed, the clerk must decide whether to appoint new appraisers, to modify, or to affirm the report.[149] If exceptions to the report have been filed, the clerk must hold a hearing and give the parties an opportunity to be heard and to present any evidence to support their contentions that the award is too great or too small.[150] If a hearing is held, notice must be given by the party moving the adoption of the report, or if neither party so acts, then the clerk should give the notice.[151] After the hearing, the clerk rules on any exceptions. If he decides that the appraisal must be redone, he either appoints new commissioners and the process begins anew or he orders the original commissioners to reappraise the property. There is no appeal from either of these orders. If, on the other hand, he confirms the commissioners' report, either party may except and appeal to the superior court at term.[152] Not until this point, and only if the clerk signs a judgment

[146] See Wilmington & W.R.R. v. Smith, 99 N.C. 131, 5 S.E. 237 (1888).

[147] See Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

[148] N.C. GEN. STAT. § 40-19 (1966).

One commentator on the article 2 procedure expressed concern over how the parties will know when the report has been filed. See Ward at 16. Nothing in the statutes requires notification to the parties. Since litigants' rights to except to the report are limited to the twenty days following the filing of the report, the statute should be amended to require the clerk to notify the parties and to send them a copy of the report. Although this procedure is voluntarily followed in some counties, N.C. GEN. STAT. § 40-19 (1966) should be amended to make this notification procedure a requirement.

[149] The role of the clerk at this stage of the procedure has been compared with that of a trial judge who must decide whether to set aside a jury's verdict because it is against the weight of the evidence. See Ward at 17.

[150] See Collins v. State Highway Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

[151] Nothing in the statute requires the clerk to give notice when neither party chooses to move the adoption of the report. The statute should be amended to include this requirement.

[152] See N.C. GEN. STAT. § 40-19 (1966). The appeal must be brought

of confirmation,[153] may either party appeal.[154] If a party has properly excepted to the clerk's rulings or confirmation of the report and then elects to appeal, the clerk transfers the condemnation proceeding to the civil issue docket of the superior court.[155] If the appeal concerns a question of law, the judge decides it in chambers.[156] At the first appellate level the court may confirm the award, set aside, order the clerk to appoint new commissioners of appraisal, or amend the award. The judge has the power "to make such orders, judgments, and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings."[157]

If the issue is one of fact on the damages assessed, either party may appeal to the superior court for a trial de novo before a jury. N.C. GEN. STAT. § 40-20 (1966), added to the article 2 procedure in 1893, entitles either party to have the amount of damages heard

within ten days after the judgment is confirmed. See also N.C. GEN. STAT. § 1-272 (1953).

[153] A certified copy of the judgment is registered with the register of deeds in the county in which the land is situated.

[154] See McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 2371(6) (2d ed. Wilson 1956).

[155] According to N.C. GEN. STAT. § 7A-248 (Supp. 1965) of the Judicial Department Act of 1965:

> The superior court division is the proper division, without regard to the amount in controversy, for the trial of all actions and proceedings wherein property is being taken by condemnation in exercise of the power of eminent domain, according to the practice and procedure provided by law for the particular action or proceeding. Nothing in this section is in derogation of the validity of such administrative or quasi-judicial procedures for value appraisal as may be provided for the particular action or proceeding prior to the raising of justiciable issues of fact or law requiring determination in the superior court.

This statute was added to clarify any question about where condemnation proceedings are to be brought when the new district court system goes into effect. The superior court will retain jurisdiction over all such suits. Note, however, that N.C. GEN. STAT. § 7A-248 (Supp. 1965) states that the "superior court division is the *proper* division." (Emphasis added.) A suit could be brought "improperly" in the new district court, and legally the district court would have jurisdiction. See N.C. GEN. STAT. § 7A-240 (Supp. 1965).

[156] See State Highway Comm'n v. Mullican, 243 N.C. 68, 89 S.E.2d 738 (1955).

[157] N.C. GEN. STAT. § 40-19 (1966).

The discretionary power of the superior court to fashion its own procedural guidelines is extraordinarily large. See Abernathy v. South & W. Ry., 150 N.C. 97, 103, 63 S.E. 180, 183 (1908), in which the court held that it was necessary for the courts to adopt procedures in condemnation cases because "the provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure."

and determined by a jury upon appeal.[158] When the suit is tried de novo, the jury makes a completely new appraisal. The report of the commissioners is not admissible evidence, and the court proceeds as if they had never been appointed. When the jury makes its decision on the award, the court enters judgment on the jury verdict, and the jury-established damages represent the final judgment,[159] unless an appeal is taken to the supreme court.

The de novo trial before the superior court is another area in the article 2 procedure that merits re-examination. One of the major criticisms leveled at the eminent domain procedure throughout the country is its considerable cost in time and money.[160] Today an appeal from the commissioners' report, an expensive and time-consuming process, is practically an automatic step in any condemnation involving much value. Many states do not permit appeals that involve new determination of fact from the appraiser's valuation, except questions involving points of law. Unless the appraisers have exceeded their province, their findings of fact are final. Of course, if the General Assembly were to amend the present law by prohibiting de novo appeals, it would be necessary to make the procedure before the commissioners more formal and uniform, with a guarantee that counsel for both condemnee and condemnor will have an opportunity to introduce evidence and cross-examine adverse witnesses.

According to N.C. GEN. STAT. § 40-19 (1966), at the completion of the appraisal and filing of the report by the commissioners,

[158] The state constitution does not guarantee a jury right in eminent domain proceedings. See Kaperonis v. State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963). Before 1893, if parties did not demand a jury trial before the appointment of the commissioners, they were deemed to have waived any right to it. Once waived, the right was lost. If the parties are not careful, the same result of losing the right to a jury trial may occur under N.C. GEN. STAT. § 40-19 (1966). For example, in Ramsey v. Southern Ry., 253 N.C. 230, 116 S.E.2d 490 (1960), the court refused a jury trial to the condemnor because he had earlier requested to withdraw a petition for appeal. The court held that the granting of his request for withdrawal of appeal foreclosed a second request for appeal and a jury trial.

There is also no constitutional guarantee of a jury trial in the federal courts. The condemnation proceeding has been held not to be a common law proceeding; thus parties to a condemnation suit have no federally guaranteed constitutional right of a jury trial.

[159] See Proctor v. State Highway Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

[160] ROKES, AN ANALYSIS OF PROPERTY VALUATION SYSTEMS UNDER EMINENT DOMAIN 1 (1961).

the condemnor may enter and take possession of the property,[161] notwithstanding a pending appeal.[162] If the condemnor so acts, he must pay into the court the sum appraised by the commissioners.[163] The money deposited remains with the court until final judgment is rendered in the suit. Upon final judgment, the money passes to the property owner, and upon payment of any court costs and counsel fees by the condemnor,[164] title passes from the condemnee and vests

[161] If immediate possession would cause irreparable damage in a suit in which the condemnee challenges the right to condemn, an injunction or restraining order may be obtained by the landowner to prevent immediate possession by the condemnor. See, *e.g.*, Topping v. North Carolina State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959).

[162] N.C. GEN. STAT. § 40-19 (1966) states that the condemnor "may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal." The appeal, as referred to in this language, is an action that may have been taken by either party. This right to an appeal is granted by this same statute to "either party to the proceedings." Thus the condemnor apparently would be able to pay into court the award as found by the appraisers, take possession, and then seek a diminution in the award by appealing to the superior court.

Although no case has been found in which an appeal has been taken in such circumstances, N.C. GEN. STAT. § 160-465(2) (Supp. 1965), a statute granting eminent domain power to urban redevelopment commissions, acknowledges the right of the condemnor to seek a reduction in the award after he has paid the amount of the award into the court and the court has paid it out to the condemnee. The statute makes no mention of the condemnor's losing the right to immediate possession, and since the right to immediate possession is the primary purpose for paying the money into the court, the condemnor apparently can take possession of the condemned property and then appeal the award.

[163] See N.C. GEN. STAT. § 40-19 (1966).

This statute should be amended to allow possession upon payment only after the clerk affirms, if he does so, the report of the commissioners. As the statute stands today, the condemnor could take possession prior to the clerk's action on the report. If this should happen and the clerk subsequently should order a new appraisal, the situation would be difficult.

[164] N.C. GEN. STAT. § 40-24 (1966) provides for the payment of counsel fees for attorneys who are appointed by the court for unknown parties or for parties whose residences are unknown. The clerk also has the authority to set a reasonable fee for the cost of the respondent's attorney when he takes a nonsuit (N.C. GEN. STAT. § 1-209.1 (Supp. 1965)) and in urban redevelopment condemnations (N.C. GEN. STAT. 160-456(2)(10)(21) (1964)).

The urban redevelopment law is noteworthy. North Carolina was one of the first states to enact legislation providing for the setting by the court of reasonable counsel fees to be charged to the condemnor as part of his costs in urban renewal projects. Although the policy behind the law is sound (it compensates the property owner who is seeking just compensation for his property and has incurred substantial attorney's fees), its application has not always been fair to redevelopment commissions, some of which have complained about some exorbitant fees awarded by clerks. Although a schedule of fees keyed to the value of the property taken would help to standardize attorney fees, whether to make it statutory and how to award attorneys for more difficult cases would remain as problems. Critics of the

in the condemnor.[165] If the condemnor had entered into possession, and the condemnation is then appealed, the condemnee is entitled to interest on the principal sum set by the commissioners.[166] This rule applies not only to quasi-public condemnors but also to condemnations by state and municipal governments.[167] The basis for the payment is the constitutionally required payment of just compensation.[168] Since the condemnee has been deprived of his right to use the property and is also deprived of the use of the money during the time between the condemnor's taking of possession and the passing of title (condemnee holds title during this time), his property has been taken during this period, and just compensation must be paid. Thus he has a right to the interest on the amount of the damage award from the date of the condemnor's possession.[169] This arrangement is unfortunate and should be changed to permit immediate payment to the landowner in the manner now provided for in highway condemnations[170] or condemnations for urban redevelopment.[171] The condemnee would then have immediate use of

present law have also charged that the law promotes champerty in that lawyers are encouraged to litigate rather than settle, since they know that their costs for additional litigation will be borne by the commission. All of these points suggest that this is another section of the eminent domain law that warrants further study by the legislature.

[165] See Topping v. North Carolina State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959). But compare this procedure with that of N.C. GEN. STAT. § 160-465 (Supp. 1965), which provides for the immediate passage of title in condemnations by redevelopment commissions.

[166] *But cf.* N.C. GEN. STAT. § 160-465(3) (Supp. 1965).

[167] Earlier case law had exempted governmental condemnors from the payment of interest. Not even interest on a "sum certain which is overdue and unpaid" was owed, the court said in Yancey v. State Highway Comm'n, 222 N.C. 106, 109, 22 S.E.2d 256, 259 (1942) unless a statute explicitly required it.

Accord, State Highway Comm'n, v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957). This outdated concept was rejected in Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959). The court held that the condemnor, a governmental agent, must pay interest on the judgment. See also Note, 38 N.C.L. REV. 89, 92 (1959).

[168] Seaboard Air Line Ry. v. United States, 261 U.S. 299 (1923). For further comment, see 1 ORGEL § 5.

[169] The law of interest for condemnation proceedings has been an area of uncertainty and confusion. The North Carolina Supreme Court clarified the uncertainty somewhat in De Bruhl v. State Highway Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958), by holding that interest begins to accrue from the date of the taking and not, as some cases have held, from the date the petition was filed. This ruling was affirmed by Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 491, 108 S.E.2d 895, 899 (1959).

[170] See N.C. GEN. STAT. § 136-113 (1964).

[171] See N.C. GEN. STAT. § 160-465 (Supp. 1965).

the money—hence the condemnor would have no obligation to pay interest on unused money.

After the appeal, the condemnor has the option not to condemn the property. He can at this point take a voluntary nonsuit;[172] this action will probably be permitted even if he has already taken possession of the property.[173] The parties then revert to their original positions, the condemnor paying the court cost. If the condemnee prevails on the issue of the right to condemn, any money paid by the condemnor, less costs, is returned by the court to the condemnor, who, in turn, must surrender possession of the property to the condemnee.

CONCLUSION

The article 2 condemnation procedure just reviewed represents the general eminent domain procedure in North Carolina. Its lack of clarity, its ambiguity, and the necessity for a uniform appraisal procedure before the clerks of court, are sufficient reasons for a legislative revision of the basic condemnation procedure. In addition, the confusion, duplication, and conflict created by the other condemnation procedures authorized by the general law, plus the maze of special procedures and powers authorized by local legislation, also make it clear that the General Assembly urgently needs to rethink and restructure this entire area of the North Carolina law.

North Carolina is not the only state in which an overhaul of eminent domain law has been in order. Other states have recognized their deficiencies in this area and in recent years have adopted one standard procedure, in the process repealing unused, unneeded, and conflicting procedures. In 1964, for example, the Pennsylvania state legislature adopted a uniform procedure that repealed all other ex-

[172] N.C. GEN. STAT. § 1-209.2 (Supp. 1965) states that: "The petitioner in all condemnation proceedings authorized by G.S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit." See State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964), which notes that this right of the condemnor to take a nonsuit at any time prior to the vesting of title had been judicially established long before the 1957 enactment of N.C. GEN. STAT. § 1-209.2 (Supp. 1965)

[173] N.C. GEN. STAT. § 1-209.2 (Supp. 1965) contains no qualification or restrictions on the right to take a voluntary nonsuit prior to the vesting of title in the condemnor. But see Johnson City So. Ry. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908). When nonsuit is taken, however, the condemnor must pay the judicial costs of his action. See, *e.g.*, State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

tant procedures, and in general revamped the state's eminent domain law.[174] Nebraska,[175] in 1951, and Virginia,[176] in 1961, did similarly.

In several other jurisdictions, state commissions that have undertaken studies of the eminent domain law will present reports to their 1967 legislatures that will recommend a complete reworking of the existing law. In Tennessee the State Legislative Council Committee, pursuant to a joint resolution by the Tennessee General Assembly, recently completed a report recommending both the repeal of over sixteen procedures scattered through more than fifty different titles and chapters of the Tennessee Code Annotated and the adoption of one standard procedure.[177] The 1967 Oregon General Assembly will also have a bill calling for the consolidation of procedures into a standard form,[178] and the Kentucky Legislative Research Commission has recently completed a study calling for similar legislative changes in their state.[179] North Carolina is thus not alone in its need for new legislation. It remains, however, among a diminishing minority of states that are not attempting to make suitable revisions.

No suggestion will be made about what type or types of procedure North Carolina should adopt. It seems apparent, however, that considerable thought should be given to the possibility of prescribing a single uniform condemnation procedure for all condemnations in the state—regardless of the condemnor. This implies that much, if not all, of the local legislation should be repealed. Room should be left, however, for modifying the general-law procedure to allow, for example, for "quick-take" powers to those condemnors that the legislature thinks should have it. The general approach, however, should be one that minimizes rather than increases differences.

What, then, are some of the possbile alternatives open to the state if it should attempt to devise a single procedure. Looking at what methods are being used in the various states, a comparative study in 1958 reported that the basic eminent domain procedure for the forty-eight states could be categorized in the following manner:

[174] See PA. JOINT STATE GOVERNMENT COMM'N, 1964 REPORT-EMINENT DOMAIN CODE.

[175] See Fitle, *Procedure Under the New Eminent Domain Act of 1951,* 35 NEB. L. REV. 259 (1955).

[176] See VA. CODE ANN. § 25-46.1 (1964).

[177] TENN. LEGISLATIVE COUNCIL COMMITTEE, STUDY ON EMINENT DOMAIN LAWS (1966).

[178] KY. LEGISLATIVE RESEARCH COMMISSION, EMINENT DOMAIN PROCEDURE 91 (1965).

[179] *Id.* at 97.

five states used only commissioners to appraise the property condemned; twenty-three states used commissioners, with a trial de novo before a jury (the article 2 procedure); and eighteen states used only a jury.[180] This rough breakdown shows only the basic types of procedures used. To mention a few procedures in greater detail, North Carolina could adopt a procedure similar to the one recently adopted in Pennsylvania. This procedure authorizes the condemnor to take possession and title upon filing a "declaration of taking" and posting a security bond. The condemnee may raise "preliminary objections" within twenty days, but this is his exclusive method of challenging the power to condemn, the sufficiency of the security, or the declaration of taking. If the condemnee is satisfied with the amount set by the condemnor in his declaration, the proceeding is completed. If, however, either the condemnor or the condemnee desires to have the property appraised, he may petition for the appointment of a "board of viewers," at least one of whom must be an attorney. This board then determines what constitutes "just compensation."[181]

Another type of procedure prevails in the District of Columbia. Here the condemnation may be initiated by either the condemnor or condemnee. If the two cannot reach an agreement as to the value of the property, either party may petition the court to have the property valued by a group of five freeholders. The five, designated as a "jury," are selected by the court from a special list of jurors who are knowledgeable in condemnation law. This list is kept by the court solely for condemnation cases.[182]

A third type of procedure is the master system. It is provided for by the public law procedure of article 3, chapter 40, of the North Carolina General Statutes and by FED. R. CIV. P. 71(a). The article 3 procedure provides that the valuation be determined by a special master appointed by the court. After a public hearing, the master fixes the amount of damages and compensation for the condemnation and reports his findings to the clerk. If either party objects to the report, the objections are heard by the clerk, who must then rule on them and enter final judgment. An appeal may be taken from this judgment if either party so desires.[183]

[180] Notes of Advisory Committee on Rules that are set out following FED. R. CIV. P. 71(a) at 28 U.S.C. 6150 (1965).
[181] See PA. STAT. ANN. tit. 26, § 1-101 (Supp. 1966).
[182] See D.C. CODE ANN. §§ 16-619 to -644 (1961).
[183] See N.C. GEN. STAT. §§ 40-30 to -53 (1966).

The federal rules also provide for a master procedure, but it is different from the article 3 procedure just described. It sets up a commission of three persons, appointed by the court, who operate in accordance with FED. R. CIV. P. 53, the federal civil rule for masters.[184]

Although all three of these procedures have much to recommend them and should be carefully considered, they will not necessarily improve upon the type of procedure represented by article 2. The fact that a great amount of case law has resulted from its long use in this state is a valuable asset, and a substantial reason for keeping it. If the legislature were to repeal most of the other procedures and make article 2 the only procedure, it should at that time adopt a standard set of procedural and evidentiary rules in order to standardize the appraisal process before the clerks of the superior court.

In the end, however, the urgency is not so much to find answers to the specific questions raised in this article, but simply to recognize that North Carolina eminent domain law needs complete re-examination and revision.

[184] For a background of the eminent domain procedure in the federal courts, see Paul, *Condemnation Procedure under Federal Rule 71A,* 43 IOWA L. REV. 231 (1958).

APPENDIX

CONDEMNORS AUTHORIZED TO CONDEMN PROPERTY UNDER THE ARTICLE 2 PROCEDURE

Condemnor	Authority	Object or Purpose
A. *Quasi-Public Condemnors*	§40-2(5)	Water supply
	§ 40-6	Water supply
Bridge company	§ 40-2(1)	General[1]
Coal company	§ 40-2(1)	General
Canal company	§ 40-2(1)	
College or university (private)	§ 40-2(5)	Water supply
	§ 40-2(7)	General
	§ 40-6	Water supply
Electric power & light company	§ 40-2(1)	General
	§ 40-2(3)	General
	§ 62-181	Public highways
Flume company	§ 40-2(1)	General
Gas company	§ 40-2(1)	General
Limestone company	§ 40-2(1)	General
Mineral company	§ 40-2(1)	General
Motor vehicle carriers	§ 40-2(8)	Union bus station
Plankroad company	§ 40-2(1)	Plankroad
Pipeline company	§ 40-2(1)	General
	§ 62-190	General
Private schools	§ 40-2(5)	Water supply
	§ 40-6	Water supply
Railroads	§ 40-2(1)	General
	§ 40-3	Union depots
	§ 40-4	Industrial sidings
	§ 40-5	General
	§ 62-220	Intersection with
	§ 62-223	highway
	§ 62-227	Change of route
	§ 62-231	Union depots
Steamboat company	§ 40-7	Wharves or warehouses
Street railroads	§ 40-2(1)	
Telegraph company	§ 40-2(1)	General
Telephone company	§ 40-2(1)	General
Tramroad company	§ 40-2(1)	Tramroads
Turnpike company	§ 40-2(1)	Turnpike
	§ 40-29(3)	Depot or station
Union bus station company	§ 40-2(8)	Union bus station
Water supply company	§ 40-2(1)	General
	§ 130-162	General

[1]Where purpose is marked "General," the power is still restricted to the legitimate concerns of the condemnor.

Condemnor	Authority	Object or Purpose
B. *Local Public Condemnors*		
Board of county commissioners[2]	§ 68-35	Fenceways
	§ 131-15 and 28.14	Hospitals
	§ 131-126.20 (a) and (b)	Hospital facilities
	§ 139-41[4]	Watershed improvement
	§ 153-9(57)	Courthouse and jail
	§ 153-284	Water and sewerage
	§ 153-287	Water and sewerage
	§ 160-158(3)	Recreation systems and playgrounds
Board of education[3]	§ 40-2(5)	Water supply
	§ 40-2(7)	General
	§ 40-6	Water supply
	§ 115-125	Site
Hospital authority	§ 40-2(7)	General
	§ 131-99	General
Housing authority	§ 157-11	General
	§ 157-12	Governmental housing projects
Housing authority (regional)	§ 157-35	General
Housing authority (consolidated)	§ 157-39.5	General
Joint water and sewer agency	§ 153-288	Water and sewerage facilities
Mosquito control districts	§ 130-213(6)	General
Metropolitan sewerage districts	§ 153-300(10)	Sewerage system
Municipalities[5]	§ 40-2(2)	Water and sewer
	§ 40-2(3)	Electric power
	§ 130-162	Water and sewer
	§ 131-15	Hospitals
	§ 131-126.20 (a) & (b)	Hospital facilities
	§ 136-66.3(c)	Roads and rights-of-way of state
	§ 160-158(3)	Recreation systems and playgrounds
	§ 160-205[6]	Cemeteries, city

[2]Other condemnation powers given to the county make no mention of a procedure. Since few counties have special procedures, the basic chapter 40 procedure will be the one most often used.

[3]The power conveyed by the first three statutory citations are also granted to colleges and universities, high schools, public schools, and school committees of public school districts.

[4]This power has been granted to only ten counties.

[5]As with the county, eminent domain power is sometimes given to municipalities without mention of a procedure to be used. Since most of the larger municipalities have special procedures authorized by local legislation, the municipality, when no procedure is designated, has a choice of using the general-law procedure or its special procedure.

[6]This section grants the city the power to condemn for all purposes specified in N. C.

Condemnor	Authority	Object or Purpose
		hall, drainage system, electric light and power, fire departments and stations, gas, markets, parks and playgrounds, sewerage system, streets, water system, and wharves
	§ 160-239	Sewerage system
	§ 160-260.1	Cemeteries
	§ 160-260.2	Easement for perpetual care of cemeteries
	§ 160-424.2 (3)	Sewerage disposal system
Sanitary district board	§ 130-130	General
Urban redevelopment commission	§ 160-465	General
Water and sewer authorities	§ 162A-6(10)	General
Watershed improvement district[7]	§ 139-24	General
C. *State Public Condemnors*		
Department of Administration[8]	§ 146-24	General
Department of Archives and History	§ 121-8	Historic and archaeological property
	§ 121-16	Tryon Palace
Department of Conservation and Development	§ 40-2(6)	Fish and fisheries
Hospitals	§ 40-2(7)	General
Penal institutions	§ 40-2(7)	Roads, sidetracks, and site
Public institutions	§ 40-2(4)	General
State Legislative Building Commission	§ 129-15	General
Utilities Commission	§ 104-11	Waterway improvements
	§ 104-13	Inland waterway
	§ 104-20	Inland waterway
Wildlife Resources Commission	§ 113-34	State forests and parks

GEN. STAT. § 160-204 (1964). To the eleven enumerated by that section, N.C. GEN. STAT. § 160-205 (1964) added the city hall as an authorized purpose.

[7]This power is granted to only ten counties.

[8]All condemnations of land on behalf of the state or any state agency must be made by the Department of Administration. N.C. GEN. STAT. § 146-22 (1964), a 1957 law, so states. Before 1957 many state agencies and bodies had been given the power of eminent domain. These grants, although not usable by the agency to which it was conferred, are still a part of the General Statutes and thus are recorded here.