A Condemnation Primer

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I. Introduction

Condemnation, or more formally, eminent domain, is the inherent right of a sovereign nation to appropriate or take private property for a public use.[1] This whole idea emanates from our English legal heritage that the King owned all of the property in a nation and, therefore, the King had the right to assume the use and possession of all real estate held by his subjects.[2] Therefore, in early English law and, in particular, futile England, every person who occupied land did so at the risk of being evicted by the superior right of the King.

When the United States was formed, it is well documented that the framers of the Federal Constitution wanted to prevent unnecessary takings or seizures of private property by the new government. The United States Constitution, therefore, put limits on the traditional power of the sovereign to appropriate private property without limitation and without payment. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.[3]

The guarantees that private property would not be taken for a public use without just compensation that are contained in the Fifth Amendment are extended to and made obligatory upon all the states through the Fourteenth Amendment, which provides:

> No state shall . . . deprive any person of . . . property, without due process of law.[4]

Therefore, the guarantees of the Fifth Amendment are extended to the states prohibiting them from taking private property without due process of law and without just compensation by virtue of the Fourteenth Amendment.[5]

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[1] *Department of Public Works and Buildings v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611 (1953).

[2] *Department of Public Works and Buildings v. Kirkendall, supra*; *Department of Public Works and Buildings v. McNeal*, 33 Ill. 2d 248, 211 N.E.2d 266 (1965).

[3] *U.S. Const.* amend. V

[4] *U.S. Const.* amend. XIV, §1

[5] *Chicago Burlington & Quincy RR Co. v. City of Chicago*, 166 US 226, 223-234, 17 S. Ct. 581, 583-584, 41 L. Ed. 979, 983-984 (1897).

The Illinois Constitution also now provides the following:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.[6]

A. Public Use Requirement

It has always been the notion that the taking of property, whether it was by the King of England, or by the State of Illinois, be done for a "public use". As recently as the 19th Century, no public use requirement existed.[7] While the King had the right to determine what the public use was and, therefore, the public use limitation was virtually meaningless; today, it is generally held in the United States that a governmental entity is only authorized to acquire private property that is necessary for a public use. The "public use" requirement has always seemed easy enough to explain, but with the vast expansion of modern day governmental services, the application of the notion of "public use" has become very difficult. In the four decades following the adoption of the United States Constitution, there were primarily two major kinds of activities for which the power to condemn was used: building roads and building mill dams.[8] Roads are a fairly clear public use. Early on, the states authorized the erection of dams for grist mills, although the dams often resulted in the flooding of other's lands because as the mills were required by law to grind the grain of any and all comers to the mill, they were regarded as giving forth a "public use."[9]

Of course, as the economy expanded and the government became more pervasive, the uses of eminent domain for the accomplishment of government purposes also expanded. In the 19th Century, as noted above, eminent domain was primarily used to condemn property for the construction of railroads. The surge of industrial growth created a major drive to exploit western resources and open western United States markets. In the 20th Century, the "public use" clause has enabled governing bodies to further economic development and alleviate economic "malaise."[10]

Early on, the Illinois Supreme Court recognized that no specific formula exists for determining what is and is not a "public use." It is much the same as the famous discussion of pornography by the United States Supreme Court wherein one of the justices

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[6] *ILL.* Art. I, §15

[7] *Missouri Pacific Ry. v. Nebraska*, 164 US 403, 41 L. Ed. 489, 17 S. Ct. 130 (1896).

[8] P. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 617 (1940).

[9] 20 B.U.L. Rev. at 619.

[10] *People, ex rel., City of Urbana v. Paley*, 68 Ill. 2d 62, 368 N.E.2d 915 (1977); *City of Chicago v. Barnes*, 30 Ill.2d 255, 195 N.E.2d 629 (1964).

indicated, "I can't really define what it is, but I know it when I see it." Perhaps the Supreme Court's best definition of a "public use" could be defined as follows:

> While from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning . . .
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> The purpose may be highly beneficial to the public as well as to private interests; and, on the other hand, the use put to the land acquired by private interests by eminent domain may be highly beneficial to the public, without giving the latter any control over the property taken. The problem is rendered more complex by development arising since the adoption of the Constitution such as the need for acquiring property for social, medical, or health purposes, as well as for the application of new inventions which may be adapted to public use. Uses for purposes not contemplated at the time may be and frequently are declared by the legislature to be public uses for which the power of eminent domain may be properly used."[11]

The Supreme Court decision in *People, ex. rel., Touhy*, set forth four criteria that many subsequent courts have looked to as guidance on the issue of whether there is a "public use" for the condemnation. These criteria are:

1. The use of the land should affect a community as distinguished from an individual;

2. The law should control the use to be made of the property;

3. The title so taken by condemnation should not be invested in a person or corporation as private property to be used and controlled as private property; and

4. The public should reap the benefit of the public possession and use and no one should exercise control over the property except the condemning body.[12]

The most recent and sweeping pronouncements on the issue of whether a condemnation is a "public" versus a "private" use is the recent Supreme Court decision in *Southwestern Illinois Development Authority v. National City Environmental* (*SWIDA*

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[11] *People, ex rel, Tuohy v. City of Chicago*, 394 Ill. 477, 481-482, 68 N.E.2d 761, 764 (1946). In *Tuohy*, the Supreme Court upheld a city ordinance that approved the condemnation and sale for redevelopment of blighted or slum areas. Although the court recognized that the city cannot go into the real estate business under the guise of relieving slum conditions, the court held that acquiring the land for the purpose of demolition and private sale is a public use and not a private one.

[12] *Touhy*, 394 Ill. at 485, 68 N.E.2d 766; See also, *Poole v. City of Kankakee*, 406 Ill. 521, 94 N.E.2d 416, 419 (1950).

case).[13] In *SWIDA*, the Regional Development Authority sought to acquire a private automobile recycling facility and then sell it to the operator of an adjoining Gateway International Raceway, a racetrack where NASCAR Truck Series and Busch Series races were held in the East St. Louis/Belleville area. *SWIDA* filed an action to condemn National City's scrap processing facility and the Circuit Court of St. Clair County ruled that *SWIDA* had properly exercised its authority to take the land in question. The Fifth District Appellate Court reversed saying that the trial court was in error. The Appellate Court decision was based upon the notion that this was a taking for a "private" purpose as opposed to a "public" purpose. The Supreme Court initially reversed the decision of the Appellate Court (i.e., reinstating the trial court decision that the taking of National City's property was proper) and, subsequently, granted a rehearing and changed their course 180 degrees affirming the decision of the Appellate Court (i.e., deciding that the trial court incorrectly allowed the condemnation).[14]

The *SWIDA* court, relying on *Touhy*, noted that the right of a modern-day sovereign to condemn private property is limited to takings for a "public use." The court also noted that while private persons may ultimately acquire ownership of the property so taken by eminent domain, the subsequent transfer the property to private ownership does not, in and of itself, defeat the requirement that there was a "public purpose" in the taking. However, the right of eminent domain must be exercised, *beyond a doubt*, for a public use as distinguished from a private use.[15] The *SWIDA* court went on to note that it is impossible to clearly delineate the boundary between what constitutes a legitimate public purpose and a direct or indirect private benefit that would not support any legitimate public purpose.[16] The court noted that any attempt to define, reach or trace the outer limits of a public purpose is fruitless and each case must turn on its own facts.[17] However, the court was not about to abandon the judicial function in reviewing these kinds of transactions and concluded:

> Great deference should be afforded the legislature and its granting of eminent domain authority. [citing cases] However, the exercise of that power is not entirely beyond judicial scrutiny [citing cases] and it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the Constitution and by the legislature that granted the specific power in question. Courts all agree that the determination of whether a given use is a public use is a judicial function.[18]

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[13] 199 Ill.2d 225, 768 N.E.2d 1 (2002).

[14] *SWIDA*, 768 N.E.2d at 2

[15] *Touhy*, 394 Ill. 477, 481, 68 N.E.2d 761 (1946); *SWIDA*, 768 N.E.2d at 7.

[16] *SWIDA*, 768 N.E.2d at 8.

[17] *SWIDA*, 768 N.E.2d at 8.

[18] *SWIDA*, 768 N.E.2d at 8; *Touhy*, 394 Ill. at 481, 68 N.E.2d 761.

The court then rejected *SWIDA*'s contention that the taking of the automobile processing facility's private property would result in a public purpose because: (1) it would foster economic development; (2) it would promote the public safety in allowing more and better parking for the Gateway International Speedway events; and (3) it would prevent and eliminate blight.[19] *SWIDA* pushed its argument a bit far contending that the distinction between "public purpose" and "public use" has long since evaporated and the proper test is simply to ask whether a "public purpose" is served by the taking.[20] The *SWIDA* court, however, soundly rejected such a notion, noting:

> While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case. We agree that these terms are necessarily somewhat loosely defined. However, that does not mean that they are indistinguishable. The term '[p]ublic purpose' is not a static concept. It is flexible and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our Constitution. [citing cases] However, this flexibility does not equate to unfettered ability to exercise taking beyond constitutional boundaries. 'A purely private taking could not withstand the scrutiny of the public use requirement and it would serve no legitimate purpose and would thus be void.' [citing cases] As held by this court in *Gaylord*, 204 Ill. at 584, 68 N.E.2d 522, '[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.'[21]

B. Public Purpose; Public Use; a Private Electric Cooperative; and a Public Utility

Illinois defines a "public utility" as:

> Every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever that owns, controls, operates or manages within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with or owns or controls any franchise, license, permit or right to engage in:

[19] *SWIDA*, 768 N.E.2d at 8.

[20] *SWIDA*, 768 N.E.2d at 8.

[21] *SWIDA*, 768 N.E.2d at 8-9.

(a) The production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water or light . . .[22]

This same section, however, goes on to indicate that the definition of public utility does not include electric cooperatives as defined in Section 3-119, apparently of the Public Utilities Act.[23]

The Public Utilities Act, in Section 3-119, defines electric cooperative as:

> Any electric cooperative which is subject to the Electric Suppliers Act enacted by the 74th General Assembly, and has the same meaning as is defined in Section 3.4 of that Act.[24]

The Electric Suppliers Act, of course, is the landmark act that was passed at the strong urging of the Association of Illinois Electric Cooperatives that resulted in the designation of territorial service areas as between electric suppliers (which includes both public utilities and electric cooperatives[25]) provided the Illinois Commerce Commission approves the electric supplier territorial agreements and the territory itself.[26] In the Electric Supplier Act, an electric cooperative is defined as follows:

> Any not-for-profit corporation or other person that owns, controls, operates or manages, directly or indirectly, within this State, any plant, equipment or property for the production, transmission, sale, delivery or furnishing of electricity and that either is or has been financed in whole or in part under the federal 'Rural Electrification Act of 1936' and the Acts amendatory thereof and supplementary thereto [citing 7 U.S.C.A. §901, *et seq.*] or is directly or indirectly caused to be formed by any one or more such not-for-profit corporations or other persons that is or has been so financed.[27] (Addition supplied)

Fortunately, language defining an electric cooperative is very broad. At first glance, it seems that to qualify as an "electric cooperative" for the purposes being discussed herein, one must be an RUS borrower. However, a close look at the language indicates that any electric cooperative that has <u>previously</u> been an RUS borrower qualifies as an electric cooperative even though it has bought out of the RUS program or no longer owes RUS any debt.

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[22] §3-105, Public Utilities Act, 220 ILCS 5/3-105.

[23] 220 ILCS 5/3-105(c)(1).

[24] 220 ILCS 5/3-119.

[25] 220 ILCS 30/3.5

[26] Electric Supplier Act, 220 ILCS 30/1, *et seq.*

[27] §3.4, Electric Supplier Act, 220 ILCS 30/3.4

It seems fairly clear that a "public utility" and an "electric cooperative" are not really "public" entities. By that, an investor-owned utility exists to make a profit and exists for the benefit of its stockholders by serving its customers in such a fashion that a profit is generated and a return is made to the stockholders who own the company. ThDr. 23ere is very little that is "public" about an investor-owned utility. It is a private, profit-making function and that is what the corporation's existence is designed to do.

By the same token, an electric cooperative exists not to make a profit but for the sole benefit of its membership . . . to deliver to its membership reliable electric service at the least cost possible. Actually, when an electric cooperative has a "margin" (in the investor-owned world, a "profit"), the electric cooperative has actually overcharged its membership during the year. In a perfect world, an electric cooperative would have zero margins each year, which means it would have delivered its product to its membership for the benefit of its membership at its dead cost. However, we all know this is not a perfect world and that never occurs.

So, while the State of Illinois and its political subdivisions have the power to directly acquire private property as we have seen, they may only do so for a public use and only then after payment of just compensation as required by the United States and State of Illinois constitutions. In the context of a public utility or an electric cooperative, where is the "public purpose" in taking private property in order that the investor-owned utility can make a profit or that the members of the cooperative can get electric energy furnished at the lowest cost possible? Obviously, there is no "public" purpose in this kind of conduct. This is a very private kind of conduct that generates either a profit for the shareholders of an investor-owned utility, or the least cost delivery of power to the members of the cooperative.

The State of Illinois has solved this interesting legal problem through the use of the Illinois Commerce Commission. In the case of *Illinois Power Company v. Lynn,*[28] the court was faced with the issue of whether Illinois Power's plans for the extension of a line constituted a "public use" so that Illinois Power could be authorized to proceed with acquiring easements by condemnation.

The *Lynn* court noted that the power to condemn and acquire private property for public purposes upon the payment of just compensation is vested in the State of Illinois. It then concluded that the State may also delegate the power to condemn property to other branches to the State of Illinois, to municipalities and to ". . . private corporations such as railroads and utilities." The court noted that the Public Utilities Act required that no utility may begin the construction of a new plant or facility without first obtaining a Certificate of Convenience and Necessity from the Illinois Commerce Commission.[29] The *Lynn* court then went on to note that the Public Utilities Act authorizes the use of the

[28] 50 Ill.App. 3d 77, 365 N.E.2d 264 (4th Dist., 1977)

[29] Ill. Rev. Stat., 1973, Ch. 111 2/3, Par. 50; now, Public Utilities Act, 220 ILCS 5/8-406(b).

power of eminent domain once a Certificate of Public Convenience and Necessity has been issued.[30]

Section 8-509 of the Public Utilities Act provides in pertinent part:

> When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.[31]

However, it should be recalled that the definition of a "public utility" under the Public Utility Act did not include an electric cooperative. Therefore, does this mean that an electric cooperative has no power to condemn private property for an extension of its system? Fortunately, the answer is no. Section 13 of the Electric Supplier Act provides in pertinent part:

> An electric cooperative when it is found by the Commission that it is necessary so to do may proceed to take or damage private property as provided for the exercise of the right of eminent domain under Article VII of the Code of Civil Procedure, as heretofore or hereinafter amended. The requirement of such finding by the Commission is not to be construed to require authorization by the Commission of the facility for which the authorization to use eminent domain is sought.[32]

Therefore, in summary, we can say that even though an electric cooperative really exercises the right of eminent domain for the "private" benefit of its members, with the blessing of the Illinois Commerce Commission and the operation of the legislative delegation of the power of eminent domain contained in the Electric Supplier Act, the legislature has effectively delegated through the Illinois Commerce Commission the right to allow an electric cooperative to condemn lands for its own private benefits and yet call that a "public use." So, even though the taking by an electric cooperative of an easement is not really a "public" use, the legislature has seen fit to make it so by virtue of the powers that the legislature has delegated to the Illinois Commerce Commission to make it so.

[30] 220 ILCS 5/8-509.

[31] 220 ILCS 5/8-509.

[32] Electric Supplier Act, 220 ILCS 30/13.

Now, let's turn to a general examination of what an easement is and when and why it needs to be taken.

II. Utility Easements

An easement may, simply said, be a right or privilege in the land of another.[33] It creates an interest in land and an encumbrance upon the title of the land affected.[34] An easement is a grant of a limited use of land which burdens the "servient estate" for the benefit of the "dominant estate."[35] The creation of the easement thus gives rise to two distinct property interests: (1) a "dominant estate" which has the right to use the land of another in a particular way; and (2) a "servient estate" that permits the exercise of that use.[36] Easements may be created by a separate document which grants the easement, or they may be implied by use over a period of time.[37]

An easement must be distinguished from a "license". An easement always implies that the easement holder has an interest in the servient estate, but a license merely confers a privilege to occupy or do an act on a parcel without ever possessing any interest in the parcel itself.[38] A license, then, is merely the authority or permission to do an act or some series of acts upon the licensor's land without having any permanent interest in that land and without having the right to remain on the property after the act or series of acts have been accomplished. A license is not assignable because it is based upon personal confidence and trust as opposed to a grant in land. By contrast, an easement is an easement in land through which one individual has the right to use the land of another for a specific purpose for a period of time determined by the easement grant.[39]

Often, particularly in an urban setting, a reservation for a utility easement is made on a recorded plat of a subdivision. A reservation in a recorded plat for public utilities, by its terms, may be limited to only electricity or only water and may delineate an area where a particular utility may be located, thereby excluding others.[40] However, electric cooperatives, over the years, have rarely been fortunate enough to be serving in platted subdivisions where the utility easements are clearly delineated. In most cases, an electric cooperative, when service is installed, must obtain an easement from that landowner, or from other surrounding landowners, to place electrical poles, lines and appliances for the

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[33] *Beloit Foundry Co. v. Ryan*, 28 Ill. 2d 379, 192 N.E.384 (1963).

[34] *Stewart v. Meyers*, 353 F.2d 691 (7th Cir., 1965).

[35] See, generally, 16A ILP, Easements, §1.

[36] Am.Jur.2d, Easements and Licenses in Real Property, §1.

[37] 16A ILP, Easements, §7.

[38] 25 Am.Jur.2d, Easements and Licenses, §3, P. 419

[39] See *Mumaugh v. Diamond Lake Area Cable TV Company*, 456 N.W.2d 425 (Mich. App., 1990).

[40] *Marlatt v. Peoria Water Works Co.*, 114 Ill.App.2d 11, 252 N.E.2d 403 (3rd Dist., 1969).

distribution of electrical energy. Those types of easements must come from a specific grant from the landowner and are more difficult, generally, to negotiate than simply installing the electric devices in an easement already delineated in a subdivision plat. Often, easements for existing distribution lines were not ever obtained and the lines were simply placed in a highway right-of-way, either state or local. However, when the state or local highway authority determines to widen or relocate the road, those existing facilities in the state, county or township right-of-way must be relocated at the expense of the utility and not at the expense of the state.[41]

A. Requiring an Easement to be Supplied

What about a by-law or a requirement of an electric cooperative that requires each member, upon request of the electric cooperative, to grant to the cooperative an easement in accordance with the terms and conditions specified by the cooperative, to either serve that particular member or other members on the system? Is such a by-law valid? If such a by-law is valid, it would certainly seem prudent to adopt a by-law and avoid the issue of condemnation altogether.

In general, a cooperative may adopt or amend by-laws within the bounds set by constitutional and statutory limits, its articles of incorporation and public policy.[42] To be enforceable, however, a by-law must be reasonable.[43] However, as noted above, the Fifth and Fourteenth Amendments to the United States Constitution, together with the Illinois Constitution, prohibit the taking of private property for a public use without the payment of just compensation. These policies seem to fly in the face of a determination that any by-law or requirement by the articles of incorporation that a member grant an easement without compensation is either reasonable or constitutional.

However, the Supreme Courts of three states and one United States Court of Appeals have indicated that such a by-law is, in fact, reasonable.[44] In *King v. Farmers Electric Coop*.[45] the cooperative had a requirement that, upon request by the cooperative,

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[41] However, when it is necessary as an incident to the construction of a new state highway that the state move facilities of a utility which are not then located upon a street or highway, the Department of Transportation can purchase or acquire by eminent domain such easements for the relocation of the public utilities. See, 605 ILCS 5/4-505. However, as a precondition to acquiring such easement for the movement of the utility, the Department of Transportation and the public utility must have entered into an agreement with the Illinois Commerce Commission concerning the relocation. See, 605 ILCS 5/4-505.

[42] 18 Am.Jur.2d, Cooperative Associations, §13.

[43] 18 Am.Jur.2d, Cooperative Associations, §12 and 18A Am.Jur.2d, Corporations, §319.

[44] *King v. Farmers Electric Coop.*, 246 P.2d 1041, 1046 (N.M. 1952); *Sutton v. Hunziker*, 272 P.2d 1012, 1016 (Idaho, 1954); *Smith v. Pickwick Electric Coop.*, 367 S.W.2d 775, 781 (Tenn., 1963); and *Lackey v. Meriwether Lewis Electric Cooperative*, 1999 U.S. App. LEXIS 10575 (6th Cir., 1999)

[45] See, Footnote No. 44.

the member had to furnish a right-of-way to the cooperative for serving the member or, apparently, serving others. The cooperative desired to construct across Mr. King's property a high-voltage line from a substation in one county, through another county, to another area. This line would have crossed more than four miles of lands owned by Mr. King. Mr. King refused to give the easement unless he was paid for it. The cooperative shut Mr. King's power off. The trial court ruled that the cooperative's requirement to give an easement over four miles was unreasonable. The Supreme Court of New Mexico reversed and found that Mr. King, by becoming a member of the cooperative, was bound by its rules, regulations and the provisions of its by-laws and articles of incorporation and, therefore, could be expelled from the cooperative and have his power shut off for failing to abide by the terms and conditions which required him to give an easement. It does not appear that Illinois has yet addressed this issue, but it does appear that there is some authority for the position that an easement can be required from a member.

However, the most recent pronouncement in or around this issue was by the Supreme Court of North Carolina in *Singleton v. Haywood Electric Membership Corporation*.[46] In *Haywood*, a transmission line which served 178 cooperative members crossed over rental property owned by Singleton. Singleton was a member of the cooperative and was purchasing electricity for the particular rental property that the transmission line crossed over, but his electricity did not come from that particular transmission line. An ice storm occurred and the transmission line fell. Singleton contacted the coop about the downed line. The coop had to replace a pole on a mountainside on Singleton's property and Singleton advised that it would have to be done "by hand" because he didn't want any trucks or equipment up there. The cooperative ignored Singleton's request, replaced the pole, replaced the conductor with a larger conductor and cleared a 30'-40' wide swath, approximately 550 feet down the side of the mountain on Singleton property cutting several large oak trees and pruning an apple orchard.

The cooperative had a service agreement which provided, among other things:

> The Cooperative will supply electrical service to the Member after all of the following conditions are met:
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> * * *
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> 2. The Member agrees to furnish without cost to the Cooperative all necessary easements and rights of way.[47]

The service agreement also went on to provide: "The Member agrees that the Cooperative will have the right of access to the member's premises at all times for the

[46] 357 N.C. 623, 588 S.E.2d 871 (2003).

[47] 588 S.E.2d 875

purpose of reading meters, testing, repairing, removing, maintaining or exchanging any and all equipment and facilities which are the property of the Cooperative or when on any other business between the Cooperative and the Member. In cases where it is reasonably necessary and cost effective, the Cooperative may use, without payment to the Member, the Member's premises for accessing neighboring property served by the Cooperative. However, the Member will have the opportunity to locate a right-of-way that is beneficial to all parties."[48]

The North Carolina Supreme Court could not bring itself to interpret this language in favor of the Cooperative primarily because of the traditional Constitutional limitations on the taking of private property without just compensation, noting:

> "For example, if HEMC [the Cooperative] had unlimited access for 'repairing, removing, maintaining or exchanging' its equipment over and above that which provides electricity to the member, then the power company could arguably place a transformer or substation on the member's property without the landowner's consent or compensation for the taking. This is simply not the case under North Carolina real property law.[49]

Therefore, the Court chose to interpret the Cooperative's bylaw requirements in a very narrow sense limiting these provisions only to the member's property and then only to those events on the member's property that needed to occur prior to the initial connection of electrical service. After service had been connected, the Court was strongly suggesting that there would and could be no use of the member's property without the payment of just compensation in the traditional constitutional sense no matter what the Cooperative's bylaws said.

Illinois has yet to rule on this issue.

III. THE ILLINOIS COMMERCE COMMISSION PROCESS

The process by which an Illinois electric cooperative would seek the permission of the Illinois Commerce Commission (ICC) to condemn land for the purpose of establishing a utility easement is codified in the Illinois Administrative Code.[50] In general, the Illinois Administrative Code sets out the criteria for success at a hearing on whether a certificate of public convenience and necessity should issue. The rules also set forth the terms and conditions for the negotiation with a landowner concerning the acquisition of a utility easement by the eminent domain process.

[48] 588 S.E.2d 875
[49] 588 S.E.2d 876
[50] 83 Illinois Administrative Code 300.10 et. seq.

Part 300 of Title 83 of the Illinois Administrative Code sets forth the process to be used by a "public utility" [51] in the taking or damaging of private property for the purpose of a utility easement. Prior to making any contact with a landowner, the public utility is required to file an "information packet" with the ICC which sets forth the following information: (1) the record owner of the premises in question as disclosed by the tax records of the county in which the property is located; (2) a brief description of the purpose of the project; (3) the type in kind of any facility(s) to be constructed; (4) the size of the site or the width of the right-of-way being sought from the landowner; and (5) in the case of the transmission line its origin and its terminus.[52]

Once the information packet has been filed with the ICC, then at least 14 days prior to initiating contact with the landowner, the public utility is required to send to the landowner, by certified US Mail, return receipt requested, a notice from the Illinois Commerce Commission [53] (the form of which is attached hereto as Appendix A). This required notice not only sets out in summary fashion what some of the landowner's rights are with regard to a condemnation proceeding, but it also serves as a notice that the landowner has a right to appear at and participate in the hearing on whether the certificate of public convenience and necessity should be granted to the public utility for this particular project.[54] Among other things, Appendix A encourages the landowner to "vigorously negotiate" with the public utility the price of the land to be taken and explains to the landowner that in the event that the public utility is unable to negotiate a price with the landowner, the public utility may apply to the Commission for an order allowing the pursuit of the property through condemnation.[55]

Section 300.30 sets forth the "rules" for the negotiation between the landowner and the public utility that occurs after the ICC issues a Certificate of Public Convenience and Necessity for the project in question.

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[51] Recall that the definition of "public utility" does not include an "Electric Cooperative." However, Section 13 of the Electric Supplier Act requires that any electric cooperative petition the ICC for permission to take or damage private property. It is apparently assumed that Part 300 of the Illinois Adm. Code, which clearly applies only to "public utilities," is nevertheless applicable to electric cooperatives.

[52] 83 Illinois Administrative Code 300.20

[53] 83 Illinois Administrative Code 300.30 (a)

[54] See Appendix A which is attached hereto

[55] Appendix A sets forth in some detail the overall procedure which is basically: (1) filing of the information packet by the public utility with the ICC; (2) hearing on Certificate of Public Convenience and Necessity; (3) negotiation period with landowner after issuance of Certificate; (4) application for order allowing public utility to condemn property needed and identified in Certificate if landowner and public utility are unable to agree on just compensation; and (5) filing of action for condemnation in the Circuit Court of the county in which the needed property is located.

These rules basically provide for the following:

(1) In addition to the notice set forth in Appendix A, a letter of explanation on the public utility's letterhead must be sent introducing the person who will be negotiating on behalf of the public utility; and

(2) The utility attempting to acquire the property must be identified; and

(3) The general purpose of the project must be fully disclosed; and

(4) The facilities to be built to must be identified; and

(5) A general description of the land to be acquired for the facilities to be constructed must be included; and

(6) A statement that the utility or its representative seeks to negotiate with the landowner to arrive at a fair and reasonable agreement for such land or land rights; and

(7) An invitation to the landowner to contact the utility representative to arrange a mutually agreeable time for an appointment to further discuss the matter[56]

If the landowner does not contact the utility representative within two weeks of the mailing of the original letter, the utility's representative may then contact the landowner to attempt to establish a mutually convenient time and date for a meeting to discuss the matter.[57] Each utility representative must carry with him/her and show to every landowner contacted an identification card showing the name and address of the contacting person, his/her employer, and a recent picture of such person. The contacting person shall leave his/her telephone number with the landowner.[58]

Upon the initial personal contact with the landowner, each utility representative must be prepared to discuss the project for which a land right-of-way is sought in detail, and more specifically inform and advise the landowner of: (1) the general purpose of the Project and the type of facilities to be constructed; and (2) provide technical information and data surrounding the proposed project which should include to the extent then known to the utility, a written statement outlining briefly the purpose of the project, a small scale map and sketches indicating type(s) of facility, approximate location of facilities, compensation and basis for compensation and, if applicable, type of structures, and amount (length and width) of the land right-of-way deemed necessary.[59] This information

[56] 83 Illinois Administrative Code 300.30(c)(1)-(7)
[57] 83 Illinois Administrative Code 300.30(d)
[58] 83 Illinois Administrative Code 300.30(e)
[59] 83 Illinois Administrative Code 300.30(f)(2)

must be left with the landowner for review, along with any agreement or contract proposed by the utility concerning the acquisition of the landowner's property.[60]

If the utility is able to obtain a Certificate of Public Convenience and Necessity for the project and thereafter is unable to acquire the necessary land or land rights from all landowners through negotiation, it may apply to the Commission for an order under Section 8-503 of the Public Utilities Act.[61] An order pursuant to Section 8-503 finds that the project is in the public interest and authorizes and directs the project to be built and thereby grants to the public utility the authority to exercise the right of eminent domain (condemnation) in order to acquire the necessary land or land rights from the landowners in question.

Title 83 allows the ICC to grant a variance from the procedures set forth herein where the ICC finds that the application of these procedures would be unreasonable or unduly burdensome, but the ICC is very reluctant to grant these variances except in extraordinary circumstances.[62]

IV. THE EMINENT DOMAIN PROCESS

A. Preliminary Considerations

The eminent domain process is primarily governed by the Eminent Domain Act as well as existing case law.[63] In the event that the landowner and the electric cooperative are unable to negotiate a purchase price for the easement that is required to complete the project approved in the Certificate of Public Convenience and Necessity, then the electric cooperative may file a cause of action to condemn the necessary property in the Circuit Court in which the property is located. It is possible for the Cooperative to put multiple parcels that are being sought into a single cause of action [64]apparently even when there are multiple landowners who would be defendants on the various parcels. This does not appear to be a good idea from a strategic standpoint since the possibility for confusion is

[60] 83 Illinois Administrative Code 300.30(f)(2)

[61] 220 ILCS 5/8-503

[62] 83 Illinois Administrative Code 300.70

[63] The Eminent Domain Act has been codified in the Code of Civil Procedure, Article VII, 735 ILCS 5/7-101, et.seq.

[64] Section 7-115 of the Code of Civil Procedure (735 ILCS 5/7-115) specifically allows for the filing of multiple properties in a single complaint.

high and the jury may perceive that the cooperative is "beating up" on innocent landowners by taking their property when the jury considers, in a single complaint, a large number of parcels that might be required for the right-of-way in question. The trial court may separate out various causes of action and defendants into separate proceedings.[65] The general rules for the trial of the case, for the most part, are the same as any other civil case and are governed by the Code of Civil Procedure of the State of Illinois.

Of early importance is the gathering of the title information regarding the ownership, easement holders and tenants who own, have or claim some interest in the target property. It is necessary to get all of these interested title holders before the court in order to adjudicate their rights. Generally tenants are the hardest to identify, particularly with national franchises, and are generally the least cooperative, primarily because they may not be aware that they have any rights in the target premises or if their lease provides that they waive any claim in any condemnation proceeds in favor of their landlord. In any event a thorough title search and examination of the land records as well as the tax records of the county in which the target is located is absolutely essential.

The attorney handling the case for the electric cooperative should also meet early on with the engineer or other persons who are in charge of determining the amount and configuration of the property that is necessary for the project. A personal inspection of the target property is essential as well as a general inspection of the neighborhood in which the property is located.

Of course, it goes without saying that a survey of the target will need to be completed in order that it can be accurately described in a complaint for condemnation. As well, any competent appraiser will want to an exact legal description of the property to determine the appropriate square footage, front footage and other valuation criteria that can be obtained from a professional appraisal.

Also, consideration should be given to the choice of an appraiser as early as possible in the condemnation process. Although the ICC notice attached as Appendix A does not expressly used the phrase "good faith" in connection with negotiations with the landowner, it can certainly be assumed that bargaining in "bad-faith" would not be tolerated. Good faith is presumed in most all contractual arrangements and there is no reason to expect that other than good faith bargaining would be required in this context. There is a fairly well-defined body of case law concerning what it means to bargain with a landowner in "good faith." Section 7-102 of the Code of Civil Procedure requires that the condemning body may case "bona fide attempt to agree" on compensation as a prerequisite to the filing of any condemnation action. It is a relatively reasonable explanation that this body of case law would be applied in the case of a condemnation for a utility easement since there appears to be an overall public policy, not only in the Code of Civil Procedure, but in the Commission's Appendix A that there be a period of open and

[65] *C.& N.W.Rwy. Co. vs Chicago Mechanic's Institute* 239 Ill. 197, 87 N.E. 933 (1909)

vigorous negotiation. In any event, an idea of the value of the landowner's property must be obtained before any serious negotiations in order for the electric cooperative to negotiate with the landowner "in good faith".[66]

It is also a good idea to contact and hire an appraiser early on in order to get the best appraiser and, in particular, deny your opponent the opportunity to hire the best appraiser away from you. Particularly, in rural areas, there are limited numbers of MAI [67] appraisers. As well, in most rural areas of Illinois, there is even a scarcity of Illinois "Licensed General Appraisers". A Licensed General Appraiser is the highest designation given by the State of Illinois to an appraiser and authorizes him/her to appraise residential, commercial and farm real estate provided that appraiser meets certain criteria required by the Professions and Occupations Act. [68] It will be necessary to obtain at least a Licensed General Appraiser to do an appraisal of the target property, and preferably an MAI appraiser if one is available. Again, by choosing an appraiser early, the selection is much better than choosing one after a group of landowners have already "picked over" the universe of appraisers reasonably available in the area.

It may also be necessary to identify other types of expert witnesses that might be needed in connection with the proof of a condemnation case. In particular, electrical engineers, mechanical or structural engineers, hydrologists, and land surveyors are but a few of the possible expert witnesses that might be required in order to prove the elements of the condemnation case. Of course, the best advice is to choose these experts early and choose them well before they can the retained by the opposition. Again, in most rural areas, there may be an absence of these specialized experts so choosing early is imperative.

Also, a review of state and federal environmental laws should also be completed. It

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[66] In *Department of Transportation v. Hunziker*, 342 Ill App3d 588, 796 N.E.2d 122 (3rd Dist, 2003, as modified on den. of reh.), the Third District Appellate Court has even gone so far as to hold that it was a failure to bargain in "good faith" when the Illinois Department of Transportation refused to give the landowner a copy of the Department's appraisal obtained for negotiations prior to the filing of any action for condemnation. The Illinois Supreme Court refused to accept the case on a petition for leave to appeal giving its implicit approval to this ruling. See also 735 ILCS 5/7-102.

[67] An MAI credential denotes that the appraiser is a Member of the Appraisal Institute which is one of the highest recognized designations that an appraiser can hold in the United States. The MAI designation may only be received after qualifying with a number of years of experience in the appraisal business followed by the completion of a number of appraisal courses and the completion of various demonstration appraisals that are reviewed by a committee of other MAI appraisers.

[68] See generally 255 ILCS 458/1-10 for the definition of a "Licensed General Appraiser" in Illinois. After July 1, 2002, it became unlawful for anyone to "appraise" real estate in Illinois without an appropriate license. (See generally 255 ILCS 458/5-5) Therefore it is clearly inappropriate for a witness to be testifying as an "expert witness" in a proceeding for condemnation when that witness does not have the appropriate appraisal credentials.

may be necessary to consider a Phase I examination of the target site identifying possible environmental damage areas. Therefore, it may be necessary to hire an environmental expert and the same advice with regard to an environmental expert is applicable to that given concerning an appraiser…… choose wisely and choose early.

Finally, the ICC Appendix A should be regularly consulted during the entire "preliminary consideration" phase of the case. There are several requirements in Appendix A that must be remembered and observed. For example, Appendix A requires that all correspondence with the landowner be retained and made available to the Commission upon the Commission's request. Rules such as these and the other requirements of Appendix A should be constantly reviewed and considered throughout the preliminary phase of the case.

B. The Condemnation Complaint

The necessary elements of a condemnation complaint are fairly straightforward and have been developed not only in from Section 7-102 of the Code of Civil Procedure but also through a large body of case law that is constantly evolving. The absolutely essential elements of a complaint for condemnation are:

(1) Parties: Obviously there must be an adequate statement of the parties to the condemnation proceeding designating the Condemnor as the Plaintiff and identifying the parties defendant and their respective interests in the real estate.[69]

(2) Unknown Owners: In some situations there will be parties who have an interest in the property who cannot be identified. The most frequent example would be a parcel of property that was not the subject of an adequate probate proceeding to pass title from a decedent to the decedent's heirs and particularly those situations where no will was ever filed and title passed according to the Illinois Statute of Descent and Distribution. The deceased titleholder's heirs may not be known. Accordingly, section 7-102 of the Code of Civil Procedure provides that unknown owners may be made parties to the proceeding"… in the same manner as provided in other civil cases." There is a well-defined body of law concerning making unknown property owners parties defendant before the trial court and, as well, the Illinois Code of Civil Procedure sets out specific rules for notifying the

[69] Section 7-102 of the Code of Civil Procedure requires that the complaint naming as defendants, "… all persons interested therein as owners or otherwise as appearing of record, if known, or, if not known, stating that fact." This statement seems deceptively simple but the failure to observe this section has great consequences because any party not made a defendant over whom jurisdiction is obtained is not affected by the condemnation proceeding. It is very embarrassing to construct a new transmission or distribution line on a parcel of property only to find out transmission or distribution line is committing a daily trespass on this owners interest. Herein lies the obvious reason for the thorough title search and physical inspection of the target. The burden on naming the correct parties in a condemnation case is on the Condemnor and the results of the pleading will bind the Condemnor at the end of the case. See *Department of Public Works & Buildings vs. Sohm* 315 Ill. 478, 146 N.E. 518 (1925).

"unknown owners" by publication in a local newspaper of general circulation in the county in which the property is located.[70] This type of jurisdiction is called "*in rem*" jurisdiction and is based upon the notion that the owner of land must be constantly aware of what is going on with his or her property in a particular community. Therefore notice by publication in a newspaper has been deemed to satisfy the 5th and 14th Amendment requirements of due process.

(3) Authority: It is obviously necessary to state the authority by which the Condemnor is acting. The complaint must clearly set forth the authority which the Condemnor is exercising and in the case of an electric cooperative there would no doubt be some fairly detailed allegations about the entire ICC process even attaching a copy of the ICC order allowing the Certificate of Public Convenience and Necessity as well as the order to proceed with the condemnation.[71]

(4) Purpose: Generally in condemnation complaints, there must be an allegation that the taking is for an allowable "public purpose." The complaint may set forth the plan in detail or it may generally allege the plan, but in any event, the Condemnor is bound by the allegations of the complaint with regard to public purpose.[72] In the case of a condemnation by an electric cooperative, we have already noted that there is really no "public purpose" that is involved in the sense of providing a benefit to the general public such as a road or highway does. However it is probably a good idea to set forth in some general detail that the cooperative is building a particular line and the ICC has approved the project as one that is a public convenience and reasonably necessary for the general public. These particular allegations may overlap the allegations setting forth the authority granted by the ICC.

(5) Necessity: There must generally be a statement that the target property is "necessary" for the completion of the project as planned and as approved by the ICC. The case law concerning the proper allegations concerning "necessity" has a long and colorful history. The Supreme Court of the State of Illinois has construed the word "necessity," in the context of condemnation law to be synonymous with "expedient," "reasonably convenient," or "useful to the public," and the court has noted that there is no requirement that there be an absolute physical necessity for the taking of the target.[73] It would follow

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[70] Generally this entire procedure is governed by the Code of Civil Procedure of the State of Illinois and in particular sections 2-206, 2-207 and 2-413. (735 ILCS 2-206, 2-207 and 2-413).

[71] The failure to adequately state the authority for the condemnation action is crucial. In the event the defendants are successful in causing the condemnation complaint to be dismissed for want of authority, the defendants are entitled to recover their attorney's fees and costs. See *Village of Cary vs. Trout Valley Association* to 97 Ill. App. 3d 63, 696 N.E. 2d 1154 (2nd Dist., 1998)

[72] See generally *East Peoria Sanitary District vs. Toledo, Peoria & Western R.R.* 353 Ill. 296, 187 N.E. 512 (1933)

[73] *Department of Public Works & Buildings vs. Lewis* 411 Ill. 242, 245-46, 103 N.E.2d 595 (1952)

however that there should be some statement in a condemnation complaint by an electric cooperative that the target is reasonably necessary to complete the plan of the cooperative that has been previously approved by the ICC. This is a very slippery area that has been full of litigation and the public arena and the cases in this area should be carefully considered. [74]

(6) Property Description: Of course, it goes without saying that there should be an accurate legal description of the target property. Generally it is good idea to attach not only a metes and bounds legal description but, as well, a plat of the property being taken at that is available.

(7) Bona Fide Attempt to Agree: As noted above, Section 7-102 of the Code of Civil Procedure requires that the Condemnor make a bona fide attempt to agree upon compensation with the landowner prior to the filing of a condemnation complaint. It therefore follows that there should be some allegation contained in the complaint that there had been a bona fide attempt to agree upon compensation but the parties could not reach agreement on compensation. This entire area was thought to be well settled by previous case law but some recent cases have called in to doubt the previous case law concerning what is required to make a bona fide attempt to agree.[75] Therefore, attention should be paid to the developing case law in this area to make sure that there has been a bona fide attempt to agree and such an attempt has been properly alleged in the

[74] Generally it can be said that once the Legislature has granted the authority to a governmental body (such as the Illinois Commerce Commission) to condemn or authorize condemnations, then the Legislature has already included in that authority to write out that governmental body to decide the necessity for the use of the power of condemnation. Generally the courts have been reluctant to interfere with a determination of "necessity," particularly when that determination has been made by an authorized governmental body such as the ICC. In such cases, only a gross abuse of power will be found to be improper. See *People ex rel. Director of Finance vs YMCA* 86 Ill. 2d 219, 427 N.E.2d 70 (1981) where the Illinois Supreme Court condemned the practice of seeking to acquire more property than what was actually "needed." See also *County of St. Clair vs. Faust* 278 Ill. App. 3d 152, 662 N.E. 2d 584 (5th Dist. 1996) where the court held that the taking of 200 acres of wetlands was grossly excessive in view of the fact that the Condemnor's own expert said only 80 acres was necessary.

[75] It has been generally held that exhaustive negotiations are not required. If there is a wide disparity between the position of the parties on compensation the courts have held that the continuance of futile negotiations are not required. *County Board of School Trustees of DuPage County vs. Boram* 26 Ill. 2d 167, 186 N.E.2d 275 (1962). For an example of a "bad faith" offer, see *Forest Preserve District of Will County vs. Marquette National Bank* 208 Ill. App. 3d 823, 567 N.E. 635 (3rd Dist. 1991). However, more recent cases seem to indicate a higher degree of activity in order to meet the requirement of "a bona fide attempt to agree." See *Department Of Transportation ex.rel. People vs. 151 Interstate Road Corp.* 209 Ill. 2d 471, 810 N.E.2d 1 (2004) where the Supreme Court reversed the appellate court decision which basically held that the Department of Transportation had failed to negotiate in good faith in has the MAI appraiser that they chose did the bad job on his appraisal. The court concluded that the appraisal was poorly done simply by virtue of the fact there was a wide disparity in the Department's appraisal and the landowner's appraisal. See also *Department of Transportation v. Hunziker*, 342 Ill. App. 3d 588, 796 N.E.2d 122 (3rd Dist, 2003, as modified on den. of reh.) set forth in footnote 66 above where the court held that the Department of Transportation was required to give a copy of the appraisal it obtained for negotiations to the landowner prior to the filing of a condemnation complaint in order to meet the burden of making a bona fide attempt to agree.

condemnation complaint. Hopefully, in the context of condemning a right-of-way easement for a utility, the Illinois Commerce Commission requirement that the electric cooperative make a vigorous effort to negotiate a purchase price will satisfy the general requirements of section 7-102 of the Code of Civil Procedure that requires the Condemnor to make a "bona fide attempt to agree."

C. Valuation

Obviously, the crux of any condemnation case is the determination of the value of the target property. This area of the law is very complicated and has been the subject of a good deal of litigation. Hopefully a competent appraiser who is experienced in eminent domain valuations will not make mistakes in the valuation of the property. However appraisers who are actually and truly familiar with condemnation law are very hard to find. Therefore we will now take a look at some of the basic valuation principles that an electric cooperative should be aware of in valuing a landowner's property not only for the purpose of negotiation but also with an eye toward the filing of a condemnation complaint if necessary.

The guiding rule for the valuation of the target property has been codified in Section 7-121 of the Code of Civil Procedure [76] and provides the following:

> § 7-121. Value. …. the fair cash market value of property in a proceeding in eminent domain shall be the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner willing but not obliged to sell in a voluntary sale, which amount of money shall be determined and ascertained as of the date of filing the complaint to condemn. In the condemnation of property for a public improvement there shall be excluded from such amount of money any appreciation in value proximately caused by such improvement, and any depreciation in value proximately caused by such improvement. However, such appreciation or depreciation shall not be excluded where property is condemned for a separate project conceived independently of and subsequent to the original project.

In general, it is the appraiser's job to determine what this hypothetical seller, willing but not obligated to sell, would nevertheless sell to a buyer, willing but not obligated to buy, in a voluntary sale that occurred on the date the complaint for condemnation was filed.[77]

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[76] 735 ILCS 5/7-121

[77] you may now be wondering how an appraiser can make an appraisal before the filing of a condemnation complaint that values property as of the date of filing. The simple answer is that the appraiser will do an initial appraisal obtained for the purpose of negotiations and will update that appraisal for trial.

There are a number of other rules that have been grafted onto the bare bones of the statute by case law. A look at some of those rules will again help to alert an electric cooperative to possible valuation problems that may be evident from the inspection of the property itself or evident from the first draft of the appraiser's appraisal.

"Just Compensation" is, in itself, a fairly easy concept to imagine but is sometimes difficult of determination. Justice Hugo Black in *United States vs. Commodities Trading Corp.* noted that the court has never attempted to fashion a rigid rule for determining what "just compensation" is under all circumstances and for all cases. The best explanation Justice Black could make, when all was said and done, is his now famous quote:

> "Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" [78]

Of course, expert testimony, in the form of the real estate appraiser, will be indispensable to establishing just compensation for the landowner. Illinois has adopted the Federal Rules of Evidence and therefore the court's primary function will be to determine that the witness tendered as an expert witness is in fact an "expert." Once that is done, the expert will be generally allowed to testify about his/her opinion and will generally be allowed to discuss facts and data of the type in kind reasonably relied on in the real estate appraisal business.[79] Generally the courts will apply a two-step analysis: (1) Is the information of the type in kind normally relied upon by experts in this field; and (2) is the particular information used by this expert sufficiently trustworthy to make reliance on that information reasonable?[80] Once the court has made these determinations, the expert will be a allowed to testify about a number of items that were previously considered hearsay, such as what comparable property other than the target property has recently sold for; the terms and conditions of those sales if they affected valuation; in some cases, comparable property in the area that has sold by a private sale; the county real estate tax records concerning the size of the property and the dimensions of the improvements; records of the zoning administration in the County and any other information that an appraiser would normally use in formulating an opinion as to the fair market value of the target property outside the context of condemnation.

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[78] 399 U.S. 121, 94 L.Ed. 707, 70 S.Ct. 547, 549 (1950)

[79] See *Wilson vs. Clark* 84 Ill.2d 186, 417 N.E.2d 1322 (1981) wherein the Illinois Supreme Court adopted Rules 703 and 705 of the Federal Rules of Evidence. See also *Department of Transportation ex.rel. People vs. First National Bank of Arcola* 241 Ill.App.3d 601, 609 N.E.2d 389 (4th Dist. 1993) where the court held that the trial court retained the right to determine whether the facts or data are the type in kind reasonably relied on by an appraiser.

[80] Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Ensuring Adequate Assurance of Trustworthiness*, 1986 U.Ill.L.Rev. 43, 75.

Of course, the trial court judge is not required to simply allow second hand, nonprobative information before the jury when its probative value in explaining the expert's opinion pales beside its likely prejudicial impact or its tendency to create confusion among the jury.[81] However the trial court is required to follow the Federal Rules of Evidence in condemnation cases in Illinois.[82]

Generally a real estate appraiser will use three approaches in valuing real estate. Actually, only two of those approaches are routinely allowed under Illinois condemnation law. The first approach is generally known as the "Market" or "Comparable Sales" approach and it involves identifying the sales of other properties and then comparing those actual sale prices to the target property in an effort to arrive at an estimate of the fair cash market value of the target property.[83] Where evidence of another sale is offered as it a "comparable" sale, the party offering that evidence has the burden of demonstrating that the sale property is in fact "comparable" to the subject property.[84] If there is a dispute over whether a particular sale is in fact "comparable" than the court must conduct a hearing on that issue outside the jury's presence. Certain sales of property are not admitted as comparable sales, such as: sales made under the threat of condemnation which are considered as "forced" sales rather than "voluntary" sales; or, sales which were a part of an "assemblage" of other properties in the area since it is assumed that the buyer might be paying a premium to acquire all of the property in a given area for, say, a shopping center.[85] There are a significant number of rules that are applied in determining "comparable" sales for the market data or sales comparison approach. Hopefully the appraiser chosen by the cooperative will be knowledgeable about these issues and the cooperative will be able to rely on his/her skill and judgment in complying with these rules.

The second approach normally recognized by the Illinois courts is the "cost approach." The cost approach is basically a technique used to estimate the value of the improvements on a property by estimating the replacement or reproduction cost for the improvements on the property and then deducting reasonable physical and functional depreciation from the structures as they exist and adding back in the value of of the land on which these improvements are located. The use of the cost approach in condemnation

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[81] See discussion of the limits of *Wilson vs. Clark* in the case of *People vs. Anderson* 113 Ill.2d 1, 495 N.E.2d 485 (1986).

[82] *Department Of Transportation vs. Beeson* 137 Ill.App.3d 908, 485 N.E.2d 511 (2nd Dist. 1985) and *City of Chicago vs. Anthony* 136 Ill. 2d 169, 554 N.E.2d 1381 (1990)

[83] See generally, Illinois Institute of Continuing Legal Education, *Illinois Eminent Domain Practice, 2002 (with 2004 Supplement)*, 2004, Section 7.10.

[84] *City of Evanston vs. Piotrowicz* 81 Ill. 2d 512, 170 N.E.2d 569 (1960)

[85] See generally, Illinois Institute of Continuing Legal Education, *Illinois Eminent Domain Practice, 2002 (with 2004 Supplement)*, 2004, Section 7.10.

cases, however, is fraught with danger. The courts have authorized the use of the cost approach as a check on or in conjunction with the market approach but had generally not permitted appraisers to rely on the cost approach exclusively.[86] There are multiple problems with the cost approach that have caused the courts to be concerned: (1) by definition, the approach is very subjective because it relies upon the particular appraiser's skill in estimating the amount of physical and functional depreciation; (2) although replacement or reproduction costs may, under some circumstances, be material to show a landowner's investment in the property, the real test is not what those improvements originally cost but what they would sell for as a part of the real estate in a voluntary sale; and (3) the cost approach, by adding the value of the land to the estimated depreciated value of the improvements violates a well-recognized rule of real estate valuation in condemnation cases known as the "unit rule." [87]

The "unit rule" prohibits an expert from valuing the component parts of a property and then simply adding those component parts together to come up with a value of the whole property. The unit rule requires that the property be valued as a whole with all of its improvements and capabilities at its highest and best use from the outset.[88] In many condemnation cases, a landowner will point to a large oak tree in the taking area and will lament the fact that the tree is going to be taken or cut down. The landowner will argue that the value of the large oak tree in the taking area is, in and of itself, more than the amount being offered for the taking of the entire property. of course, the issue is not what is the value of the old oak tree, the issue is how much would a ready willing and able buyer, not compelled to buy, pay to a ready willing and able seller, not compelled to sell for the property in question with the old oak tree located on it.

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[86] *Department of Public Works & Buildings vs. Divit* 25 Ill. 2d 93, 1 to N.E.2d 749 (1962)

[87] See *City of Chicago vs. Giedraitis* 14 Ill. 2d 45, 150 N.E.2d 577, 580 (1958); *Department of Public Works & Buildings vs. Lotta* 27 Ill. 2d 455, 189 N.E.2d 238, 240 (1963)

[88] See generally, Illinois Institute for Continuing Legal Education, *Illinois Eminent Domain Practice, 2002 with 2004 supplement*, Section 7.23.