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## **Initial Procedures and Pleadings of the State and Other Condemning Bodies**

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## I. INTRODUCTION

### A. [2.1] The Eminent Domain Act

On January 1, 2007, the Eminent Domain Act (EDA), 735 ILCS 30/1-1-1, *et seq.*, became law, applying to all condemnation complaints filed after its effective date. The bill that created the EDA was 431 pages long. Despite its length, the EDA had only five changes of substance over the eminent domain provisions of former Article VII of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, three of which changes were relatively minor. Most of the remainder of the text was devoted to changing references for consistency or to inconsequential language changes.

The two major changes — codifying the standards for determining public use and requiring the government to pay relocation costs of persons displaced from the acquired property — are major changes for units of local government but will have little impact on state takings. Because the state’s exercise of eminent domain is almost exclusively for public ownership and control and because the definition of “public use” in the EDA (see 735 ILCS 30/5-5-5) is not materially different from the pre-EDA standard, there is no change for these condemnations. Similarly, because a large percentage of state acquisitions are for federally assisted transportation projects for which, as discussed below, the payment of relocation reimbursement has been a requirement since 1970, the relocation requirement adds little.

The EDA was passed in an attempt to limit the use of condemnation power to assist private development. Since 1954, the United States Supreme Court has held that it is not a violation of the public use clause of the Fifth Amendment for government to acquire property through eminent domain and then transfer the property to private persons for economic development. *Berman v. Parker*, 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954). The Court’s decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005), affirmed the power to condemn for private development but created a public backlash. In response to the backlash, the Illinois General Assembly, like the legislatures in many states, passed the EDA to limit the power of government to condemn property for the purpose of conveying it to a private party for economic development and enacted other reforms.

The EDA’s major changes are as follows:

**Standards for determining public use.** Property may not be taken unless it is for a “public use.” 735 ILCS 30/5-5-5(a). If the property will be subject to public ownership and control, it is for a public use if the condemning authority proves that “(i) the acquisition of the property is necessary for a public purpose and (ii) the acquired property will be owned and controlled by the condemning authority or another governmental entity.” 735 ILCS 30/5-5-5(b). In substance, this language is little changed from the pre-EDA standard. Any acquisition for a road project, government office building, or public park will be for public use under this standard.

The EDA’s major change is its codification of the standards of proof for acquisitions when the ultimate user is not a government body, such as for the clearance of blight, the assemblage of properties for private redevelopment, or the lease or operation of government property by a private entity. The EDA imposes a variety of standards that apply depending on the purpose of

the acquisitions. See 735 ILCS 30/5-5-5(c) through 30/5-5-5(f). The most stringent standard applies to acquisitions for private ownership or control, or both. 735 ILCS 30/5-5-5(c). In these cases, the condemnor must prove by clear and convincing evidence that the acquisition is (1) primarily for the benefit, use, or enjoyment of the public and (2) necessary for a public purpose. Section 5-5-5(c) reverses the former presumption of validity enjoyed by government acquisitions. The various applications of §5-5-5 of the EDA are covered elsewhere in this handbook.

**Relocation reimbursement.** Prior to the EDA, persons displaced by condemnation were not entitled to be paid for their moving and other related expenses. Since 1970, under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. §4601, *et seq.*, in acquisitions for federally funded projects or other projects with federal involvement, the condemnor was required to pay the relocation costs for owners and other persons displaced for the project. The EDA requires relocation payments for all Illinois condemnations in the same manner as under the URA. 735 ILCS 30/10-5-62. Relocation reimbursements are described in more detail in §2.12 below. This is a major change for most local condemnors, who are now required to budget and pay relocation costs.

The EDA's minor changes are as follows:

**Variable valuation date.** The former eminent domain statute established the date of filing the complaint as the date as of which the property to be acquired should be valued. The valuation date did not change, except for abusive delay by the condemnor. 735 ILCS 30/10-5-60 retains the date of filing as the valuation date but authorizes the judge to move the date forward if the case does not proceed to trial within two years of filing the complaint. The court will decide on a new date "in the interest of justice and equity," but not later than the date of trial (or, in the case of quick-take, not later than the date that the condemnor took title to the property). *Id.*

**Limits on disposition of acquired property within five years.** Property that is acquired by condemnation or threat of condemnation for public ownership and control may not be disposed of for five years unless certain public bidding procedures are followed. 735 ILCS 30/10-5-105. During the five-year holding period, the government must dispose of the property by bid. The state must follow the State Property Control Act, 30 ILCS 605/1, *et seq.*, and municipalities must observe the procedures of the Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.* 735 ILCS 30/10-5-105(c), 30/10-5-105(d). The EDA also has detailed disposition procedures for other governmental entities, including that the property be sold for not less than 80 percent of its appraised value. 735 ILCS 30/10-5-105(e).

**Offer of settlement at trial.** Because this settlement offer procedure applies to acquisitions for other than public ownership and control, it has little application to the state and will not apply to other condemnors involving acquisition for traditional uses such as roads, schools, parks, and the like. 735 ILCS 30/10-5-110 resembles Federal Rule of Civil Procedure 68. In trials for the acquisition of property for private ownership or control, the defendant may make an offer of settlement between the close of discovery and 14 days before the start of trial. 735 ILCS 30/10-5-110(b). If the condemnor rejects the offer and the verdict exceeds the offer, the condemnor must pay the owner's costs and attorneys' fees. Attorneys' fees are calculated as a sliding percentage of the "net benefit," the portion of the award that exceeds the condemnor's last written offer. 735 ILCS 30/10-5-110(f). The offer of settlement is describe in more detail in §6.23 of this handbook.

**B. [2.2] Scope of Chapter**

This chapter outlines the procedures that the attorney for the condemning body will follow from the time the case is assigned to the filing of the complaint for condemnation. Most of the chapter is applicable to proceedings on behalf of the State of Illinois and its agencies, as well as to proceedings on behalf of local governments and similar governmental bodies. For both the state and subordinate governmental entities, the constitutional requirement of just compensation and the procedural and substantive provisions of the Eminent Domain Act apply. One major difference lies in the superior dignity of the state. As a sovereign, the State of Illinois has inherent power of expropriation. Authority granted by the Illinois Constitution and delegated by statute to departments of state government is sufficient to justify the exercise of eminent domain. No additional legislative authority is necessary for the state and its agencies. See, *e.g.*, §4-501 of the Illinois Highway Code, 605 ILCS 5/1-101, *et seq.* (605 ILCS 5/4-501). For all lesser divisions of the state, including local governments and special state agencies and subdivisions, two additional requirements are necessary. First, there must be express delegation of the power of eminent domain (home rule units of local government do not require this delegation). Second, each individual taking or project requires specific authority. For all condemnations other than those exercised by the State of Illinois and its agencies, there must be an authorizing ordinance or resolution, and this authority must be set forth in the complaint for condemnation. For example, if a statute grants authority to a state university to exercise condemnation, the university's governing board should specifically authorize each project and acquisition.

For the most part, the law and procedures described in this chapter apply to acquisitions by any condemning body, including the State of Illinois, its subdivisions, or units of local government. In addition, attorneys for condemnees will want to be familiar with the principles described in this chapter so that they can assure themselves that all of the protections and prerequisites are carried out before the state exercises the extraordinary power of expropriation.

**II. PRE-CONDEMNING PROCEDURE****A. [2.3] Preliminary Considerations**

The attorney should be involved at the outset if land acquisition is contemplated. This early involvement will help ensure that the condemning body properly exercises its authority, that requirements imposed by state and federal funding sources are complied with, that the owner is treated fairly, that the acquisition proceeds expeditiously, and that the price paid is fair to all sides.

Frequently, however, the lawyer representing the condemnor has had no involvement with the case until the condemnor has determined that it cannot obtain the property without condemnation. Agencies of the State of Illinois with statutory authority to acquire property by condemnation, such as the Department of Transportation or the Department of Natural Resources, have their own staffs capable of negotiating with landowners, obtaining appraisals, and generally setting the stage for the filing of the condemnation petition. In these cases, the careful practitioner

will double-check the preliminary work to make certain that all statutory and other requirements have been met. These bodies normally supply the lawyer with a form of complaint for condemnation. This form should be reviewed and, if necessary, adapted to the particular assignment.

The first task of a lawyer representing a client in a condemnation proceeding is to ascertain the relevant facts at an early stage in the acquisition process. A good working knowledge of the facts will enable the attorney to discuss the case more intelligently with the landowner and the condemnor, but, more importantly, it will give a better idea of the options available to the client from both a legal standpoint and a practical standpoint.

What is the purpose of the acquisition? Who is the condemning body, and what powers does it have? What steps has the condemnor already taken toward acquisition? What property interests are sought to be acquired? What is the extent of the landowner's total holding, and how will the remainder of the land be affected by the taking? Are federal or state funds involved? Who, in addition to the fee owner, may be interested in the award? Will tenants or others seek to share in the award? Who will be entitled to relocation benefits? Will benefits accrue to the remainder of the property because of the public improvement? What is the schedule for the project? The answers to these questions often shape the course of action to be taken on behalf of the client.

The attorney representing the condemnor should also be involved in the drafting of the authorizing ordinance or resolution. *Village of Cary v. Trout Valley Ass'n*, 282 Ill.App.3d 165, 667 N.E.2d 1082, 217 Ill.Dec. 689 (2d Dist. 1996), illustrates the pitfalls of amateurish preparation. The village's complaint for condemnation was dismissed because its acquisition ordinance did not follow the authorizing statute by specifying the financial details of the sewer project and neither did the village comply with the requirement to publish the ordinance. Research into the authority to exercise condemnation would have avoided this embarrassing and expensive scenario.

#### **B. [2.4] Hiring Appraisers**

In order to evaluate the condemnor's offer properly, the market value of the property, including damage to the remainder, must be estimated. This determination requires that the opinion of a qualified real estate appraiser be obtained.

The attorney should participate in the choosing of the appraiser to ensure that the appraiser is one who understands and is comfortable with the legal theories involved. An experienced attorney will know which appraisers he or she can work well with, which are best suited for particular assignments, and which will best convey their opinions to the jury.

The appraiser must have a thorough understanding of his or her role and assignment before beginning the appraisal. This prior understanding is especially important when federal grants are expected. The Uniform Relocation Assistance and Real Property Acquisition Policies Act and consolidated regulations promulgated thereunder applicable to acquisitions funded by federal agencies (49 C.F.R. pt. 24) require that the condemning body offer the owner an amount no less than the approved appraisal value of the property. Thus the initial appraisals establish the lowest price of the property.

Choosing an appraiser is not always easy, and no single rule is applicable to all cases. For example, a real estate broker who may be well qualified to value a single-family residence is not necessarily qualified to value an industrial park even though he or she could qualify as an expert on the witness stand.

Factors to be considered in choosing the appraiser include whether a full or partial taking is involved, present zoning and the probability of rezoning, the highest and best use of the property, and the appraiser's background, experience, and knowledge of the subject property. In any case, the attorney should review the law of compensability with the appraiser to ensure that all compensable elements of damage will be considered by the appraiser.

Many appraisers belong to professional societies, admission to which is granted to appraisers with certain education, training, or experience. These societies include the Appraisal Institute (formed by a merger of the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers), whose members, designated as MAI (Member Appraisal Institute) or SRA (Senior Residential Appraiser), have passed the most stringent requirements.

Other professional organizations include the National Association of Independent Fee Appraisers, the International Right of Way Association, the Independent Right of Way Association, the American Right of Way Association, the Independent Right of Way Appraisers, and the American Society of Appraisers. Other qualifications could include memberships on local real estate boards and experience as a real estate broker or developer. Although admission to membership in professional societies may ensure that an appraiser will do a reasonably thorough job and that others have found him or her to be qualified, in choosing an appraiser the attorney should be guided by his or her own knowledge of an appraiser's ability and his or her evaluation of the appraiser's knowledge, experience, and judgment.

The Illinois Department of Transportation (IDOT) has developed forms for use by its appraisers. These forms ensure uniformity in the methodology used and the kinds of information relied on by each appraiser. Frequently, the appraiser is already retained by the state agency. The forms may already be filled in and the appraisal completed by the time the attorney is assigned to a case. An attorney should nevertheless exercise independent judgment as to the expert witness to use for the purpose of a jury or bench trial. It may be necessary to retain a different appraiser if the particular situation warrants.

### **C. [2.5] Personal Inspection of the Property**

An attorney should personally confirm the situation and condition of the subject property at the earliest opportunity. The attorney should inspect the property to be acquired, including (if feasible) the interior, the surrounding properties, and the neighborhood. This inspection will better equip the attorney to assess theories of valuation, to discuss the property with appraisers in a more informed way, and to consider the property's effect on the jury.

### **D. [2.6] Identifying the Parties**

From the beginning, it is necessary to determine the identities of the owners and other persons having an interest in the property to be acquired. This may be done through a current

“minutes of condemnation” or commitment for title insurance obtained from a local title insurance company. Any identifiable owner or interested person who is not made a party to a condemnation action gives rise to at least two risks. If compensation is determined and paid without service on an interested party, this person can later join the action and seek additional compensation from the state. In addition, the court may not have jurisdiction over such an enjoined party and would be unable to order the party to turn over possession of the property to the state.

Do not omit lessees as parties. A lessee should be named even if the lease has not been recorded. 735 ILCS 30/10-5-10(a) requires that the complaint for condemnation name “all persons interested in the property as owners or otherwise, as appearing of record, if known, or if not known stating that fact.” The complaint must request that the court “cause the compensation to be paid to the owner.” *Id.* In *Chef’s No. 4, Inc. v. City of Chicago*, 117 Ill.App.3d 410, 453 N.E.2d 892, 73 Ill.Dec. 67 (1st Dist. 1983), the court reiterated that lessees are “owners” for the purpose of receiving compensation if their rights are condemned and that they are necessary parties in any condemnation proceeding. The lessee in *Chef’s No. 4* was neither named as a party in the complaint nor served with process in the condemnation proceeding. The condemnation case proceeded to judgment without the presence of the lessee, and the full award was paid to the county treasurer. The lessee subsequently filed an inverse condemnation action seeking payment for the remainder of its lease, alleging that its leasehold had been taken without compensation. The court held that the lessee was entitled to maintain an inverse condemnation action against the condemnor to compensate for the lessee’s rights and property that had been acquired in the condemnation action. The lesson of *Chef’s No. 4* is that there is danger of paying double compensation unless all persons interested are made parties to the condemnation action.

#### **E. [2.7] Compliance with Federal and State Prerequisites — Environmental, Landmark Protection, Relocation, and Farmland Preservation Statutes**

Condemnors acquiring land for a variety of projects must frequently satisfy state or federal environmental, landmark protection, and procedural statutory requirements. Failure to comply with a statute could lead to administrative or judicial proceedings to enjoin the project. Loss of state or federal funding could also result from violating any of these provisions. For example, significant projects using federal funds or subject to a federal permit must be preceded by a proper environmental assessment or an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §4321, *et seq.* Similarly, under §106 of the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, before property that has been placed on or is eligible for nomination to the National Register of Historic Places may be damaged or destroyed, a hearing must be held and certain other procedures followed. 16 U.S.C. §470f. Illinois has a similar procedure for projects in which state funding or permits could impact historic landmarks that are on the National Register of Historic Places or have been determined to be eligible for the placement on the National Register. See §4 of the Illinois State Agency Historic Resources Preservation Act, 20 ILCS 3420/1, *et seq.* (20 ILCS 3420/4). Further, with respect to any interest in real property to be acquired in part with federal funds, the Uniform Relocation Assistance and Real Property Acquisition Policies Act must be obeyed.

Although there may be severe adverse impacts from the condemnor's failure to comply with these environmental, landmark protection, procedural, and relocation statutes, a prohibition against acquisition is not one of these consequences. Violations of environmental laws do not prohibit a condemnor from acquiring property for the project pursuant to the law of eminent domain. *See, e.g., Illinois State Toll Highway Authority v. Karn*, 9 Ill.App.3d 784, 293 N.E.2d 162 (2d Dist. 1973), in which the court held that a permit under the Environmental Protection Act was not required before condemning land for a highway since it is the operation of vehicles, not the highway or its construction, that causes air pollution.

With respect to the URA, Illinois courts have held compliance with the Act not to be a condition precedent to condemnation. *See, e.g., Department of Transportation v. Zabel*, 47 Ill.App.3d 1049, 362 N.E.2d 687, 6 Ill.Dec. 52 (3d Dist. 1977). *See also City of Chicago v. R. Zwick Co.*, 27 Ill.2d 128, 188 N.E.2d 489 (1963); *Rhodes v. City of Chicago ex rel. Schools*, 516 F.2d 1373 (7th Cir. 1975). The URA itself provides that it shall not affect the validity of any property acquisition. 42 U.S.C. §4602(a). Because the URA and other similar statutes do not affect the exercise of condemnation power, compliance with such statutes should not be alleged in any petition to condemn.

735 ILCS 30/10-5-62 imposes the obligation on all condemnors to pay relocation reimbursement for persons displaced under the power of eminent domain. Unlike the URA, the Eminent Domain Act is silent as to the consequences of failing properly to do so. Since relocation reimbursement is usually paid after the property is acquired, relocation reimbursement should not affect the validity of the acquisition.

Similarly, the Farmland Preservation Act, 505 ILCS 75/1, *et seq.*, expresses the General Assembly's desire to protect the state's natural resources and reduce the loss of agricultural land. While the Act does not prohibit the acquisition and conversion to other uses of farmland, it requires many of the state's agencies to confer with the Department of Agriculture and consider the Department's regulations aimed at reducing the loss of farmland.

Section 5 of the Farmland Preservation Act is similar to §106 of the National Historic Preservation Act. Prior to participating in any project leading to conversion of farmland to nonagricultural purposes, the head of the agency is to notify the Department of Agriculture and a report is to be prepared. If the procedural prerequisites are complied with, the agency may proceed with the project. 505 ILCS 75/5. But note that the court in *Department of Transportation v. Sunnyside Partnership, L.P.*, 337 Ill.App.3d 322, 785 N.E.2d 1018, 1026, 271 Ill.Dec. 824 (5th Dist. 2003), held, in affirming the denial of a traverse, that "involvement by the courts is not contemplated by the Farmland Preservation Act."

## F. [2.8] Surveys

In most cases, the condemnor should obtain a survey of the property to be acquired. In many cases (*e.g.*, highway projects), a survey is made early in the planning process to determine the project boundaries. In the case of highways, the alignment, exits, utility connections, drainage patterns, and easements are likely to be known in advance of condemnation because these matters appear on the surveys. In other cases, the attorney for the condemnor should see that a survey is prepared prior to proceeding with the case.

An acquisition survey will reveal many important conditions. In addition to the boundaries of the individual properties to be acquired, the survey may show land area, the footprint of any building on the property, square footage of such a building, and easements.

Surveys are clearly important for architects and planners so that they may know the size and location of the property to be acquired and how to site any new buildings. In addition, however, square footage and easements assist the attorney and appraiser in forming an opinion of value. When values are based on square footage of land, building-to-land ratio, and square footage of building, the exact size of the land and the magnitude of improvements are important. Similarly, if the property is burdened with any easement, its value will be affected accordingly.

The surveyors should be instructed to provide the square footage of each parcel to be acquired, the area of a building's footprint, and the total building floor area. Surveyors may also prepare an acquisition parcel map illustrating all of the parcels to be acquired in an area. When this is mounted on a display board, it become a useful tool for the attorney and the public body to keep track of the acquisition status of the project. Individual parcels may be colored in on the plat as they are acquired.

#### **G. [2.9] Environmental Assessment**

For the purposes of planning and valuation, it is useful to have an environmental assessment prior to proceeding with an acquisition. An environmental assessment (also known as a "Phase I environmental assessment") is a report prepared by an expert, made after a visual inspection of the premises and a study of historical sources. Generally, a Phase I environmental assessment does not involve laboratory testing except, frequently, for asbestos-containing materials. See American Society for Testing and Materials, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-05. A Phase I environmental assessment will report the likelihood of environmental contamination on the subject property. The current use of the subject property, its historical uses, the location of nearby sources of contamination, and the presence of underground storage tanks will be found in the Phase I report.

This information will help planning officials in determining the uses that may be made of the acquired property or the work that must be done to remediate contamination. The same information will be helpful to attorneys and appraisers in determining market value. Obviously, known contamination will have an adverse impact on value. Appraisers commonly base their opinion of value on the assumption that the property is not contaminated; with a Phase I environmental assessment, the appraiser will be able to provide a more realistic determination of value.

Although environmental issues are treated in more depth in Chapter 12 of this handbook, it is important to understand that the environmental assessment may have a role in the valuation proceedings and also to understand the limits of this role. Section 10-5-50 of the Eminent Domain Act appears to make such a report, as well as the cost of remediation, admissible on the question of value:

**Evidence is admissible as to . . . any unsafe, unsanitary, substandard, or other illegal condition, use, or occupancy of the property [and] the reasonable cost of causing the property to be placed in a legal condition, use, or occupancy. . . . Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of the illegal condition, use, or occupancy.** 735 ILCS 30/10-5-50.

Despite similar language in former 735 ILCS 5/7-119 (predecessor to §10-5-50 of the EDA), the appellate court in *Department of Transportation ex rel. People v. Parr*, 259 Ill.App.3d 602, 633 N.E.2d 19, 198 Ill.Dec. 557 (3d Dist. 1994), held that remediation costs were not admissible in that proceeding. The court held that the costs are admissible only if the trial court finds the presence of an underlying illegal condition to justify the admission of these costs. The court found that the statute presupposes the existence of an illegal condition, and unless the condition is determined to be illegal, it is improper to introduce these costs in the valuation proceeding. *Cf. Department of Transportation v. LaSalle National Bank*, 251 Ill.App.3d 901, 623 N.E.2d 390, 191 Ill.Dec. 145 (2d Dist. 1993) (allowing testimony regarding wetlands on subject property). Although the admissibility of these reports will doubtless be subject to further litigation, the importance of having a Phase I report at the outset cannot be denied.

#### **H. [2.10] Identifying the Occupants**

Section 2.6 above indicates that parties who have an interest in the property but are not served may later seek compensation, even after the property has been acquired. The right to possession is yet another problem created by unserved parties. The condemnor may not extinguish the rights to possession of persons occupying the subject property if these persons have not been served. Even if occupants may not be entitled to monetary compensation (because, for example, they have no lease or there is no bonus value to their lease), they have a right to possession. Such a right may not be extinguished without the persons being before the court.

Although public records disclose the persons in title and others with recorded interests in the property, it is frequently very difficult to determine the rights of persons with unrecorded interests, which can include tenants with leases, tenants without leases, squatters, advertising signs, and cell towers and other antennas. The obligation to name all parties in interest extends to those who do not have recorded interests.

The landlord cannot be relied on to identify all tenants. Prior to filing a complaint, owners may be reluctant to reveal this kind of information. Other landlords may not disclose tenants because they do not want the tenants to learn of the imminent acquisition, fearing that the tenants may break their leases or leave the property earlier than necessary. A landlord may fraudulently conceal an imminent condemnation from tenants or prospective tenants. *City of Chicago v. American National Bank & Trust Co.*, 233 Ill.App.3d 1031, 599 N.E.2d 1126, 175 Ill.Dec. 112 (1st Dist. 1992).

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**PRACTICE POINTER**

- ✓ A visual inspection will be helpful in determining whether there are advertising signs, antennas, and the like. Doorbells, lobby directories, and signs can reveal the identity of tenants. At times, the services of a private investigator will be necessary to complete the roster of the persons with interests in the property.
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**I. [2.11] Special Parties — Active Duty Military Personnel and Their Dependents**

Condemnors should always respect the rights of persons on active military service. Military personnel away from home on active duty and their dependents who remain behind receive certain protections pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C.App. §501, *et seq.*

There are three provisions of the SCRA that relate to condemnation proceedings:

1. A default judgment may not be entered against military service personnel on active duty. 50 U.S.C.App. §521. If a default judgment is entered, it may be vacated. The SCRA requires that when a default judgment is entered in state or federal court, the attorney must file an affidavit of military service. A sample copy of Circuit Court of Cook County Form CCG 0004, Affidavit as to Military Service, is available at the Web site of the Clerk of the Circuit Court of Cook County at [www.cookcountyclerkofcourt.org](http://www.cookcountyclerkofcourt.org).

2. At the instance of any person, civil proceedings may be stayed with respect to the person on active military duty. *Id.*

3. Even after a condemning body properly obtains title and possession to a building, family members of a person on active military duty may not be evicted for 90 days. 50 U.S.C.App. §531. This applies to any dwelling renting for \$2,400 per month or less during the period of military service for the wife, children, or other dependents of a person in military service, with certain discretion vested in the court.

For a fuller explanation of the SCRA, see [www.uscg.mil/legal/la/topics/sscra/about\\_the\\_sscra.htm](http://www.uscg.mil/legal/la/topics/sscra/about_the_sscra.htm).

**J. [2.12] Relocation Reimbursement**

Section 10-5-62 of the Eminent Domain Act provides that the condemnor shall pay to persons displaced by the acquisition of their real property reimbursement for their reasonable relocation costs:

**Except when federal funds are available for the payment of direct financial assistance to persons displaced by the acquisition of their real property, in all condemnation proceedings for the taking or damaging of real property under the exercise of the power of eminent domain, the condemning authority shall pay to**

**displaced persons reimbursement for their reasonable relocation costs, determined in the same manner as under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended from time to time, and as implemented by regulations promulgated under that Act. This Section does not apply to the acquisition or damaging of property under the O’Hare Modernization Act. 735 ILCS 30/10-5-62.**

The amount to be paid to displaced persons is to be determined in the same manner as pursuant to the URA. Relocation reimbursement has a much broader meaning than “relocation” would suggest. A displaced person is entitled to payment for the cost to move, that is, moving personal property from one place to the next. In addition, packing costs and loading and unloading are reimbursable. In certain cases, when a replacement structure is not available, storage for up to one year may be reimbursed. Other costs can include reprinting stationery and signs for a business to include the new address and disconnection and reconnection of equipment. Preparation of the new structure (*e.g.*, tenant improvements) is not reimbursable.

An unexpected feature of the federal regulations implementing the URA, now to be followed in all Illinois condemnations, is financial assistance that the condemnor must provide to certain residents when they are unable to find new safe, sanitary, and decent housing at the same cost as at the location from which they were displaced. If the new housing cannot be found at the same price, the condemnor must provide a subsidy. If this housing cannot be found at all in the community, the condemnor must provide it. This applies to renters as well as owners.

Who is entitled to receive relocation reimbursement? The URA applies to all persons who are displaced by a federally supported project regardless of whether they are owners and regardless of whether their property is taken. But, the terms of the EDA are not so broad. It applies to persons displaced by the “acquisition of their real property.” *Id.* Tenants are displaced when the condemnor acquires their landlord’s real property. Literal interpretation of the EDA would exclude relocation payments to tenants since their real property is not being acquired. However, tenants own a stick in the bundle of real property rights. In light of this and benefits under the URA, it would seem unlikely that tenants would not receive relocation reimbursement.

Like all provisions of the EDA, §10-5-62 “applies only to complaints to condemn that are filed on or after its effective date” (*i.e.*, January 1, 2007). 735 ILCS 30/90-5-5. Read literally, this means that when a condemnor acquires property by agreement under threat of condemnation, but when no complaint is filed, displaced persons are not entitled to relocation reimbursement. The exclusion of voluntary transactions also appears in the language of §10-5-62, which provides that reimbursement is required “in all condemnation *proceedings* for the taking or damaging of real property *under the exercise of the power of eminent domain.*” [Emphasis added.]

It will be difficult for condemnors to avoid reimbursement in voluntary transactions, even if §10-5-62 does not require these payments. If the condemnor refuses to pay reimbursement as part of a negotiated purchase, the owner need only refuse the deal and make the condemnor obtain the property in court, thereby forcing the payment of relocation costs.

The URA not only requires that condemnors reimburse relocation costs, but also establishes many procedural and substantive standards for condemnors to follow. For example, there are elaborate regulations concerning the notices to landowners, the appraisal process and the minimum time that a person must be allowed to remain on the acquired property. Section 10-5-62 applies the URA only to “relocations costs,” which are to be “determined in the same manner as under the [URA].” The EDA language is unlikely to be interpreted as adopting the federal rules to any aspect of condemnation other than relocation.

#### **K. [2.13] Relocation Coordinator**

A relocation coordinator may ease the acquisition process. A staff member or private relocation coordinator will be very helpful in facilitating the acquisition. The coordinator is a person (or firm) familiar with relocation law, the labyrinthine guidelines, and local moving companies. A coordinator helps displaced owners and tenants to understand their eligibility and the compensation rules and helps them apply to the public body for relocation compensation.

The coordinator can do the following:

1. identify tenants and other parties (At the outset of a project, the relocation coordinator can visit all of the tenants and businesses in the acquisition project area. In the process of informing them of their relocation rights, the coordinator can obtain the identities of the interested parties.);
2. inform tenants of relocation rights (The relocation coordinator can advise tenants about the kind of relocation assistance available, the procedures for obtaining this assistance, and the paperwork involved in documenting the move and applying for compensation.);
3. determine the relocation budget (By identifying all persons eligible for relocation compensation and estimating eligible costs, the relocation coordinator can advise the condemnor as to the amount to be budgeted for relocation.); and
4. provide easy communication with interested parties (Relocation coordinators have frequent contacts with tenants and owners in the course of advising them about and coordinating their application for relocation reimbursement. The tenants will have a contact who can answer their questions, and therefore, the acquisition attorney can avoid frequent questions from unrepresented parties. The relocation coordinator, as the source of relocation reimbursement funds, appears as a friendly, generous representative of the condemning authority.

In federally funded projects, the costs of a relocation coordinator are reimbursable project expenses.

#### **L. [2.14] 60-Day Notice Letter for State Agencies**

Notice of the intention to condemn must be given at least 60 days before the state or its agencies file a complaint for condemnation. 735 ILCS 30/10-5-15(d). The state and its agencies

desiring to initiate condemnation must send a letter via certified mail, return receipt requested, to the owner and furnish the following information:

- (1) The amount of compensation [to be offered] for the taking of the property proposed by the agency, and the basis for computing it.**
- (2) A statement that the agency continues to seek a negotiated agreement with the property owner.**
- (3) A statement that, in the absence of a negotiated agreement, it is the intention of the agency to initiate a court proceeding under this Act. *Id.***

Section 10-5-15(d) of the Eminent Domain Act requires that the state agency maintain a record of the letters sent for at least one year.

The contents of the notice letter appear to track the offer letter usually sent in condemnation cases, but with some additional requirements. The “basis for computing” the offer must also be stated. 735 ILCS 30/10-5-15(d)(1). An appraisal report would seem to satisfy this requirement.

A sample form of a 60-day notice letter is found in §2.68 below.

Section 10-5-15(c) contains an additional requirement. At the time of the first contact with the property owner, whether in person or by letter, the state agency must advise the property owner in writing of the following:

- (1) A description of the property that the agency seeks to acquire.**
- (2) The name, address, and telephone number of the State official designated . . . to answer the property owner’s question.**
- (3) The identity of the State agency attempting to acquire the property.**
- (4) The general purpose of the proposed acquisition.**
- (5) The type of facility to be constructed on the property, if any. *Id.***

A sample form of a first-contact letter that could be sent to conform to this requirement is found in §2.67 below.

Since 1991, when the 60-day notice statute was first enacted, there have been few reported appellate court decisions interpreting it, and several issues remain unresolved:

1. Is the notice requirement mandatory or directory? A statutory direction may be considered directory if it does not provide a penalty for failure to comply. Section 10-5-15(d) contains no such penalty despite its injunction to serve the notice 60 days before initiating

condemnation. Thus, if a property owner seeks to base a traverse (motion to dismiss) on the state's failure to comply with the statute precisely (such as failing to send in the manner required by the EDA or giving less than 60 days' notice), the state may defend on the ground that the notice requirement is directory only and that failure to comply is not fatal to the take.

2. What is a "state agency" for the purpose of the statute? Agencies in the executive branch of Illinois government, such as the Illinois Department of Transportation or the Illinois Department of Natural Resources, are clearly state agencies and likely objects of the §10-5-15(d) notice requirement. These departments have blanket expropriation power, need no additional legislative authority to file condemnation, and are subordinates of the chief executive of the state. However, the statute's application to other agencies is not so clear. The Toll Highway Authority, interstate compact agencies, and state universities are not in the executive branch of government. They are not subordinates of the Governor, but are governed by statutory bodies. These entities may not be "agencies" for the purpose of the EDA.

3. How long must the state agency's offer of purchase remain open? The sample form of a letter of a final good-faith offer in §2.74 below provide that the condemnor's offer will terminate after seven days. The purpose of terminating the offer is to establish that if the owner does not accept the offer, "the compensation to be paid . . . cannot be agreed upon by the parties" (735 ILCS 30/10-5-10(a)). However, the terms of §10-5-15(d) provide that the 60-day notice contain the amount of proposed compensation and a statement that "the agency continues to seek a negotiated agreement" with the owner. Nothing in this language expressly permits the offer to be terminated prior to filing condemnation. The practitioner is advised to be aware of the tension between this language and the common practice of terminating offers to purchase.

4. May the first-contact letter and the 60-day letter be combined? Sections 10-5-15(c) and 10-5-15(d) describe respectively the requirements of the letter to be sent on the state's first contact with the property owner and the letter of offer. In some exigent circumstances, it may be necessary to send concurrent first-contact and offer letters, or a combined first-contact and offer letter.

5. What is a first contact, and when does it occur? Is the first-contact letter to be served when the state first begins consideration of the subject site but before the decision is made that the property is necessary or desirable for the project? For example, surveys, environmental assessments, and appraisals may be needed before the state determines whether to proceed with a project. Each of these inspections necessitates contact with the property owner. Must the official first-contact letter be served at the investigation stage prior to even deciding whether to proceed with a project?

The Illinois Supreme Court has construed the 60-day notice strictly. In *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 810 N.E.2d 1, 284 Ill.Dec. 348 (2004), the court held that once the 60-day notice is sent, the state agency cannot reduce the amount of its offer without reinstating the 60-day notice requirement. In *151 Interstate Road*, the Illinois Department of Transportation had sent a 60-day notice under former 735 ILCS 5/7-102.1(d) (predecessor to §10-5-15(d) of the EDA) but subsequently reduced its offer for the

property by \$7,000. According to the court's calculations, the reduction was not based on a reduced taking but was a decrease in the per-acre value being offered by IDOT. The court held that this constituted a new offer, requiring a new 60-day period. The court stated:

**Meaningful negotiation will only occur if property owners believe they will be no worse off at the end of the process than they were at the beginning. If the state is permitted to do what DOT did here, namely, to make an offer at a certain price, but then reduce the rate it is willing to pay and proceed to court before an additional 60-day period has expired, property owners will have no such assurance. The prospect of diminishing payment will intimidate some property owners, making them feel pressured to accept the State's initial proposal and forego further discussions for fear that they might end up receiving less and less the closer the state comes to the time when it can initiate court proceedings against them. . . . [M]eaningful bargaining will be substantially impaired. That outcome is directly contrary to the result the General Assembly hoped to achieve when it enacted section 7-102.1(d).** 810 N.E.2d at 9 – 10.

Section 10-5-15(d) of the EDA requires that the 60-day notice set forth the amount of compensation for the taking and “the basis for computing it.” In 2003, the Third District Appellate Court had held that when an appraisal forms the basis for computing the compensation, the appraisal must be furnished to the owner upon request (*Department of Transportation ex rel. People v. Hunziker*, 342 Ill.App.3d 588, 796 N.E.2d 122, 277 Ill.Dec. 407 (3d Dist. 2003)), but then three years later, the court overruled itself, holding that the plain statutory language cannot support the conclusion that the appraisal must be furnished. *Department of Transportation v Tucker*, 366 Ill.App.3d 739, 853 N.E.2d 749, 753, 304 Ill.Dec. 672 (3d Dist. 2006). Nevertheless, the court warned that an agency cannot conceal its appraisal report for the purposes of low-balling the owner since doing so would breach the statutory obligation of good-faith negotiation. See §§2.31 and 2.40 below regarding good-faith negotiation.

#### **M. [2.15] Uniform Relocation Assistance and Real Property Acquisition Policies Act**

The Uniform Relocation Assistance and Real Property Acquisition Policies Act applies to every acquisition funded in whole or in part with federal grants. As noted in §2.7 above, failure to observe the requirements of the URA does not result in the inability to acquire property, but it could result in a failure of the project because of the deprivation of federal funding. Thus, when the URA applies, it is imperative to follow it and the regulations promulgated thereunder by the various federal departments and agencies.

The URA not only requires that relocation assistance be paid to displaced owners and tenants, it also imposes certain other procedures not otherwise required by Illinois law.

The acquisition and relocation regulations for acquisitions funded by federal agencies appear at 49 C.F.R. pt. 24. These regulations apply to all property acquired in whole or in part with federal funds except those negotiated without any threat of condemnation and without designation of a specific site. The following summarizes some, but by no means all, of the applicable regulatory requirements:

1. As soon as feasible, the condemning body shall notify the owner of its interest in acquiring the property and inform the owner of the basic protections under the URA, including the obligation to secure an appraisal. The obligation to inform may be satisfied by providing the federal agency's information booklet.

2. Before the initiation of negotiations, there shall be an appraisal.

3. Acquiring bodies are encouraged to obtain at least two appraisals for high-value properties or properties requiring a complicated valuation process.

4. The owner shall be given an opportunity to accompany the appraiser during the appraiser's inspection.

5. Appraisals must conform to federal agency standards, and the appraiser must be certified under state law pursuant to Title IX of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §3331, *et seq.*

6. Appraisals shall be subject to review by a qualified reviewing appraiser.

7. Before initiation of negotiations, the condemning body shall establish an amount that it believes to be just compensation for the taking. "The amount shall not be less than the approved appraisal of the fair market value of the property" or the reviewing appraiser's recommended fair market value. 49 C.F.R. §§24.102(d), 24.104. Promptly thereafter, the condemning body "shall make a written offer to the owner to acquire the property for the full amount believed to be just compensation." 49 C.F.R. §24.102(d).

8. Along with the initial written purchase offer, the owner shall be given a written statement of the basis for the offer, which shall include the following:

- a. a statement of the amount offered;
- b. a description and location of the property to be acquired and the interest to be acquired; and
- c. an identification of the buildings and other improvements to be included.

9. The condemning body is prohibited from advancing the time of condemnation, delaying negotiations of condemnation, or taking any other course of action to coerce an agreement.

10. The condemning body must have standards for the appraisal and the qualifications of appraisers.

11. The condemning body is responsible for paying recording fees, transfer taxes, and similar expenses incidental to conveying the real property. The condemning body is also responsible for the payment of penalty costs for prepayment of a mortgage and the prorated portion of real property taxes applicable to the period after acquisition of title.

## **N. Conditions Precedent to Filing**

### **1. [2.16] Authority and Delegation of Authority To Implement Condemnation**

The state has the inherent power to condemn property for public use. U.S.CONST. amend. V; ILL.CONST. art. I, §15; *Forest Preserve District of DuPage County v. West Suburban Bank*, 161 Ill.2d 448, 641 N.E.2d 493, 204 Ill.Dec. 269 (1994). Statutes or ordinances that authorize the acquisition of property for a public project may also provide the manner for implementing the acquisition and identify the public officials responsible for carrying it out. This legislation must be specific enough to be a proper delegation of power and, if so, must have been approved. *Forest Preserve District of DuPage County v. Loren & Gisela Brown Family Trust*, 323 Ill.App.3d 686, 753 N.E.2d 1110, 257 Ill.Dec. 484 (2d Dist. 2001) (approving delegation to staff and attorneys of authority to negotiate voluntary sale and to institute condemnation if negotiation failed). It should be remembered that the decision to acquire must be exercised by the appropriate corporate authorities or the General Assembly. For state projects, the General Assembly has delegated the decision to acquire property to the executive branch, which exercises this authority without additional specific legislative authority. See, e.g., §4-501 of the Illinois Highway Code, which allows the Illinois Department of Transportation the authority to acquire such property as is “necessary” for highway projects, without further specificity. 605 ILCS 5/4-501.

For the text of delegation ordinances approved by the court, see *Loren & Gisela Brown Family Trust*, *supra*, 753 N.E.2d at 1112 – 1113.

### **2. [2.17] Prerequisites for New Quick-Take Authority**

The Illinois House of Representatives has established prerequisites for it to consider before enacting a new quick-take authority. The rules apply to the state as well as to units of local government. See Illinois House Rule 41(c), 95th General Assembly.

Rule 41(c) provides that before the Illinois House of Representatives will consider legislation authorizing additional quick-take powers under former §7-103 of the Code of Civil Procedure (now §20-5-5 of the Eminent Domain Act (735 ILCS 30/20-5-5)), the state agency or unit of government requesting this authority must notify affected owners by certified mail, publish notice, and hold a public hearing. Thereafter, the corporate authorities, if a unit of local government, must adopt a resolution requesting the General Assembly to add quick-take powers. Then, not less than 30 days after giving notice, the head of the state agency or local government must file documentation certifying that the procedures have taken place and identifying the property and the owners that will be affected. Among the documents required to be submitted are appraisals of the affected property.

Rule 41(c) expires at the end of the 95th General Assembly on December 31, 2008, but these provisions, or others like them, have been in effect since 2003 and are expected to be reenacted by subsequent General Assemblies.

This procedure can be expensive and time-consuming. However, the impact of Rule 41(c) can be reduced by good planning. As a practical matter, the General Assembly passes most legislation only two or three times a year with a January session, a late June session, and a November veto session. Governments or agencies requesting new quick-take legislation should submit their applications well in advance of these passages dates.

### 3. [2.18] Availability of Funds Not Condition Precedent to Filing Petition

It is not a condition precedent to the filing of a condemnation petition that the condemnor have the money immediately available to pay for the property sought to be acquired. This principle was restated in *County of St. Clair v. Wilson*, 284 Ill.App.3d 79, 672 N.E.2d 27, 219 Ill.Dec. 712 (5th Dist. 1996).

In *Village of Depue v. Banschbach*, 273 Ill. 574, 113 N.E. 156, 159 – 160 (1916), the court said:

**It is further urged that the proceedings were defective for the reason that no provision had been made for payment for the lands taken and damaged. The fact that no tax had been levied or provision made to raise funds to pay for the improvement is no concern to the appellant. (*City of Chicago v. Sanitary District*, 272 Ill. 37). He is not required to give credit to the municipality or part with his land until he is paid in full the compensation awarded him by the verdict of the jury and judgment of the court. (*City of Chicago v. Sanitary District, supra.*) . . . It is immaterial to the rights of appellant that such funds were not in its treasury at the time this proceeding was instituted, so long as they are there at the time his lands are taken.**

See also *Forest Preserve District of Cook County v. Chicago Title & Trust Co.*, 351 Ill. 48, 183 N.E. 819 (1932). In fact, if the ultimate award exceeds what the condemnor is willing to pay, the condemnor may dismiss or abandon the petition provided it has not taken possession of the property pursuant to a quick-take order (in which case abandonment or dismissal is not permitted). See 735 ILCS 30/10-5-70; *Department of Public Works & Buildings of State of Illinois v. Greenlee*, 63 Ill.App.2d 425, 211 N.E.2d 771 (2d Dist. 1965). Of course, §10-5-70 of the Eminent Domain Act requires the payment of costs, expenses, and attorneys' fees upon abandonment or dismissal.

### 4. [2.19] Final Plans of Project Not Condition Precedent to Filing Petition

A corollary to the principle described in §2.18 above (*i.e.*, that the availability of funds is not a condition precedent to filing a condemnation petition) is the principle that asserts that plans for the project for which land is being acquired need not be final before condemnation may be commenced. *City of Chicago ex rel. Schools v. Albert J. Schorsch Realty Co.*, 127 Ill.App.2d 51, 261 N.E.2d 711 (1st Dist. 1970). In *Department of Transportation v. Keller*, 127 Ill.App.3d 976, 469 N.E.2d 262, 265, 82 Ill.Dec. 728 (5th Dist. 1984), the court noted:

**Respondents also contend that petitioner was without authority to exercise the powers of eminent domain since the construction plans offered as evidence at the**

**hearing were not “final plans.” The record indicates, however, that the State’s plans were final to the extent that circumstances would reasonably allow. The fact that the Department of Transportation could not offer extensive plans for every parcel of land sought in the acquisition, or for every phase of a project which would extend over a period of several years, did not deprive the Department of the authority to condemn the various tracts. Neither was the department required, as respondents suggest, to obtain, prior to acquiring title, every permit which might be required in the course of construction.**

The principle that condemnation is authorized for a public purpose, even if specific plans have not been formulated in detail, is also applicable to quick-take. The First District Appellate Court rejected the argument that such a principle was applicable only in a non-quick-take condemnation proceeding. The court held that even if “extensive plans” might not be available or even if a project might extend over a period of years, this situation did not deprive the condemning body of authority to condemn, even in a quick-take action. *City of Chicago v. First Bank of Oak Park*, 178 Ill.App.3d 321, 533 N.E.2d 424, 428, 127 Ill.Dec. 552 (1st Dist. 1988).

The condemnor need not identify the funding sources of the project for which the property is being acquired. In *South Park Commissioners v. Livingston*, 344 Ill. 368, 176 N.E. 546, 547 (1931), the owner alleged that the condemning authority “was without the necessary funds and had made no appropriation or levy to develop the property for park purposes or for any purpose within its charter powers.” Similarly, the owner challenged the taking on the ground that the condemning authority “never adopted any plan for the use of the land nor made an appropriation for it, and that the court was unable to pass upon the sufficiency of the money available for the construction of the work.” *Id.* The Illinois Supreme Court held that these were not proper issues to challenge an eminent domain taking.

It is permissible to acquire property for anticipated needs. In *Alsip Park District v. D & M Partnership*, 252 Ill.App.3d 277, 625 N.E.2d 40, 192 Ill.Dec. 80 (1st Dist. 1993), the appellate court upheld the acquisition of additional land for a park when there was disputed evidence on the issues of whether the land was needed now, whether there were specific plans, and whether other land might better fulfill the district’s immediate needs. The appellate court quoted *City of Chicago v. Vaccarro*, 408 Ill. 587, 97 N.E.2d 766, 772 (1951), in which the Illinois Supreme Court approved of acquisitions that “anticipate the future increased demands for the public use to which the land is to be devoted.” 625 N.E.2d at 46. However, a condemnor can go too far in the court’s eyes. See *County of St. Clair v. Faust*, 278 Ill.App.3d 152, 662 N.E.2d 584, 214 Ill.Dec. 1018 (5th Dist. 1996), in which the court held that the county’s acquisition was limited to the minimum acreage necessary for its purposes and that the amount sought grossly exceeded those needs.

The courts allow the condemning body wide latitude in establishing the ultimate use for the property to be condemned. One court has even gone as far as to say that “recent cases suggest that a legislative finding of necessity by a city council is not required to defeat a traverse.” *City of Oakbrook Terrace v. LaSalle National Bank*, 186 Ill.App.3d 343, 542 N.E.2d 478, 482, 134 Ill.Dec. 299 (2d Dist. 1989). While this statement is an observation, not the ratio decidendi of the case, the court reiterated the principle that an eminent domain action may be maintained although

the ultimate use of the condemned property has not yet been determined. A further instance of this principle is *State of Illinois Medical Center Commission v. United Church of Medical Center*, 142 Ill.App.3d 498, 491 N.E.2d 1327, 1329, 96 Ill.Dec. 867 (1st Dist. 1986), in which the court upheld the taking even though the condemning body could prove no more definite use than for “medical institutional expansion.” The taking was upheld despite the fact that no use or prospective user had been identified, either in the authorizing resolution or by evidence in the traverse hearing. One court has even gone as far as to state that the failure to “pass a specific resolution before filing its complaint in condemnation” is a nonfatal defect if the condemning authority presents evidence at the traverse hearing showing that the taking is necessary. *County of Wabash v. Partee*, 241 Ill.App.3d 59, 608 N.E.2d 674, 680, 181 Ill.Dec. 601 (5th Dist. 1993).

#### **5. [2.20] Prior Notice Not Condition Precedent to Filing Petition — Other Than by State Agencies**

Although owners frequently allege that they had no prior notice that their property might be taken, prior notice is not required. “[E]very private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain.” *Deerfield Park District v. Progress Development Corp.*, 22 Ill.2d 132, 174 N.E.2d 850, 853 (1961). Except in the case of state agencies (see §2.14 above) no specific prior notice is required. Of course, all formalities relating to notice of public meetings must be observed to ensure that the authorizing legislation was properly passed.

Notice can be a two-edged sword. Advance notice can give property owners sufficient time to plan to move. On the other hand, lengthy notice, particularly if there is not a particular date set for the acquisition, can cause uncertainty for property owners. Lengthy notice can cause a decline in property values. See, e.g., *Chicago Housing Authority v. Lamar*, 21 Ill.2d 362, 172 N.E.2d 790 (1961). It is even possible that the public project will not proceed (e.g., because of lack of funds), leaving the property owner with no recourse. See *City of Chicago v. Loitz*, 61 Ill.2d 92, 329 N.E.2d 208 (1975). Notice too far in advance can cause tenants to vacate, leaving the owner with no rental income while waiting for condemnation to be approved or completed.

#### **6. [2.21] Delay in Instituting or Prosecuting Condemnation Action Not Fatal**

Frequently, there is a significant lapse of time between the planning of a project and the actual acquisition of the property required for it. In the case of highways, the recording of the highway centerline project usually occurs relatively early in the planning stages. The result is that the centerline appears as a title objection long before the condemnor seeks to acquire the affected property, which may make the property unmarketable. Public knowledge of the imminence of other kinds of projects has a similar effect. When a property is targeted for expropriation, an owner may be unable to sell it and unwilling to maintain it until acquisition occurs. When there is lengthy delay, the landowner is often left without any practical remedy since these pre-condemnation activities by the condemnor do not constitute a taking that would obligate the condemnor under the Illinois and U.S. Constitutions to compensate the owners of the affected property. See *City of Chicago v. Loitz*, 61 Ill.2d 92, 329 N.E.2d 208 (1975); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 81 L.Ed.2d 1, 104 S.Ct. 2187 (1984); *Griffin v. City*

of *North Chicago*, 112 Ill.App.3d 901, 445 N.E.2d 827, 831, 68 Ill.Dec. 183 (2d Dist. 1983) (“no taking occurs until the execution of a purchase agreement or conclusion of eminent domain proceedings”).

In *Patel v. City of Chicago*, 383 F.3d 569 (7th Cir. 2004), the court reaffirmed the principle that the designation of properties for acquisition has no legal impact on these properties; challenges to these designations are not ripe. In *Patel*, the plaintiffs were owners of motels that the city found to be deteriorated. The motels were singled out for acquisition under the City of Chicago’s Lincoln Avenue tax increment financing (TIF) district ordinance. The owners challenged the condemnation designation on TIF and equal protection grounds, alleging that motels, as distinct from other properties in the district, were singled out for acquisition and that the city council’s designation was a malicious attempt to punish the motel owners without any legitimate governmental objective.

The Seventh Circuit held that if the owners’ complaint was for a taking, their recourse would be an action in state court for inverse condemnation. On the other hand, an equal protection claim was also premature under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985). Equal protection could not be used to avoid the finality requirements of *Williamson*. The court in *Patel* found that since the plaintiffs alleged no protected class violations, the claims were nothing more than land use claims, which, under *Williamson*, must await a final local decision. *Patel* reiterates the principle, citing Supreme Court and Seventh Circuit precedent, that governmental acquisition activities short of filing condemnation or a physical invasion of the property are not actionable under the Fifth Amendment.

In contrast to prefiling immunity, the courts may dismiss the action in egregious cases of delay following the filing of a complaint for condemnation. See, e.g., *Department of Public Works & Buildings v. Vogt*, 51 Ill.App.3d 770, 366 N.E.2d 310, 9 Ill.Dec. 53 (5th Dist. 1977); *Department of Conservation v. Cox*, 95 Ill.App.3d 1126, 420 N.E.2d 1061, 51 Ill.Dec. 503 (5th Dist. 1981). Because of irreparable harm that may be caused to the landowner before a complaint is filed and the risk of dismissal afterward, filing and prosecuting a condemnation action should proceed expeditiously.

In *City of Quincy, Illinois v. Diamond Construction Co.*, 327 Ill.App.3d 338, 762 N.E.2d 710, 261 Ill.Dec. 121 (4th Dist. 2002), the court did not approve the city’s sandbagging the owner by letting the owner move and then seeking to value the property as vacant.

Under the Eminent Domain Act, delay during trial is less likely, or if delay occurs, it is less likely to harm the owner. The EDA provides incentives for the condemnor to expedite trial. The EDA establishes that the property in condemnation is to be valued as of the date the complaint was filed; however, if trial does not occur within two years of the filing, the court may advance the valuation date to the date of trial. 735 ILCS 30/10-5-60. This inevitably leads to a higher valuation.

### 7. [2.22] Approval of Illinois Commerce Commission for Public Utility Property

Section 10-5-10(g) of the Eminent Domain Act requires that a condemnor obtain permission from the Illinois Commerce Commission before acquiring public utility property by eminent domain:

**No property [with certain exceptions] belonging to a railroad or other public utility subject to the jurisdiction of the Illinois Commerce Commission may be taken or damaged, pursuant to the provisions of the Article VII of this Act, without the prior approval of the Illinois Commerce Commission. 735 ILCS 30/10-5-10(g).**

Similarly, a motion for vesting title in a quick-take condemnation pursuant to 735 ILCS 30/20-5-5(b) requires prior approval for the acquisition by the Illinois Commerce Commission. The EDA is silent as to what standards the Illinois Commerce Commission should use in considering whether to grant approval. There is a dearth of caselaw; one court has simply declared that the purpose of the approval requirement “is to insure that property necessary for utility purposes is not taken.” *Department of Conservation v. Chicago & North Western Transportation Co.*, 59 Ill.App.3d 89, 375 N.E.2d 168, 170, 16 Ill.Dec. 537 (2d Dist. 1978).

In addition to the lack of standards, it is also unclear whether this requirement is jurisdictional or may be waived by agreement. The one certainty is that the condemning body is assured of two condemnation proceedings for each utility parcel. Therefore, the attorney and the client must make allowances for additional preparation required by both an Illinois Commerce Commission and a circuit court proceeding.

### 8. [2.23] Special Considerations — Railroad Property

For railroad property, additional regulatory approval must be sought. In order for a railroad to abandon trackage, it must receive the permission of the Surface Transportation Board (STB) of the United State Department of Transportation. 49 U.S.C. §10903. The STB is the successor to the Interstate Commerce Commission. By regulation, the STB has exempted rail property inactive for two years from the purview of the statute. 49 C.F.R. §§1152.50, 1152.60. For acquisition of exempt property not in active rail use, certification to the STB is given by the railroad itself. Note that it is often impossible to determine by casual inspection whether a rail line is in use. Although a line may appear to be abandoned or to have little or no use, it nevertheless may not have met the qualifications for exemption.

### O. [2.24] Condemnation for Use by Another Governmental Entity — Intergovernmental Cooperation

The courts have approved the acquisition of property by one agency for conveyance to another agency. In *Department of Transportation of State of Illinois v. Callender Construction Co.*, 305 Ill.App.3d 396, 711 N.E.2d 1199, 238 Ill.Dec. 538 (4th Dist. 1999), the Illinois Department of Transportation built a highway through a conservation area and sought to replace it by acquiring a conservation easement over other private property. The court, citing the Intergovernmental Cooperation Act, 5 ILCS 220/1, *et seq.*, held that the acquisition was

necessary for the highway even though the conservation easement was to satisfy an agreement with the Illinois Department of Conservation. *See also City of Chicago v. Gorham*, 80 Ill.App.3d 496, 400 N.E.2d 42, 35 Ill.Dec. 905 (1st Dist. 1980) (approving City of Chicago acquisition of property for state office building).

**P. [2.25] Preservation of Status Quo While Condemnation Is Pending**

Condemnation may be of assistance in preserving a threatened natural resource, an historic property, or any existing improvement that the condemning body desires to retain. In *Forest Preserve District of DuPage County v. West Suburban Bank*, 161 Ill.2d 448, 641 N.E.2d 493, 204 Ill.Dec. 269 (1994), the Illinois Supreme Court upheld an injunction issued by the trial court preventing the landowner from converting pristine prairie land into parking lots. Although the actual take is not complete until after a verdict, judgment, and deposit of funds, the court may issue an injunction to preserve features of the property for which the property is being acquired. When property is at imminent risk of destruction and the public agency intends to acquire it for preservation of a resource or historic structure, a complaint for condemnation may be filed to allow a court to issue an injunction preserving the status quo. Note that in order to file a complaint, there must already be in existence a statute, ordinance, or other authority authorizing acquisition; the acquisition must be for a public purpose; and the statutory requirements for condemnation, principally the attempt to agree, must already be in place or have occurred. One impediment to this methodology for a state agency is the 60-day notice requirement of 735 ILCS 30/10-5-15. As discussed in §2.14 above, §10-5-15 provides no penalty for noncompliance. Thus, it can be argued that the section is directory, not mandatory. Even if the complaint for condemnation would be premature, the courts may preserve the status quo pending the filing of condemnation. *Forest Preserve District of Cook County v. Mount Greenwood Bank Land Trust 5-0899*, 219 Ill.App.3d 524, 579 N.E.2d 1066, 162 Ill.Dec. 252 (1st Dist. 1991).

**Q. [2.26] Notice of Right-of-Way Designation and Advance Acquisition**

Pursuant to 605 ILCS 5/4-510, the Illinois Department of Transportation may designate a proposed highway right-of-way. The designation has several purposes: It notifies landowners that their land is likely to be acquired for a highway; it prohibits new development on the proposed right-of-way that would increase acquisition costs; and it forces IDOT to decide whether to acquire the property when new development is proposed.

After public notice and a hearing, IDOT records an alignment map showing property lines and identifying owners of record along the right-of-way. IDOT then publishes public notice and notifies owners of record that it recorded the map. Thereafter, an owner is required to notify IDOT 60 days before any improvement or development of the property. IDOT has 45 days following notice to determine whether to acquire the property through the exercise of eminent domain. If IDOT decides to acquire, it has 120 days to initiate the purchase. If IDOT declines to acquire, the owner may develop the property and must be compensated for the improvement if the property is eventually acquired. But, if the owner fails to give notice, the property will be valued as if no further development had occurred. *Id.*

The filing of a highway right-of-way map permits the Department of Transportation to stop development on land to be acquired. Before an owner can start development, there is effectively a 165-day moratorium, consisting of the 45-day decision period and the 120-day period allowed for IDOT to commence acquisition. This moratorium would not constitute a taking without compensation. The mere planning or plotting in anticipation of a public improvement is not a taking or damage to the affected property. *Davis v. Brown*, 221 Ill.2d 435, 851 N.E.2d 1198, 1205, 303 Ill.Dec. 773 (2006). See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 152 L.Ed.2d 517, 122 S.Ct. 1465 (2002).

#### **R. [2.27] Prefiling Contacts with the Owner**

It is good public policy and good public relations for the condemning body to inform the owner at an early date that acquisition of the owner's property is probable. This early notice will give the owner adequate time to plan to move and will avoid surprises. The regulations promulgated under the Uniform Relocation Assistance and Real Property Acquisition Policies Act require that, for federally funded projects, the owner must be informed of his or her rights and the condemnation procedures. Pursuant to 49 C.F.R. §24.203, landowners must be informed of the length of time they will be permitted to occupy condemned property, the right to present evidence regarding value, and the relocation benefits that may be expected. This information is ordinarily provided by the condemning state agency through the use of a form letter and an enclosed booklet outlining the condemnee's rights and obligations.

Even for projects to which the URA does not apply, it is good policy for the staff of the condemning body to make early contact with affected property owners concerning the impending condemnation. The condemning attorney should carefully monitor the staff's communication with landowners. It is important not to give this notice to owners whose property will not be taken and not to give the notice too early. In addition to other effects, notification of condemnation can adversely affect property owners by making the properties unmarketable or discouraging investment in improving or maintaining their properties to be acquired. See also the ethical considerations noted in §2.35 below regarding communications with a property owner.

#### **S. [2.28] Records of Conversations**

Perhaps attorneys need not be reminded of the necessity for keeping notes and records of contacts with owners and their attorneys. Questions occasionally arise about whether an attempt to agree occurred. An attorney's notes concerning telephone calls from and meetings with the owner or the owner's attorney will be helpful in confirming that the offer was received and that an attempt was made to agree. Similarly, one can keep a record of the parties' latest position on a settlement amount. With many parcels in a project, it is difficult to commit to memory the latest prices being discussed in negotiations. Adequate notes will allow the attorney to avoid mistakes and to refresh the attorney's recollection in case there is a dispute as to whether the owner received an offer or the condemnor failed to negotiate.

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#### **PRACTICE POINTER**

- ✓ The regulations under the Uniform Relocation Assistance and Real Property Acquisition Policies Act require that written records be maintained of all contacts with owners.
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**T. [2.29] Prefiling Inspection**

Contact with the property owner is required at the appraisal stage. The regulations promulgated under the Uniform Relocation Assistance and Real Property Acquisition Policies Act require that the property owner be given notice that an appraiser will be inspecting the affected property. 49 C.F.R. §24.102. The owner should be given the opportunity to accompany the appraiser on the inspection (for federally funded projects, this is a requirement). Cooperation of the owner is also essential in order to inspect the interior of the property. Until a complaint for condemnation is filed, discovery is unavailable. Therefore, the appraiser will be unable to enter nonpublic portions of private property without the invitation of an owner or occupant.

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**PRACTICE POINTER**

- ✓ For highway projects, the Illinois Highway Code authorizes the state to inspect property irrespective of permission. 605 ILCS 5/4-503. Note that the Code requires that the state shall be responsible for all damages occasioned thereby.
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It is increasingly important for the condemnor to know whether the property to be acquired is polluted. The condemning body should know whether the property is currently or was in the past used as the site of potentially contaminating activities, whether underground storage tanks exist, and whether the property is otherwise contaminated. The problem is that the owner may be unwilling to reveal any this information. The usual kind of environmental inspection, a Phase I audit, may be conducted by an environmental consultant. A Phase I audit requires a review of public records. However, except for certain state acquisitions, soil tests and onsite inspections may be conducted only with the owner's consent before initiation of a condemnation proceeding.

A sample form of a letter notifying the property owner of the imminence of condemnation and requesting an inspection is found in §2.69 below.

**U. Attempt To Agree as to Compensation****1. [2.30] Attempt To Agree a Prerequisite**

The Eminent Domain Act evidences the public policy of encouraging voluntary acquisitions of property and discouraging forced acquisitions through the exercise of eminent domain. *Patrick Media Group, Inc. v. DuPage Water Commission*, 258 Ill.App.3d 1068, 630 N.E.2d 958, 196 Ill.Dec. 793 (1st Dist. 1994). 735 ILCS 30/10-5-10(a) requires that a complaint for condemnation may not be filed unless the condemnor cannot agree with the interested parties as to the amount of compensation to be paid for the property sought to be appropriated or damaged unless the owner of the property is incapable of consenting, his or her name or residence is unknown, or he or she is a nonresident of the state. The inability to agree must be alleged in the complaint for condemnation. *City of Chicago v. Collin*, 302 Ill. 270, 134 N.E. 751 (1922); *Trustees of Schools v. Clippinger*, 404 Ill. 202, 88 N.E.2d 451 (1949).

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**PRACTICE POINTER**

- ✓ The offer to purchase may be sent at any time, even before any other formal action to acquire the property has been taken. In *City of Oakbrook Terrace v. LaSalle National Bank*, 186 Ill.App.3d 343, 542 N.E.2d 478, 134 Ill.Dec. 299 (2d Dist. 1989), the court upheld the validity of the city's offer to purchase even though the offer was sent before the city had enacted an ordinance authorizing condemnation. The property owner noted that the ordinance that was eventually enacted authorized the city attorney to undertake negotiations to purchase (as these ordinances usually do) and, if the negotiations should prove unsuccessful, to initiate condemnation. However, the offer was transmitted before the enactment of the ordinance. The property owner challenged the offer on the ground that it was not the offer authorized by a later-enacted ordinance. The court upheld the validity of the pre-ordinance offer, noting that there is good reason to hold these negotiations valid even if they precede an authorizing ordinance. If the negotiations were successful, they would eliminate the necessity for city council action. Such an offer satisfies the Eminent Domain Act because it facilitates the amicable conveyance of the property.
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**2. [2.31] Condemnation Following Unsuccessful Negotiations by the Expected Developer**

It is understood that the offer prerequisite to acquisition must be made in good faith. *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 810 N.E.2d 1, 7, 284 Ill.Dec. 348 (2004). Is good faith lacking when condemnation proceeds after negotiations by private purchasers fail?

Property acquired in connection with a redevelopment project is sometimes conveyed to a developer for private development. In order to avoid condemnation costs and in hopes of saving money and time, the prospective developer often tries to negotiate the purchase of the needed property prior to the initiation of condemnation by the governmental body. Because the private developer lacks condemnation power, the property owner may refuse to accept a price that the developer considers reasonable. After failure to reach an agreement with the property owner, the private developer will call on the government to use its eminent domain powers to force a reluctant owner to sell and to do so for a reasonable price.

The exercise of the government's power of expropriation to support private development and to force an unwilling owner to sell at a price the private developer believes to be more reasonable may appear to be an abuse of power. In *Illinois State Toll Highway Authority v. DiBenedetto*, 275 Ill.App.3d 400, 655 N.E.2d 1085, 21 Ill.Dec. 702 (1st Dist. 1995), the property owner challenged the acquisition on the ground that the condemnor, acting through a third party, had made an inadequate offer, thus demonstrating that the offer had been made in bad faith. Homart, an eventual private beneficiary of the public project, initially offered to purchase the property at a price equivalent to only 66 percent of the condemnor's (official) subsequent offer. The court found that the Homart offer was not made on behalf of the condemnor and was not so low as to be in bad faith. Justice Zwick, concurring, argued, however, that the Homart offer was bad practice and not in good faith.

The property owner in *City of Chicago v. Boulevard Bank National Ass'n*, 293 Ill.App.3d 767, 688 N.E.2d 844, 228 Ill.Dec. 146 (1st Dist. 1997), alleged that bad faith occurred when the intended developer asked the city to condemn after the developer was unable to obtain the property through private negotiations. The court upheld the condemnation without considering the allegations of bad-faith negotiations.

In *Village of Skokie v. Gianoulis*, 260 Ill.App.3d 287, 632 N.E.2d 106, 198 Ill.Dec. 47 (1st Dist. 1994), a bank attempted to negotiate a purchase of the Gianoulis' property. When negotiations failed, the bank sought to have the village condemn the property for it as part of an existing redevelopment project. While the appellate court described the purchase attempt, it did not rule on it. Instead, the court found that there was no authority to condemn because the property had not been included in the original acquisition ordinance.

The final word is that of the Illinois Supreme Court. In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1, 263 Ill.Dec. 241 (2002), the court found such an acquisition to violate the public use provision of the United States and Illinois Constitutions. The owner of a motor raceway (originally developed with the support of the Southwestern Illinois Development Authority (SWIDA)) failed in its attempt to purchase a neighboring property for additional patron parking. SWIDA then attempted to condemn the property for the purpose of conveying it to the raceway. The Illinois Supreme Court held that SWIDA's condemnation was not for a public purpose.

### **3. [2.32] Who May Submit the Condemnor's Offer?**

It probably does not matter who submits the offer to purchase as long as it is clear that the offerer is acting on behalf of the condemnor. In state cases, it may be a highway engineer; in other cases, it may be the chief executive officer, the head of the planning department, or the condemnor's attorney. See *Forest Preserve District of DuPage County v. Loren & Gisela Brown Family Trust*, 323 Ill.App.3d 686, 753 N.E.2d 1110, 257 Ill.Dec. 484 (2d Dist. 2001), for an ordinance specifically authorizing particular officers to negotiate a purchase of property on behalf of the condemnor.

### **4. [2.33] Testing the Sufficiency of the Attempt**

The sufficiency of the attempt to agree on compensation to be paid is a preliminary question that must be challenged by a traverse (motion to dismiss). *Evanston v. Piotrowicz*, 20 Ill.2d 512, 170 N.E.2d 569 (1960). If not traversed, the objection is waived, and the court may proceed to determine just compensation. *People ex rel. White v. Busenhart*, 29 Ill.2d 156, 193 N.E.2d 850 (1963); *Chicago Housing Authority v. Berkson*, 415 Ill. 159, 112 N.E.2d 620 (1953). If the allegations of the petition to condemn required by 735 ILCS 30/10-5-10 are not included in the petition, the objection thereto may be raised by a motion to dismiss because the court may not proceed to determine the just compensation to be paid unless the petition complies with the statutory jurisdictional allegations. *Department of Public Works & Buildings v. Lewis*, 344 Ill. 253, 176 N.E. 345 (1931).

## 5. [2.34] Form Indicating Attempt To Agree

In order to avoid the question of a good-faith attempt to agree, a wise practice for the condemnor is to make a final offer by letter referring to the negotiations between the condemnor's agent and the landowner, concluding by advising the owner that if the offer is not accepted within a stated number of days, it must be concluded that the parties cannot agree on compensation to be paid for the taking. Such a letter is sufficient to prove adequate negotiations if no response is received by the condemnor. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 182 N.E.2d 169 (1962); *Village of Deerfield v. Rapka*, 54 Ill.2d 217, 296 N.E.2d 336 (1973); *Illinois State Toll Highway Authority v. Karn*, 9 Ill.App.3d 784, 293 N.E.2d 162 (2d Dist. 1973).

A sample form of a final good-faith offer letter is found in §2.74 below. Note that the letter of offer (a) describes the property sought to be acquired, (b) describes the interest sought to be acquired, (c) offers a sum certain for the interest sought, and (d) sets a specific time within which a response is requested. While none of these elements is specifically required by statute, the incorporation of these elements into the letter of offer will generally simplify proof of an attempt to agree should the issue later be raised in the condemnation proceedings.

Meticulous written records of attempts to agree should be kept, including notes of telephone calls with the owner or owner's representative. Also, the written offer should be sent by certified mail, return receipt requested. Outside negotiators should keep memoranda of all contacts with the owner.

## 6. [2.35] Conferences with Unrepresented or Represented Defendant

The condemnor's attorney should be mindful of potential conflicts when communicating with an owner. The letter of offer (or other pre-condemnation contacts) will frequently bring an immediate telephone call from a landowner. Unsophisticated owners will have many questions, such as the imminence of the acquisition, how long they can stay on their property, how much money they can expect, how much money the condemning body has appropriated to purchase their property, and how they should go about establishing a value for it. Since the condemning attorney is, by nature of the assignment, in an adversarial position to the owner, the attorney must be very careful about these direct contacts with the owner. On the one hand, as a representative of a public body, the attorney will want to furnish to the owner truthful and informative data concerning the history of the acquisition project and general aspects of the condemnation procedure. On the other hand, the condemning attorney does not want to be in the position of giving legal advice to an adversary. In particular, the condemning attorney does not want to leave the landowner with the impression that the attorney is representing him or her. Illinois Rule of Professional Conduct 4.3 states as follows:

**In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.**

Another rule, RPC 4.2, prohibits contact with an adversarial party if the party is represented by counsel, providing that “a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter” without obtaining the prior consent of the other lawyer. Accordingly, one of the first questions the condemning attorney should ask is whether the owner is represented by counsel. If the owner is represented by counsel, the condemning attorney should advise the owner of the requirements of RPC 4.2 and that the owner’s attorney should contact the condemning attorney as soon as possible.

#### **7. [2.36] Terminating the Negotiations**

Almost any good-faith attempt to agree will be considered in compliance with 735 ILCS 30/10-5-10(a). Nevertheless, care should be taken to terminate the negotiations if they cannot lead to a settlement so that it may be demonstrated that the compensation “cannot be agreed upon by the parties interested.” *Id.* In one of the few cases in which an appellate court found that the state had not demonstrated that the parties were unable to agree, the state negotiators had failed to respond to a counteroffer submitted by the owner in response to the negotiator’s offer. Failure to reject the counteroffer was evidence that the attempt to agree was continuing. *Department of Transportation v. Walker*, 80 Ill.App.3d 1039, 400 N.E.2d 956, 36 Ill.Dec. 376 (3d Dist. 1980). *Contra County of Wabash v. Partee*, 241 Ill.App.3d 59, 608 N.E.2d 674, 682, 181 Ill.Dec. 601 (5th Dist. 1993) (“The offer was not responded to. Therefore, the county was under no obligation to continue to negotiate further.”).

#### **8. [2.37] Waiver**

The landowner’s filing of a cross-petition for damages to the land not taken constitutes a waiver of the question of whether there has been a failure to agree on compensation to be paid. *County of Fayette v. Whitford*, 365 Ill. 229, 6 N.E.2d 157 (1936); *Chicago North Shore & Milwaukee R.R. v. Chicago Title & Trust Co.*, 328 Ill. 610, 160 N.E. 226 (1928).

#### **9. [2.38] Multiple Owners, Incompetents, and Nonresidents**

When there is more than one owner, proof of the inability to settle with an owner is sufficient to satisfy the requirements of an attempt to agree. *Public Service Company of Northern Illinois v. Recktenwald*, 290 Ill. 314, 125 N.E. 271 (1919); *Trustees of Schools of Township No. 37 v. First National Bank of Blue Island*, 49 Ill.2d 408, 274 N.E.2d 56 (1971). When the owner of property is incapable of consenting, when his or her name or residence is unknown, or when he or she is a nonresident of the state, a petition to condemn may be filed, and no attempt to agree in this instance is required. 735 ILCS 30/10-5-10(a).

#### **10. [2.39] Standards for Finding an Attempt To Agree**

Although in some reported decisions the courts use the word “negotiations” in the context of an attempt to agree (*see, e.g., Department of Transportation v. Platolene “500”, Inc.*, 33 Ill.App.3d 470, 337 N.E.2d 100 (4th Dist. 1975)), it appears that a mere offer to purchase the

property will suffice as an attempt to agree. In *County Board of School Trustees of Macon County v. Batchelder*, 7 Ill.2d 178, 130 N.E.2d 175, 178 (1955), the court stated:

**Defendants' contention that there was a failure to prove inability to agree on compensation before the petition was filed must likewise be rejected. By letter addressed to defendants they were offered the sum of \$500 for their land, and no reply was made to the letter. Under such circumstances no further attempt to negotiate was necessary. There was sufficient effort on the part of the Board to agree with defendants.**

Thus, the focal point is an attempt to agree. Under appropriate circumstances, an offer may not even be required. For example, in *County Board of School Trustees of DuPage County v. Boram*, 26 Ill.2d 167, 186 N.E.2d 275 (1962), the landowner was adamant that he would accept only a certain figure that the condemnor was not willing to pay, and it was thus clear from the acts of the parties that an offer would be futile. In *Davis v. Northwestern Elevated R.R.*, 170 Ill. 595, 48 N.E. 1058, 1059 (1897), the court said:

**It is contended that the court had no jurisdiction to entertain the petition unless there was proof of failure on the part of the petitioner to agree with the lot owners as to the amount of compensation. The pleadings show that defendants were non-residents, and that certain of them were minors. In such case it is not necessary to show by proof that the compensation and damage could not be agreed upon. The minors could not make an agreement.**

Generally, a landowner will seek a higher price for his or her property if he or she is aware that it is needed for a public improvement, and it could, therefore, be advantageous for a condemnor to attempt to acquire the necessary property without revealing its true identity. However, the condemnor may not fulfill the "attempt to agree" requirement by seeking to acquire the property through an undisclosed agent. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Gage*, 280 Ill. 639, 117 N.E. 726 (1917).

A refusal of one of the owners to agree to sell will generally excuse the condemnor from making any further effort to agree. In *St. Louis & Cairo R.R. v. Postal Telegraph Co.*, 173 Ill. 508, 51 N.E. 382 (1898), the lessee was unwilling to agree to the construction of a telegraph line on its property. The court stated:

**As the Mobile and Ohio Railroad Company had a lease of the right of way, which was not to expire for thirty-four years, a refusal on its part to allow the appellee to construct its telegraph line rendered such construction impossible, without reference to what the lessor, the St. Louis and Cairo Railroad Company, might have to say in the matter. . . . Where an owner refuses to sell altogether, negotiation as to the amount of compensation is thereby cut off. . . . It is not necessary, that there should be a series of efforts, or a prolonged negotiation, in order to agree upon compensation; an effort to agree is all that is required. 51 N.E. at 387.**

The condemnor is not required to wait for an unlimited period of time to allow the owner to make up his or her mind. In *County of Mercer v. Wolff*, 237 Ill. 74, 86 N.E. 708, 711 (1908), the court stated:

**The appellants object that it is essential to allege and prove that the petitioner cannot agree with the owners upon the compensation to be paid, and that the evidence shows that they could agree with Prentiss, and that Wolff was negotiating with the county when the petition was filed. Whether or not the petitioner could agree with Prentiss did not effect the appellants. Wolff had declined to accept the offer of the county, and while it is true that he stated that he could not give an answer within a week, the county board was not compelled to wait that length of time. If he would not accept the offer, that constituted a failure to agree.**

An offer to purchase extended by the condemning body's attorney is considered bona fide even though the amount offered by the attorney is subject to later approval by the governing board of the condemnor. The Eminent Domain Act simply requires an attempt to agree, and Illinois courts have never held that a condemnation offer must be the same as a legally binding offer in private estate cases. *Lake County Forest Preserve District v. First National Bank of Waukegan*, 200 Ill.App.3d 354, 558 N.E.2d 721, 146 Ill.Dec. 758 (2d Dist. 1990).

#### **11. [2.40] Good-Faith Offer — Reasonableness of the Amount**

A mere difference of opinion as to value will not disqualify an offer. *Department of Transportation ex rel. People v. Brownfield*, 221 Ill.App.3d 565, 582 N.E.2d 209, 164 Ill.Dec. 1 (3d Dist. 1991). Nevertheless, Illinois courts continue to be loathe to approve lowball offers. In *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill.App.3d 734, 763 N.E.2d 951, 261 Ill.Dec. 702 (2d Dist. 2002), the court affirmed a dismissal of the complaint for condemnation because of the condemnor's failure to make a good-faith offer. The City of Naperville had offered the owners \$200,000 despite the value of \$500,000 determined by the city's own appraiser. The court all but said that the appraisal value must be offered: "[G]ood faith requires that the condemning authority offer a price that correlates to the fair market value of the property *as determined by the condemning authority*." [Emphasis added.] 763 N.E.2d at 957. By this reasoning, the condemnor would have to show why market value of the property was less than its appraisal in order to justify offering a lesser amount.

The offer must be carefully drawn and must be supported by an appraisal or other substantial indication of value. Caselaw has interpolated the requirements of bona fides and good faith into the simple "attempt to agree" language of §10-5-10(a) of the Eminent Domain Act (735 ILCS 5/10-5-10(a)). In the past, virtually any offer transmitted by the condemnor could be considered acceptable, even under the standards of bona fides and good faith. However, off-the-wall offers without a sufficient basis in fact violate the standard and will be subject to a motion to dismiss. In *Forest Preserve District of Will County v. Marquette National Bank*, 208 Ill.App.3d 823, 567 N.E.2d 635, 638, 153 Ill.Dec. 677 (3d Dist. 1991), the Forest Preserve District's offer was held to be insufficient. The district submitted a "windshield" appraisal. The so-called appraisal ignored recent rezonings, offers to purchase, and investments of capital. The amount offered was grossly insufficient. The court upheld the dismissal based on the district's failure to meet the statutory requirements.

There are no fixed guidelines for judging how high an offer must be in order for it to meet the requirement of good faith. For example, in *City of Oakbrook Terrace v. LaSalle National Bank*, 186 Ill.App.3d 343, 542 N.E.2d 478, 134 Ill.Dec. 299 (2d Dist. 1989), the court found valid an offer that was almost one fifth the value sought by the property owner. It should be noted that in *Oakbrook Terrace*, the city's offer was supported by an appraisal. *But see City of Springfield, Illinois v. West Koke Mill Development Corp.*, 312 Ill.App.3d 900, 728 N.E.2d 781, 245 Ill.Dec. 699 (4th Dist. 2000), in which a \$200 offer, even in light of a \$54,925 jury verdict, was not, without more, evidence of the city's failure to negotiate in good faith.

The Illinois Supreme Court has clarified what is required for a good-faith offer. Although many appellate courts have held that the condemnor's attempt to agree must be in good faith, the Illinois Supreme Court has stated definitively that "the Eminent Domain Act requires the condemnor to negotiate with the landowner in good faith over the amount of compensation to be paid before it initiates proceedings to take the landowner's property through eminent domain." *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 810 N.E.2d 1, 7, 284 Ill.Dec. 348 (2004). The court further noted that a disparity between the owner's and the condemnor's views does not indicate that an offer was not made in good faith. In *151 Interstate Road*, the court rejected the owner's argument that the offer, based on an appraisal, was not in good faith because the appraiser lacked credentials, there were weakness in the appraiser's analysis, and the appraiser did substantial business with the state. Since the appraisal was performed by a licensed appraiser with 15 years of experience who followed accepted methodology and did not deviate from professional standards, the offer was not lacking in good faith despite the appraiser's opinion being substantially lower than that of the owner. Thus, an offer based on a competent appraisal meets the standard of good faith.

## 12. [2.41] Successful Negotiations — Acquisition by Agreement

After successful negotiations, the property may be acquired by contract to convey. The contract may be in the usual form of a real estate buy-sell agreement. The closing of the sale may be accomplished as in ordinary private transactions. It is customary (required in federal cases) for the condemnor to pay the owner's closing costs.

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### PRACTICE POINTER

- ✓ An owner's voluntary sale may not convey all interests in the property. In certain circumstances, it may not be advisable for the condemnor to acquire property through a buy-sell agreement even if the parties are in agreement as to the price. An owner may not be able to furnish good title or may be unable to deliver all of the interests in the property. This is particularly true when the property is burdened by easements or tenants or other occupants. In these cases, the condemning authority succeeds to the position of the seller. The condemnor becomes the landlord and must still deal with the holders of easements, tenants, and other occupants.
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### 13. [2.42] Voluntary Conveyance

Even if negotiated under the threat of condemnation, voluntary sales by the owner have the attributes of an ordinary conveyance, not a condemnation. In *Patrick Media Group, Inc. v. DuPage Water Commission*, 258 Ill.App.3d 1068, 630 N.E.2d 958, 196 Ill.Dec. 793 (1st Dist. 1994), the Illinois appellate court held that the commission's termination of a lease on purchased property was not a taking for which compensation was due. Under threat of condemnation, the water commission purchased land that had been leased for use by the billboard company. After the conveyance, the water commission sent a termination notice pursuant to the lease. The court held that the lease was terminated by contract law, not condemnation.

Relying on *Patrick Media*, the court in *Kleinschmidt Inc. v. County of Cook*, 287 Ill.App.3d 312, 678 N.E.2d 1065, 223 Ill.Dec. 57 (2d Dist. 1997), held that the question of the condemnor's authority to condemn was irrelevant to the validity of a voluntary conveyance. Cook County purchased the plaintiff's property under threat of condemnation. It later conveyed part of the property to a third party to substitute for property taken from that party. The plaintiff sued to undo the original conveyance because the county's reconveyance of the property was not for public use. The court found that the public use argument was not relevant because the conveyance was considered voluntary despite having occurred under threat of condemnation.

A consent judgment in a condemnation case is treated differently than a contract to convey. In *City of Marseilles v. Radke*, 287 Ill.App.3d 757, 679 N.E.2d 125, 223 Ill.Dec. 181 (3d Dist. 1997), the parties agreed to a consent judgment in a condemnation case. The property owner had a change of heart and moved to vacate the consent judgment on the ground that the city had no authority to condemn since the subject property was outside the boundaries of the project for which condemnation was being exercised. The appellate court agreed, holding that the boundary question was jurisdictional, so the trial court had no jurisdiction to entertain condemnation or to enter a consent decree.

These cases suggest that a voluntary conveyance (but not necessarily a consent judgment), even under threat of condemnation, trumps any procedural errors or substantive questions of the authority to condemn.

The Public Officer Prohibited Activities Act, 50 ILCS 105/0.01, *et seq.*, requires that “[b]efore any contract related to any ownership or use of real property is entered into by and between the State or any local governmental unit . . . the identity of every owner and beneficiary having any interest . . . in such property . . . must be disclosed.” 50 ILCS 105/3.1. The Act provides the details concerning the size of interest that must be disclosed and how disclosure should be made. The disclosed property ownership interests include those of any parent entity.

The settlement amount of a voluntary conveyance is inadmissible in court. The condemning body need not avoid a voluntary conveyance for fear that the amount might be used to establish compensation at the trial of other parcels in a project. Compensation paid under threat of condemnation is not considered a voluntary sale. *Board of Trustees of University of Illinois v. Shapiro*, 343 Ill.App.3d 943, 799 N.E.2d 383, 389, 278 Ill.Dec. 665 (1st Dist. 2003), citing *Forest Preserve District of Cook County v. Krol*, 12 Ill.2d 139, 145 N.E.2d 599 (1957), and *Oak Brook*

*Park District v. Oak Brook Development Co.*, 170 Ill.App.3d 221, 524 N.E.2d 213, 120 Ill.Dec. 448 (2d Dist. 1988). Even if not admissible at trial, the amount paid is a matter of public record and is likely to be considered by both sides in negotiations for the acquisition of subsequent parcels.

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#### PRACTICE POINTER

- ✓ The Public Officer Prohibited Activities Act also makes it unlawful for any appointed or elected official to have a financial interest in a contract that the officer might be called on to vote for. 50 ILCS 105/3. In the contract of conveyance for the acquisition of any real property, it is useful to have the owner disclaim any interest in the property or its proceeds by a public officer. This can be done by inserting in the contract a section that paraphrases the relevant portions of §3 of the Act.

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#### 14. [2.43] Statements by Public Officials — Are They Binding?

Public officials may have opinions of value or the highest and best use of property being acquired. Is a public body bound by these expressions? In *County of St. Clair v. Wilson*, 284 Ill.App.3d 79, 672 N.E.2d 27, 219 Ill.Dec. 712 (5th Dist. 1996), the condemnee tried to introduce the statement of the county board chairman concerning highest and best use. The statement was asserted to be the admission of the condemning body. One of the problems with this assertion was that a single person's "admission" cannot be binding as official policy of a public body. The court found the chairman's statement too general and not specifically related to the property at issue in the case. Therefore, it was not admissible as documentation of the highest and best use in the acquisition proceeding.

### III. COMPLAINT FOR CONDEMNATION

#### A. [2.44] Source and Purpose

If the parties cannot agree on the compensation to be paid for the acquisition of property, the Eminent Domain Act permits the court to determine compensation upon the filing of a complaint for condemnation. 735 ILCS 30/10-5-10(a). The EDA governs the substance and procedure of eminent domain proceedings. What is now correctly denominated the "complaint for condemnation" had traditionally been known as a "petition to condemn."

It has been said that the sole object of a complaint for condemnation of property for public use is to ascertain the compensation to be paid for taking or damaging the property, and the amount of compensation is the only issue. *Department of Public Works & Buildings v. Sohm*, 315 Ill. 478, 146 N.E. 518 (1925). Nevertheless, a complaint for condemnation has several other practical effects. Upon judgment and deposit of the award, the petition establishes title in the condemnee as against all persons properly made parties who appear or have been served and defaulted. In addition, the same court that had jurisdiction to establish the amount of just compensation may retain jurisdiction to grant the condemnee possession of the property.

The foregoing functions are frequently sought in the complaint's prayers for relief. Another function of the complaint for condemnation is to apportion the award among interested parties. In the condemnation action, just compensation is established for the property as a whole. When the award of just compensation is deposited with the county treasurer, the court, upon application of the parties, has the authority to order distribution of the award among interested parties, such as the owner of the fee, lessees, mortgagees, lienholders, and the treasurer acting as tax collector. The power to distribute the award is implicit in 735 ILCS 30/10-5-10, which requires that all interested parties be joined in the action. Distribution among interested parties also appears expressly in 735 ILCS 30/10-5-90.

## **B. [2.45] Elements of the Complaint for Condemnation**

The complaint for condemnation is the initial pleading filed by the condemnor and must follow certain strict requirements. The basic outline and requirements are found in §10-5-10(a) of the Eminent Domain Act:

**The complaint shall set forth, by reference, (i) the complainant's authority in the premises, (ii) the purpose for which the property is sought to be taken or damaged, (iii) a description of the property, and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known, or if not known, stating that fact; and shall pray the court to cause the compensation to be paid to the owner to be assessed.** 735 ILCS 30/10-5-10(a).

Caselaw has interpreted and broadened these requirements.

A sample form of a complaint for condemnation is found in §2.70 below. This form may be used for ordinary as well as quick-take condemnation. Quick-take has been said to be a "proceeding within a proceeding." *Department of Public Works & Buildings v. Dust*, 19 Ill.2d 217, 166 N.E.2d 36, 38 (1960). After filing a complaint for condemnation, the condemning body may file a motion for immediate vesting (735 ILCS 30/20-5-5(b)) to gain early title and use of the property. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 250 Ill.App.3d 665, 619 N.E.2d 1321, 189 Ill.Dec. 272 (2d Dist. 1993). The complaint might also specify which of the standards of 735 ILCS 30/5-5-5 the condemnor chooses to proceed under, as does the sample form in §2.70. The EDA does not appear to force an election at the time of filing the complaint, however, and it might preserve the condemnor's flexibility to avoid making the choice until the owner raises an objection.

While local practice and the practitioner's style may alter the suggested wording, §§2.46 – 2.57 below may be considered a checklist of the required elements of a condemnation petition.

### **1. [2.46] Name in Which the Action Is Brought**

The case should be filed under the corporate name of the condemnor, such as "The Board of Trustees of the University of Illinois," "The Department of Transportation, State of Illinois," or "The City of Kankakee, an Illinois municipal corporation." Under the School Code, 105 ILCS 5/1-1, *et seq.*, when a school district is the condemning body, the case is brought in the name of

the school board for the use of the condemning school district. 105 ILCS 5/16-6. In Chicago, the suit would be in the name of “The City of Chicago in Trust for the Use of Schools.”

## 2. [2.47] Necessary Parties Defendant

The Eminent Domain Act requires that the complaint name as defendants “all persons interested in the property as owners or otherwise, as appearing of record, if known, or if not known stating that fact.” 735 ILCS 30/10-5-10(a). This statement is deceptively simple. If a party is not named, the action is a nullity to this party. *Chicago & Northwestern Ry. v. Miller*, 251 Ill. 58, 95 N.E. 1027 (1911). Therefore, the list of defendants should include any person or entity known to the condemnor who has any interest in the subject property. In some cases the condemnor will be aware of a party not shown of record, such as a tenant under an unrecorded lease. Any such party should be named. The following is a list of types of parties that should be included as defendants:

- a. parties revealed of record, including spouses;
- b. lienholders and judgment creditors when the judgment has been recorded as a lien against the property;
- c. beneficiaries of trusts, if known (If not known, they should be included as “unknown owners.” Beneficiaries of land trusts need not be included. *Chicago Land Clearance Commission v. Darrow*, 12 Ill.2d 365, 146 N.E.2d 1 (1957); *Department of Conservation v. Franzen*, 43 Ill.App.3d 374, 356 N.E.2d 1245, 1 Ill.Dec. 912 (2d Dist. 1976). Under the older holdings, executors and administrators having no legal title to land were not necessary parties. *Highway Commissioners of Town of Ross v. Chambers*, 265 Ill. 113, 106 N.E. 492 (1914). However, under §20-1(a) of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.*, which places possession of real estate in the personal representative during the period of administration or until possession is granted to the rightful heir or devisee by the court (755 ILCS 5/20-1(a)), it would appear better practice to make the personal representative a party to condemnation actions.);
- d. guardians of incompetents whose interests in the property are affected;
- e. remaindermen, if known, otherwise listed as “unknown owners,” when the record indicates a remainder interest; and
- f. parties in possession.

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### PRACTICE POINTER

- ✓ While a party in possession may not be revealed in the title search, the interest is obvious and should be revealed to the condemnor through the process of viewing the property and negotiations prior to the filing of the petition.
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Parties whose interests are not recorded or known to the condemnor at the time the petition is filed are not necessary parties. *People ex rel. O'Connor v. City of Chicago*, 299 Ill.App. 504, 20 N.E.2d 306 (1st Dist. 1939).

It is common, although probably not necessary, to have as a party the county collector, who has an interest in the property with respect to real estate taxes.

Note that the above list is intended to be illustrative rather than exhaustive.

### 3. [2.48] Unknown Owners

Section 10-5-10(d) of the Eminent Domain Act provides, “Any interested persons whose names are unknown may be made parties defendant by the same descriptions and in the same manner as provided in other civil cases.” 735 ILCS 30/10-5-10(d). Unknown owners are named as parties to avoid the problem of ascertaining parties in interest when the record is not clear or when either the state of the record or the use and possession of the subject property indicate to the condemnor that not all interests are shown in the record. The use of the term “unknown owners” does not relieve the pleader from ascertaining the necessary parties according to the definition in the EDA. The burden of naming the right parties is on the condemnor, which will be bound by its pleading on this point. *Department of Public Works & Buildings v. Sohm*, 315 Ill. 478, 146 N.E. 518 (1925).

As in other civil cases, in order to serve unknown owners, an affidavit must be filed, and then service must be obtained by publication. 735 ILCS 30/10-5-25; 735 ILCS 5/2-206, 5/2-207, 5/2-413. Note, however, that if the complaint for condemnation omits the name of an interested party whose name is actually known or whose name could reasonably have been ascertained, service on this person cannot be obtained by publication.

Pursuant to 735 ILCS 5/2-401(c), all parties must be named in the body of the complaint.

It is essential that all interested persons be made parties; otherwise, the condemnor risks having an unnamed party appear after the termination of the proceedings to ask for possession and compensation. See *Wehde v. Regional Transportation Authority, Commuter Rail Division (METRA)*, 237 Ill.App.3d 664, 604 N.E.2d 446, 178 Ill.Dec. 190 (2d Dist. 1992). Even in case of a judgment by agreement, unknown owners are not bound unless it appears on record that they were properly served but did not appear and an order of default was entered.

Nevertheless, failure to join all parties has no effect on the proceedings with respect to the persons who have been joined. In *Department of Transportation v. Collins*, 69 Ill.App.3d 269, 387 N.E.2d 6, 9, 25 Ill.Dec. 549 (3d Dist. 1979), the court stated:

**It has long been the rule that the omission of a necessary party does not invalidate a condemnation proceeding as against those who are made parties, but rather the only consequence is that, as against the omitted party, the proceeding is nugatory.**

#### 4. [2.49] Statement of Authority

The Eminent Domain Act provides that the petition must set forth clearly the authority under which the condemnor is exercising the right of eminent domain: “The complaint shall set forth, by reference . . . the complainant’s authority in the premises.” 735 ILCS 30/10-5-10. This may be satisfied by specific reference to the enabling legislation or statutory grant of authority in cases involving the State of Illinois, its departments, or a political subdivision of the state. For condemning bodies other than the state and its departments, the complaint should state, in addition to the state constitutional or statutory authority, the specific resolution or ordinance adopted by the corporate authorities or governing body that authorizes the acquisition. For utilities under the jurisdiction of the Illinois Commerce Commission, reference must be made to the order of the Commission granting authority to file the proceedings. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 182 N.E.2d 169 (1962).

In *Trotter v. Spezio*, 349 Ill.App.3d 959, 812 N.E.2d 577, 285 Ill.Dec. 757 (3d Dist. 2004), the court rejected the owner’s contention that the taking was improper because the complaint failed to cite one of the statutes authorizing the acquisition. Reference to a particular statute was omitted in the complaint, but the court held nevertheless that the record showed that “[t]here was no surprise to the landowners” regarding the basis for the take. 812 N.E.2d at 580. Despite this, it is wise to refer to all statutes and ordinances that authorize the take.

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#### PRACTICE POINTER

- ✓ Note the consequences if the owner succeeds in traversing the complaint. If the owner wins a dismissal for want of authority, it is entitled to attorneys’ fees. *Village of Cary v. Trout Valley Ass’n*, 297 Ill.App.3d 63, 696 N.E.2d 1154, 231 Ill.Dec. 583 (2d Dist. 1998).
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#### 5. [2.50] Statement of Purpose

The statement of purpose requirement in 735 ILCS 30/10-5-10(a) is met by an allegation that the taking is for an allowable public use. The exact nature of the proposed use is not required (*East Peoria Sanitary District v. Toledo, Peoria & Western R.R.*, 353 Ill. 296, 187 N.E. 512 (1933)), but the petition may set forth the plan in detail to limit the remainder damages the landowner may seek as a result of the proposed use. The risk here is that the petition binds the condemnor on this point. *Trunkline Gas Co. v. O’Bryan*, 21 Ill.2d 95, 171 N.E.2d 45 (1960).

#### 6. [2.51] Statement of Necessity

The petition must allege that the taking is necessary for the public use intended. It is not required that the allegation be supported by such facts as would be required to make a prima facie case (*Department of Public Works & Buildings v. Lewis*, 411 Ill. 242, 103 N.E.2d 595 (1952)), but the courts reserve the right to question necessity when challenged (*Deerfield Park District v. Progress Development Corp.*, 22 Ill.2d 132, 174 N.E.2d 850 (1961); *Forest Preserve District of DuPage County v. Illinois Commerce Commission*, 12 Ill.2d 319, 146 N.E.2d 27 (1957)).

(determination of necessity was questioned by Commerce Commission when permission of Commission was required before property under its jurisdiction could be condemned)).

In a quick-take proceeding, the condemning body must establish, as a preliminary matter, the right and necessity to exercise eminent domain, just as in an ordinary condemnation action. Pursuant to 735 ILCS 30/20-5-5(b), the condemning body must allege the necessity for the taking, the court must determine as a threshold matter “that the plaintiff has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of that right, and that the right of eminent domain is not being improperly exercised in the particular proceeding.” 735 ILCS 30/20-5-10(b). Quick-take does not involve a stricter standard of necessity than an ordinary eminent domain action. In *City of Chicago v. First Bank of Oak Park*, 178 Ill.App.3d 321, 533 N.E.2d 424, 427, 127 Ill.Dec. 552 (1st Dist. 1988), the court noted that there were no differences between the two proceedings in this respect:

**[O]ther than the burden upon the condemnor of showing immediate need for the property sought, there is no stricter standard applicable in a quick-take proceeding.**

The First District Appellate Court’s holding in *First Bank of Oak Park* was approved by the Illinois Supreme Court in *Department of Transportation v. First Galesburg National Bank & Trust Co.*, 141 Ill.2d 462, 566 N.E.2d 254, 152 Ill.Dec. 567 (1990).

It is essential that the complaint allege all of the elements necessary to establish the condemnor’s right to acquire the property. If it does, it will obviate the need to present evidence on the issue of the right to acquire. The government may be required to present a prima facie showing of reasonable public necessity only if the property owner files a traverse. *City of Chicago v. American National Bank & Trust Company of Chicago*, 146 Ill.App.3d 784, 497 N.E.2d 413, 100 Ill.Dec. 435 (1st Dist. 1986). The well-pleaded allegations of necessity are conclusive and may not be challenged in the same proceeding absent a traverse.

At the same time, if a traverse (motion to dismiss) is filed, some objections may be cured later. It is clearly the safer course for both the condemnation complaint and the governing body of the condemnor by law to describe specifically the purpose and necessity for the acquisition. Nevertheless, the absence of a legislative finding of necessity would not be fatal if it is otherwise unequivocally established by the evidence in the record that the property is necessary for a public purpose. *People ex rel. Director of Finance v. Young Women’s Christian Association of Springfield*, 86 Ill.2d 219, 427 N.E.2d 70, 55 Ill.Dec. 950 (1981); *State of Illinois Medical Center Commission v. United Church of Medical Center*, 142 Ill.App.3d 498, 491 N.E.2d 1327, 96 Ill.Dec. 867 (1st Dist. 1986). Thus, insufficient legislative findings may sometimes be cured in an evidentiary hearing on the owner’s traverse.

## 7. [2.52] Necessity — Replacement Property

It seems settled that for certain purposes, the authority to condemn includes the power to condemn replacement property. “Replacement property” is property not related to the project for which the power is exercised but acquired to replace land condemned for a project. The necessity for replacement often occurs in highway projects and is specifically authorized. See §4-509 of the

Illinois Highway Code (605 ILCS 5/4-509), authorizing the replacement of public property taken for a project. Thus, if a school must be acquired for a highway, the Illinois Department of Transportation is authorized to condemn other lands for use as a replacement school. Similarly, IDOT may condemn a conservation easement for another agency (e.g., the Illinois Department of Natural Resources) to replace a nature reserve taken for a highway. *Department of Transportation of State of Illinois v. Callender Construction Co.*, 305 Ill.App.3d 396, 711 N.E.2d 1199, 238 Ill.Dec. 538 (4th Dist. 1999). It is not certain whether the same authority exists to condemn replacement property for the use of a private party, outside of special statutory authority. For example, §4-511 of the Illinois Highway Code (605 ILCS 5/4-511) permits the acquisition of land to replace such buildings as factories taken for a highway, provided that the replacement is within one mile. Similar authority exists in the Metropolitan Pier and Exposition Authority Act, 70 ILCS 210/1, *et seq.*, and the O'Hare Modernization Act, 620 ILCS 65/1, *et seq.* (see 70 ILCS 210/2; 620 ILCS 65/15), but it is questionable whether the authority to condemn private property to replace other private property is valid. In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1, 263 Ill.Dec. 241 (2002), the Illinois Supreme Court found that the condemnation of land from one person for development by another (private) person is not a public use and therefore violated the Fifth Amendment. Perhaps this principle will not apply when the condemnation supports an acquisition for a governmental use such as a highway, a convention center, or an airport.

#### **8. [2.53] Failure To Agree on Compensation**

Failure to agree on compensation is jurisdictional; failure to agree through negotiation is a prerequisite to maintaining an eminent domain action in Illinois. 735 ILCS 30/10-5-10(a). The complaint should allege that the condemnor has attempted to agree as to compensation but has been unsuccessful.

#### **9. [2.54] Description of Property Sought**

The description of the property to be taken must not leave doubt as to the boundaries or the nature and extent of the interest taken; a verdict based on an uncertain description may be held void. *Central Illinois Public Service Co. v. Rider*, 12 Ill.2d 326, 146 N.E.2d 48 (1957). While the landowner is to raise any objection to the legal description (*Chicago, Ottawa & Peoria Ry. v. Rausch*, 245 Ill. 477, 92 N.E. 300 (1910)) and cannot raise such an objection for the first time on appeal (*Forest Preserve District of Cook County v. Lehmann Estate, Inc.*, 388 Ill. 416, 58 N.E.2d 538 (1944)), the burden rests on the condemnor, for if the land is not described, it is not condemned. Therefore, the legal description should be reviewed with the surveyor or plan engineer before preparing the complaint. Numerous parcels may be included in a single complaint for condemnation.

It perhaps goes without saying that the property described in the complaint must lie within the area authorized for acquisition. In *City of Marseilles v. Radke*, 287 Ill.App.3d 757, 679 N.E.2d 125, 223 Ill.Dec. 181 (3d Dist. 1997), the property sought to be condemned was neither alleged in the complaint nor proved at trial to be within the tax increment financing district for which it was being acquired. Since there was no authority to acquire property outside the boundaries of the TIF district, the appellate court held that there was no jurisdiction for the condemnation; therefore a consent condemnation judgment could be vacated.

However, in *Village of Round Lake v. Amann*, 311 Ill.App.3d 705, 725 N.E.2d 35, 244 Ill.Dec. 240 (2d Dist. 2000), the court held that a description is not inaccurate if it is less than the fee (such as a public right-of-way) or if it reserves certain interests.

An erroneous legal description may not be corrected after the complaint is filed. In *Forest Preserve District of DuPage County v. Miller*, 339 Ill.App.3d 244, 789 N.E.2d 916, 273 Ill.Dec. 742 (2d Dist. 2003), the Forest Preserve District enacted an ordinance to acquire the Rodenburg Marsh. The ordinance contained both a metes and bounds description and a plat map. Although the metes and bounds description described the marsh, the plat map omitted a portion of the marsh. The court held that the ordinance could not authorize the taking of the marsh because of the discrepancy between the two legal descriptions.

After the complaint to condemn was filed, the Forest Preserve District discovered the error and passed a new ordinance fully describing the area to be acquired. The court held that the new ordinance was ineffective because the complaint had no proper condemnation authority when it was filed and the subsequent ordinance correction could not cure the error.

#### **10. [2.55] Description of Interest Sought**

The interest taken — whether fee simple or a lesser estate — must be specified. In most cases, the condemning body will be seeking a fee interest. Frequently, however the condemnation will be for a lesser interest, such as a construction easement, an easement for a transmission line, or the extinguishment of access rights. In any condemnation, the petition should clearly set forth the exact estate or interest to be acquired. Again, the condemnor will be bound by the allegation in the complaint, and the landowner is not required to make the determination. *Department of Public Works & Buildings v. Finks*, 10 Ill.2d 20, 139 N.E.2d 242 (1956).

#### **11. [2.56] Jury Demand**

To avoid having to make a separate demand (and to prevent forgetting to make the demand entirely), a demand for trial by jury may be included in the complaint for condemnation.

#### **12. [2.57] Prayer for Relief**

As the sole issue to be determined in an eminent domain trial is the compensation to be paid for the land or interests taken, the complaint must include a prayer to the court “to cause the compensation to be paid to the owner to be assessed.” 735 ILCS 30/10-5-10(a). This requirement is statutory. In addition, the prayer may ask the court to retain jurisdiction following payment of the judgment to award possession to the condemnor or to apportion the award among interested parties.

#### **C. [2.58] Summons**

The standard summons form should not be used. While 735 ILCS 30/10-5-25 provides that “[s]ervice of summons and publication of notice shall be made as in other civil cases,” because of the nature of eminent domain, the form of summons provided by Supreme Court Rule 101(d) should be modified. The following is a suggested form of modification:

**You are summoned and required to file or otherwise make your appearance in this case in the Office of the Clerk of this Court within 30 days after service of this summons, not counting the day of service. If you fail to do so, a trial may be held and judgment entered against you for the relief asked in the complaint filed herein.**

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**PRACTICE POINTER**

- ✓ Modification of the usual civil case summons is necessary because answers are considered an improper pleading in eminent domain. Even though an answer may contain jurisdictional challenges or raise other issues such as damages to the remainder, it is properly stricken on motion of the condemnor. *Department of Public Works & Buildings v. Lewis*, 344 Ill. 253, 176 N.E. 345 (1931). The proper form of summons will contain no reference to an answer and will merely require the landowner or interested party to appear.
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**D. [2.59] Service by Publication**

Unknown owners and parties who cannot be served by summons may be made parties by publication as in other cases (with the same exceptions as to form as for the summons itself). Sample forms of an affidavit for publication and an affidavit as to unknown owners are set forth in §§2.72 and 2.73 below, respectively.

**E. [2.60] Service of Summons; Special Process Servers**

Not only is it essential to name all interested parties in the complaint; it is also essential to ensure that each is properly served. Named but unserved parties will not be bound by any judgment establishing compensation, and neither can their possession of the property be terminated.

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**PRACTICE POINTER**

- ✓ The attorney must check the sheriff's return of service to ensure that the named parties have been served and have been properly served in accordance with statute. Unsuccessful service should be cured by obtaining and serving an alias summons. In stubborn cases, a private investigator may be appointed as a special process server to ensure that service is made.
- 

**F. [2.61] Excusing Service of Complaint for Condemnation**

S.Ct. Rule 104(c) provides that for good cause shown, a court may excuse the service of the pleadings with the summons. In cases in which a great number of parcels are combined in a single complaint, the burden of serving copies of the complaint may be avoided by ex parte application to the court pursuant to Rule 104(c).

### G. [2.62] Motions for Appointment of Guardians ad Litem

Practice regarding guardians ad litem is similar to other civil cases and is provided for in 735 ILCS 30/10-5-10(b), when there may be a person “not in being” or under disability who may have interest in the property to be acquired. When the title search raises the possibility of the need for a guardian, the motion should be prepared for filing with the petition.

### H. [2.63] Lis Pendens Notice

Under 735 ILCS 5/2-1901, a condemnation suit

**shall, from the time of the filing in the office of the recorder in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given the defendant or defendants, either by service of summons or publication as required by law, then such notice shall cease to be such constructive notice until service of summons or publication as required by law is had.**

A sample form of a lis pendens notice is found in §2.71 below. The lis pendens warns subsequent purchasers about the pending action.

Under the Clerks of Courts Act, 705 ILCS 105/0.01, *et seq.*, filing fees are waived for circuit court filings by a local government or school district. 705 ILCS 105/27.2a(dd)(2).

### I. [2.64] Amendments to the Complaint for Condemnation

Amendments to the complaint can have unexpected consequences. As in other civil cases, a complaint may be amended. It is important to note, however, that the land is considered taken as of the date of the filing of the complaint for condemnation, and the valuation is fixed as of that date. 735 ILCS 30/10-5-60. If the amendment materially changes either the description of the land being taken (other than to make the description more certain) or the issues raised by the pleading, the court may treat the amended complaint as a new pleading and thus change the valuation date to a later date. *See, e.g., Department of Transportation v. HP/Meachum Land Limited Partnership*, 245 Ill.App.3d 252, 614 N.E.2d 485, 185 Ill.Dec. 351 (2d Dist. 1993), in which the court held that adding additional acreage required a new valuation date. In such a case, the condemnor is faced with the necessity of new appraisals and the risk of greater cost due to inflation in land prices. For this reason, it is wise to take the extra time to make certain that all

preliminaries are correctly accomplished and that the petition is complete in form and substance rather than to risk the filing of a defective petition and have to do the whole thing over again or abandon the proceedings entirely. Abandonment, of course, brings the risk of attorneys' fees and costs being assessed against the condemnor. See 735 ILCS 30/10-5-70(a).

In *Department of Transportation v. LaSalle National Bank*, 102 Ill.App.3d 1093, 430 N.E.2d 286, 58 Ill.Dec. 344 (2d Dist. 1981), the Illinois Department of Transportation's initial petition sought to acquire 21 acres of a 274-acre tract plus the access rights to the remaining 253 acres. Two years later, after the owner had constructed an \$80 million hotel and office facility on the 253 acres, IDOT amended the petition to condemn, deleting the access rights from the property to be acquired. The owner's counsel claimed that the deletion of the request for the access rights was "tantamount to [the filing of] a new petition" that entitled the owner to attorneys' fees and defense costs as well as a two-year advancement of the valuation date. 430 N.E.2d at 290. The court ruled that the mere deletion of access rights, without any addition or substitution of property, does not equal the filing of a new petition and does not, therefore, require a new valuation date. See also *City of Crystal Lake v. LaSalle National Bank*, 121 Ill.App.3d 346, 459 N.E.2d 643, 648, 76 Ill.Dec. 728 (2d Dist. 1984), in which the condemnor amended its original petition by reducing the take from 236 acres to 27 acres with easements over the remaining 209 acres.

#### **J. [2.65] Abandonment — Condemnor's Dismissal of the Complaint**

When there has been no quick-take (see Chapter 4), the condemnor may abandon the proceedings at any time, even after entry of the judgment, until possession is taken or the award is paid. In these cases, the landowner is entitled to reasonable attorneys' fees and costs. 735 ILCS 30/10-5-70(a). The abandonment or dismissal of the case prior to the entry of a final judgment does not bar a subsequent attempt to acquire the same property provided that the abandonment or dismissal was in good faith. It would appear from the cases on this point that the courts will examine the question of good faith. Abandonment is a decision that must be carefully weighed due to its severe consequences.

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#### **PRACTICE POINTERS**

- ✓ Months or years may elapse between the valuation date (the date of filing the complaint to condemn) and the trial. At trial, the property that the jury views may not be in the same condition as it was on the valuation date. It may have deteriorated or may have been improved. Particularly when quick-take is exercised, the improvement may have been demolished for a public works project or conveyed to a developer who changed it from its original condition. Courts may deem that a jury's view of the premises may be prejudicial if the condition at the date of its view does not correspond to its condition on the valuation date. See, e.g., *Illinois State Toll Highway Authority v. Grand Mandarin Restaurant, Inc.*, 189 Ill.App.3d 355, 544 N.E.2d 1145, 136 Ill.Dec. 370 (2d Dist. 1989).
- ✓ In order to demonstrate the condition of the premises at the valuation date, the condemnor's attorney should arrange to have the property photographed or videotaped at

the time the complaint is filed or as soon thereafter as possible. The photos or video may demonstrate to the jury the appearance of the property, even if the improvement has long since been demolished. Obtaining this evidence will require the cooperation of the property owner and tenants. In difficult cases, however, application may be made to the court to permit the preservation of this evidence.

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Abandonment is permitted even after deposit. Unlike ordinary judgments, a judgment or a verdict in condemnation need not be paid. See §2.18 above.

Abandonment may occur even after the award is paid if the condemnor has not yet taken possession of the property. In *City of Chicago v. Harris Trust & Savings Bank*, 346 Ill.App.3d 609, 804 N.E.2d 724, 281 Ill.Dec. 759 (1st Dist. 2004), the City of Chicago acquired the fee interest in a downtown property, and a separate judgment for just compensation was determined for the leasehold interest for a billboard. After depositing the just compensation award for the billboard, the city realized that the billboard lease would have expired by its own terms. The city had not taken possession of the billboard but permitted it to remain for an interim period. Since the city had not yet taken possession of the billboard, it was permitted to abandon taking, despite having deposited the amount of just compensation.

The court noted the express terms of the abandonment statute (now 735 ILCS 30/20-5-40): “[A]fter the plaintiff has taken possession of the property pursuant to the order of taking, the plaintiff shall have no right to dismiss the complaint or to abandon the proceeding.” [Emphasis added.] 804 N.E.2d at 730, quoting 735 ILCS 5/7-110 (2002). Since the statute speaks of possession as terminating the right to abandon, the court held that it made no difference that the city had deposited the award, as long as it had not yet taken possession of the property.

## IV. APPENDIX

### A. [2.66] Additional Authorities

For further information on the topic of this chapter, see Frank S. Righeimer, Jr., *EMINENT DOMAIN IN ILLINOIS* (3d ed. 1986) (an excellent reference but now somewhat dated, particularly because it predates the Eminent Domain Act); Julius L. Sackman et al., *NICHOLS’ THE LAW OF EMINENT DOMAIN* (rev. 3d ed.) (multivolume set, year varies by volume); and Thomas F. Geselbracht et al., *ILLINOIS ZONING, EMINENT DOMAIN, AND LAND USE MANUAL* (1997).

**B. Sample Forms****1. [2.67] First-Contact Letter**

[letterhead of state agency]

\_\_\_\_\_, 20\_\_

[name and address of recipient]

Dear [Mr.] [Mrs.] \_\_\_\_\_:

**Public records indicate that you own or have an interest in the following property:**

[legal description] [common address] [PIN]

**Please be advised that the Illinois Department of \_\_\_\_\_ seeks to acquire the above-described property in fee simple [or other interest]. The purpose of the proposed acquisition is to furnish a site for [project description]. The type of facility to be constructed on the property is \_\_\_\_\_.**

**If you have any questions concerning this acquisition, please contact \_\_\_\_\_ at [contact information]. Please be advised that the person designated above shall respond to the property owner's questions about the authority and procedures of the Illinois Department of \_\_\_\_\_ in acquiring property by condemnation and about the property owner's general rights under those procedures. However, the designated person is unable to provide property owners with specific legal advice or specific legal referrals.**

Very truly yours,

\_\_\_\_\_

**2. [2.68] 60-Day Notice Letter**

[letterhead of state agency]

\_\_\_\_\_, 20\_\_

**Certified Mail No. \_\_\_\_\_  
Return Receipt Requested**

[name and address of recipient]

**Dear [Mr.] [Mrs.] \_\_\_\_\_:****The public records indicate that you are the owner of or interested in the following described property:****Parcel \_\_\_\_\_**  
[legal description]  
[common address, if applicable]  
[interest to be acquired]**The Illinois Department of \_\_\_\_\_ has ordered and directed that the above-described property be acquired for \_\_\_\_\_ purposes.****The Illinois Department of \_\_\_\_\_ hereby offers the sum of \$\_\_\_\_\_ for the interest in the above-described property free and clear of all claims of other parties, liens, taxes, and encumbrances.****The compensation hereby offered has been established pursuant to appraisals conducted by independent fee appraisers. The appraisers considered the size, shape, location, topography, and zoning of the subject property. The appraisers also considered one or more of the following measures of value: recent sales of comparable properties; reproduction or replacement cost, less depreciation; and the income generated by the subject property.****If you wish to discuss this offer, please make an appointment with the undersigned for that purpose at the above address. Unless we hear from you or your attorney, we shall assume that you have rejected this offer, and condemnation proceedings to acquire the property will be instituted pursuant to the Illinois Eminent Domain Act.****Very truly yours,**

\_\_\_\_\_

**By: \_\_\_\_\_  
Attorney for Condemnor**

### 3. [2.69] Letter To Request Inspection

[letterhead of municipality]

[name and address of recipient]

**Re: Property Location:** \_\_\_\_\_ Street, \_\_\_\_\_, IL  
**PIN Numbers:** \_\_\_\_\_ and \_\_\_\_\_  
**Legal Description:** \_\_\_\_\_  
 \_\_\_\_\_,  
 \_\_\_\_\_ County, Illinois

**Dear [Sir] [Madam]:**

**Public records indicate that you are the owner of the property referred to above.**

**The subject property is located within the Greater Downtown Area Redevelopment Project of the Village of \_\_\_\_\_. In furtherance of the village's redevelopment plan for this area, the village has recently sought proposals from developers. The plans of the village call for the eventual acquisition of property within the development area.**

**In order to begin the development process, the village will be appointing appraisers to provide expert valuations of the subject property.**

**For the appraisers to value your property accurately, it will be necessary for them to conduct an interior inspection and obtain helpful information from the owner. We would appreciate the opportunity to obtain a mutually convenient date so that you can accompany our appraiser on such an inspection. Naturally, you, your appraiser, and your attorney may be present during such an inspection.**

**Our attorneys, \_\_\_\_\_, will be representing the village in the development process. Kindly get in touch with the attorneys listed below in order to arrange an appraisal inspection.**

**Please contact:** [attorney information]

**Very truly yours,**

\_\_\_\_\_  
**Village Manager**

**4. [2.70] Complaint for Condemnation**

**IN THE CIRCUIT COURT OF  
\_\_\_\_\_ COUNTY, ILLINOIS  
[COUNTY DEPARTMENT, LAW DIVISION]**

<b>DEPARTMENT OF TRANSPORTATION,</b>	)	
<b>STATE of Illinois,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>No. _____</b>
<b>v.</b>	)	
	)	<b>Parcel No. _____</b>
_____;	)	
<b>and UNKNOWN OWNERS,</b>	)	
	)	
<b>Defendants.</b>	)	

**COMPLAINT FOR CONDEMNATION**

**THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS, Plaintiff herein, by \_\_\_\_\_, Attorney General of the State of Illinois, and \_\_\_\_\_, Special Assistant Attorney General, respectfully states:**

**1. The plaintiff, Department of Transportation, State of Illinois, is a Department of the State government of the State of Illinois, as created and provided for in an Act known as the Civil Administrative Code of Illinois.**

**2. Under and by virtue of Article 2 and Article 4, Division 5, of the Illinois Highway Code, 605 ILCS 5/2-101 through 5/2-220 and 605 ILCS 5/4-501 through 5/4-512, and all other applicable provisions of the Illinois Highway Code, and Section 5-5-5(b) and other provisions of the Eminent Domain Act, the plaintiff is engaged in the relocating, reconstructing, extending, widening, straightening, improving, repairing, and maintaining of the roadway known as Route \_\_\_\_\_ in \_\_\_\_\_ County, a highway under the control and jurisdiction of the plaintiff; and for such purposes, and the providing of natural deposits and road materials therefor, that highway has been surveyed, laid out, and projected over certain lands and premises situated in \_\_\_\_\_ County, Illinois; and those lands and premises, which are the subject of this complaint, are in Section \_\_\_\_\_, which is concerned with widening and improving the existing roadway in \_\_\_\_\_ County, Illinois.**

**3. The land, rights, or other property hereinafter described is private property, and the persons hereinafter mentioned in connection therewith are, as far as appears of record, and as far as plaintiff has been able to learn, the persons who own or otherwise are interested in them or claim to have some interest therein.**

4. The work and improvement described above is a public work, is for public use, and constitutes a public purpose, namely, a public highway; and it is necessary that the plaintiff have and acquire for the use of the people of the State of Illinois for highway purposes the land, rights, or other property hereinafter described.

5. Plaintiff, under the provisions of Section 4-501 of the Illinois Highway Code (referred to above), is authorized to acquire for the purposes aforesaid the fee-simple title, or such lesser interest as may be desired, to the lands, rights, or other property hereinafter described.

6. The compensation to be paid by the plaintiff for or in respect to each tract of property sought to be appropriated or damaged for the above-mentioned purposes cannot be agreed on between the plaintiff and the parties interested therein although plaintiff has attempted to effect such an agreement; and the plaintiff, therefore, is authorized to proceed to acquire said lands, rights, or other property through the exercise of the right of eminent domain under the eminent domain laws of this State.

7. The plaintiff now seeks to acquire under the Eminent Domain Act, for the uses and purposes described above, the fee-simple title to the real property in \_\_\_\_\_ County, Illinois, hereinafter described in numbered parcel \_\_\_\_\_. The names of all persons interested in each numbered parcel as owners or otherwise, as appearing of record, or as far as is known to the plaintiff, all of whom are hereby made parties defendant to this complaint, are as follows:

Parcel \_\_\_\_\_

That part of the Southeast quarter of Section 12, Township 42 North, Range 10 East of the Third Principal Meridian, in \_\_\_\_\_ County, Illinois, described as follows:

[legal description]

**Interest Sought: Fee Simple**

**Owner of Record:**

\_\_\_\_\_ Bank, as Trustee under Trust Agreement dated \_\_\_\_\_, 19\_\_\_\_, known as Trust Number \_\_\_\_\_.

**Parties Otherwise Interested:**

\_\_\_\_\_, as mortgagee under mortgage dated \_\_\_\_\_, 19\_\_\_\_, and recorded \_\_\_\_\_, 19\_\_\_\_, as doc. No. \_\_\_\_\_.

**Unknown Owners**

8. In addition to persons designated by name herein, there are other persons who are interested in this action and who have or claim some right, title, interest, or lien in, to, or on the real estate, or some parts thereof, described in this petition, and the name of each of those other persons is unknown, and all such persons are, therefore, made parties defendant to this action by the name and description of Unknown Owners.

9. In addition to persons designated by name herein, there are or may be other persons occupying or in possession of a portion of the building or structures on the real property described, and the name of each of those other persons is unknown, and all such persons are, therefore, made parties defendant to this action by the name and description of Unknown Owners.

WHEREFORE, your plaintiff prays that the usual process of summons be issued against each and all of the above-described defendants according to law, commanding them to be and appear before this court on the return day of the summons, and that due notice according to the law may be given to the owners of and parties interested in and to the Unknown Owners of the real property described above. Your plaintiff further prays the Court to cause compensation to be ascertained and determined according to the statute for the fee-simple title to the property sought to be acquired and to take such proceedings and enter such orders as necessary, ordering that the plaintiff enter on the property and use it upon payment of full compensation to the parties entitled thereto, or to the County Treasurer, within such reasonable time as is fixed by the Court and that the Court retain jurisdiction of this cause to enter such further orders as may be necessary, including such orders as may be necessary to put the plaintiff into possession of the subject property.

**PLAINTIFF DEMANDS TRIAL BY JURY.**

**DEPARTMENT OF TRANSPORTATION,  
STATE OF ILLINOIS**

\_\_\_\_\_  
**Governor of the State of Illinois**

\_\_\_\_\_  
**Secretary of the Department of  
Transportation**

\_\_\_\_\_  
**Attorney General of the State of Illinois**

\_\_\_\_\_  
**Special Assistant Attorney General**

[attorney information]

5. [2.71] Lis Pendens Notice

[Caption]

LIS PENDENS NOTICE

I, the undersigned, do hereby certify that the above-entitled cause was filed in the above Court on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, for [Condemnation] and is now pending in said Court and that the property affected by that cause is described as follows:

[legal description]  
[party names]  
[interest to be acquired]

Signature: \_\_\_\_\_ (Check one)  
 Party to said Cause  
\_\_\_\_\_  Attorney of Record  
[Type or print name for clarification.]

\_\_\_\_\_ [address]

Mail to: Name: \_\_\_\_\_  
Address: \_\_\_\_\_

OR

Deposit in Box No. \_\_\_\_\_  
Recorder's Office

**6. [2.72] Affidavit for Publication**

[Caption]

**AFFIDAVIT FOR PUBLICATION**

\_\_\_\_\_, attorney for the plaintiff in the above-entitled cause, being first duly sworn, states that the defendants in this cause herein named reside or have gone out of state, on due inquiry cannot be found, or are concealed within this state so that process cannot be served on them; that upon diligent inquiry their places of residence cannot be ascertained; and that their last known places of residence are as herein shown:

**Parcel** \_\_\_\_\_

**Name:**

**Last Known Place of Residence:**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Owners and holders of indebtedness secured by trust deed.**

**Unknown**

**Unknown Others**

**Unknown**

**FURTHER** affiant sayeth not.

\_\_\_\_\_

**SUBSCRIBED AND SWORN**  
 to before me this \_\_\_\_\_ day  
 of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
**Notary Public**

\_\_\_\_\_, 20\_\_  
**Expiration Date**

7. [2.73] Affidavit as to Unknown Owners

[Caption]

**AFFIDAVIT AS TO UNKNOWN OWNERS**

\_\_\_\_\_, attorney for the plaintiff in the above-entitled action and the duly authorized agent of the plaintiff in its behalf, being first duly sworn, on oath deposes and states that there are persons who are interested in this action whose names are unknown, and all such persons are made parties defendant to this action by the name and description of “Unknown Owners.”

Affiant further states that upon due and diligent inquiry it cannot be ascertained whether the persons whose names are set forth in the complaint filed herein as persons interested as owners or otherwise are living or dead and that the names of such persons who would be their heirs or devisees are unknown, and all such persons are made parties defendant to this action by the name and description of “Unknown Owners.”

Affiant further states that there are persons who are or may be interested in this action as the heirs or devisees of certain deceased persons and that the names of such persons are unknown. Therefore, all such persons are made parties defendant to this action by the name and description of “Unknown Owners.”

**FURTHER** affiant sayeth not.

\_\_\_\_\_

**SUBSCRIBED AND SWORN**  
to before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_, 20\_\_  
Expiration Date

**8. [2.74] Letter of Final Good-Faith Offer**

\_\_\_\_\_, 20\_\_

**Certified Mail No. \_\_\_\_\_  
Return Receipt Requested**

[name and address of recipient]

**Dear [Mr.] [Mrs.] \_\_\_\_\_:****The public records indicate that you are the owner of or are interested in the following described property:****Parcel \_\_\_\_\_**

[legal description]

[common address, if applicable]

**[Condemnor] has ordered and directed that this property be acquired for \_\_\_\_\_ purposes.****[Condemnor] hereby offers you the sum of \$\_\_\_\_\_ for the above-described property, free and clear of all claims of other parties, liens, taxes, and encumbrances.****If you wish to discuss this offer, please make an appointment with the undersigned for that purpose at the above address. Unless we hear from you or your attorney within seven days from the date of this letter, we shall assume you have rejected the offer, and condemnation proceedings to acquire the property will be instituted by [condemnor].****Very truly yours,**

\_\_\_\_\_

**By: \_\_\_\_\_  
Attorney for Condemnor**

