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Compensation for Illinois Farm Land Taken by the Public

By H. W. HANNAH and N. G. P. KRAUSZ

Most of us are not familiar with the way in which the public obtains the rights it needs in private property. When the state or a power company, for example, makes an offer to a farmer for rights to his land, he is likely to be confused and uncertain as to what he should do. He may wonder: Are they offering me enough money? Does the township really need my land for a school? Do I have to sell the light company a right of way? Can I persuade the agency to look somewhere else and leave me alone?

This circular is intended to help answer these and similar questions in the light of Illinois statutes and court decisions bearing on the subject. It is not meant as a substitute for legal counsel. In fact, the more an owner knows of his rights and the rights of the public in any taking of land, the more likely he is to realize that he needs an attorney's advice in the transaction.

Why has the public the right to take private property?

The agencies by which we are governed and served must have room in which to operate. A state without grounds for a state house, a county without a public square for the courthouse, or a power company with no path across the country for its towers and lines would be sorry spectacles. A government cannot exist without the right to take such land as it needs, known as the right of eminent domain, any more than it can exist without the right to defend itself.

As with all so-called “inherent” powers of government, however, when the right of eminent domain is extended beyond what people have learned to accept or consider obvious, they question the fairness of the demand. Problems and controversies then arise which often must be settled in court.

What limitations are placed on the right of the public?

In general the power of eminent domain coincides with the powers of government. For example, a county as part of the government has

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the legal right to improve highways and can take any private property needed in straightening or widening old highways or in building new ones. But when taking such property, the county (or any other public agency) is held in check by two very important limitations: It can take only those rights to private property that it absolutely needs and, according to both the federal and the Illinois constitutions, must pay just compensation for any property taken or damaged.

The right of public utilities to acquire private property in Illinois is limited by the Illinois Commerce Commission. A power, telephone, telegraph, gas, pipe-line, water, or railroad company wishing to expand or change its service must first get a permit from the Commission. Before deciding whether to grant the permit, the Commission checks any proposal to obtain land to extend lines, pipes, or other facilities. The Commission must usually approve the route the company plans to take before any extension may be made.

What agencies in Illinois have the right of eminent domain?

In Illinois the agencies which may obtain private property through use of the eminent-domain procedure are:

- The federal government or any of its agencies.
- The government of Illinois or any of its agencies.
- Political subdivisions of the state (counties and townships).
- Municipalities.
- Public corporations (school districts, drainage districts, fire-protection districts, and others).
- Public utilities, public-service corporations, or quasi-public corporations (power, light, gas, electric, telephone, telegraph, water, or pipe-line companies).

Private corporations and individuals do not have the power of eminent domain, though sometimes a right of necessity may be granted to one individual in the land of another (a necessary road or drainage outlet, for example).

When is the right of eminent domain exercised?

Agencies needing rights in private property first try to get them through agreement with the owner. If the owner is willing to donate the right, or will accept what is offered and transfer the right, nothing needs to be done beyond completing the formalities of transfer. If the
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The airview on the left, taken in 1939, shows a right-angle intersection on a highway leading to Rochelle, Illinois. That on the right shows the same intersection in 1954 after the right angle on the main highway was replaced by a circular curve. To make this improvement possible, several acres of farm land were taken for public use. (Fig. 1)

owner refuses to convey the right, the agency may begin an eminent-domain proceeding (sometimes referred to as a "condemnation" proceeding). Also, when an owner is for some reason not able to consent, is not a resident of the state, or his name or residence is unknown, eminent domain may be used.

Where are proceedings conducted?

An eminent-domain proceeding is a suit at law and must be conducted in a court. If the federal government is involved, the suit is conducted in a Federal District Court; otherwise the suit is in the circuit or county court of the county in which all or part of the property is located.

What are the rights of the property owner?

The purpose of the eminent-domain procedure is to make sure that the property owner is fairly treated and that the public gets the rights it needs. An owner may bring in evidence to establish the value of the property that is being taken and to show how much he will be damaged. A jury hears the evidence and decides the amount of compensation the owner is to receive. The owner or the party bringing suit may ask the jury to go upon the property and examine it before making a decision. Appeals may be taken from the county or circuit court to the Supreme Court of Illinois.
In court the landowner may challenge the right of the petitioner to take his property by stating that it is not being taken for a public purpose. He does this by a motion to dismiss the suit. Then the petitioner must prove that the property is needed and that it is for a public purpose.

**How is a proceeding conducted?**

**How proceedings are begun.** The agency wanting to take private property begins by filing a petition with the clerk of the county court or with the clerk of the circuit court. This petition must show the authority of the agency to take by eminent domain, the purpose for which the property is wanted, a description of the property, and the names of all known owners and other parties interested in the property. After the petition is filed, a summons is served on the defendant and notice of the hearing is published. The law requires that the hearing be set twenty days or more after the summons is served on the defendant or after the notice is published. The court may permit amendments of the petition and may bring in parties not named in the petition.

Any person not included as a party to an eminent-domain proceeding may become a party by filing a cross petition stating that he is an owner or has an interest in the property which will be taken. The court must then determine his rights and give them full consideration.

Under the Illinois law any number of separately owned tracts in the same county may be included in one petition. The compensation for each may be decided in the same or in different trials, or by the same or different juries, as decided by the court.

**Appearance in court.** A statement that the agency has the right to take private property must appear on the face of the petition. If the owner wishes to challenge the right of the petitioner to take all or any portion of the land described in the petition, he must file a motion to dismiss. Then the court can hear evidence from both parties in determining whether the motion should be sustained. If the owner feels that the petition has not been properly filled out—if, for instance, the reason for taking his property is not stated or the description of it is inaccurate—he should file a demurrer. Then he does this, he is not challenging the right to take his land; he is merely saying that the case has not been properly presented and the court cannot legally proceed.
Defenses available to a landowner. With the help of his attorney, a landowner may make the following moves to defend himself and his property:

Challenge the right to take his property.

Challenge the necessity of taking the land requested. This is on the theory that more property is requested than is necessary. An owner will need clear and convincing proof to back up such a challenge, for the courts have given public agencies wide leeway in deciding how much land they need. For example, a strip of land one-half rod wide for a telegraph line and enough land to eliminate a right-angle turn in a highway have been held necessary and reasonable.

Challenge the sufficiency of the petition.

Show that the petitioner did not try to reach an agreement with him on the price for the land and that therefore the petitioner has no right under the law to begin an eminent-domain proceeding. The petitioner cannot answer such an objection by saying that the owner did not ask for compensation because the law does not require an owner to make a claim to protect his constitutional rights. The courts have decided that a letter addressed to the owner offering a certain amount per acre is a sufficient effort to reach an agreement; that refusal such an offer or stating that he would not be able to answer within a week means that the owner has failed to agree; and that if an owner appears in court to contest the petition he has waived the right to contest on the ground of failure to agree and must do so on some other ground. An owner has a right, however, to know with whom he is dealing and may disregard an offer from an agent who will not say for whom he is acting.

File a cross petition asking for damages to land not taken. When he files a cross petition, an owner is admitting that he and the petitioner could not agree, and that the petitioner is acting within his legal rights in exercising eminent domain.

Demand a jury as a matter of right. Both the landowner and the agency wanting his land have the right to ask a jury to go upon the land and examine it. After seeing the land and hearing the proof offered by both parties, the jury will make a report to the court stating what compensation is fair. The impanelling of the jury, challenging, and other procedures are conducted as in other civil suits.

Costs, expenses, and fees. Usually the petitioner pays the costs of an eminent-domain proceeding, but the landowner pays his own
attorney's fees. However, if the petitioner gives up the proceedings, or does not pay the owner within the time specified in the judgment, the petitioner must pay the owner's costs, expenses, and attorney's fees. An owner is also entitled to payment for damages he suffers because of the petitioner's delay.

Interest. Interest on an award is payable from the time the judgment is given until the award is paid, but ordinarily if the owner has accepted the principal sum without interest, he cannot ask for interest. There are some exceptions: If the petitioner has refused to pay interest with the principal, for example, or has agreed to pay it later, the owner may expect interest even though he has already accepted the principal sum.

Appeals. If the landowner or the petitioner is not satisfied with the decision of the county or circuit court, either party may appeal directly to the Supreme Court. (The circuit court has no power to review cases heard in the county court.) When a petition includes several owners, each owner is entitled to a separate appeal. An appeal may be based on alleged errors of the court or on alleged inadequate compensation. An award will not be changed unless the Supreme Court feels that the jury acted without considering the evidence or that the lower court allowed substantial error to creep in. When the evidence is conflicting, the Supreme Court prefers to rely on the judgment of the jury that heard the case.

General. An owner cannot have a condemnation proceeding dismissed on the ground that the agency has no money with which to pay for the property; if he does not receive his money after the judgment is rendered he has adequate remedies under the law. The courts have also decided that a condemnation proceeding is not the place to try title to land. If the title is not clear, the money may be paid to the county treasurer and held until it has been cleared. The eminent-domain proceeding can still be completed and the petitioner can take possession. An owner is entitled to payment in legal tender and does not have to accept bonds or any form of substitute.

When must an owner yield possession?

The general rule in Illinois is that the owner does not have to give up his property until he has been paid. There are some exceptions to this rule. If the case is appealed by the owner, the petitioner may
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give bond guaranteeing payment and take possession. Also if the owner is not known, or for some reason cannot receive payment, the amount may be paid to the county treasurer, and the petitioner may take the property.

In certain special cases both the state and federal government may take possession under a “declaration of taking” before the proceedings have been concluded. This right is exercised by the federal government when the war department needs land for military purposes amounting to an emergency, and by the state of Illinois when the land is needed for highways or for certain housing purposes. A “declaration of taking” signed by the governor and accompanied by the supplementary information required by law must be filed with the clerk of the court, and the estimated amount of compensation must be left with him to be kept for the landowner. Possession then passes to the state, but the owner is entitled to have his rights decided in the eminent-domain proceeding which will follow. He is also entitled to receive 6 percent interest on the amount finally awarded from the time his land is taken until he is paid. In cases of undue hardship, the court may permit the owner to keep his land for a period not longer than six months by postponing the right of entry under a “declaration of taking.”

If either the trial court or a court of review finds that property taken under “a declaration of taking” was not taken for a public purpose, the land is given back to the owner together with damages for the interruption of his possession. Any amount deposited by the state is returned. An owner may challenge a declaration of taking by filing a motion to strike the declaration and dismiss the suit.

The court may allow a reasonable length of time for the petitioner to pay the award and take possession. What length of time is “reasonable” depends on circumstances. In one instance a drainage district was allowed three years within which to pay the award.

If a petitioner tries to take possession before he has a legal right, an owner can take legal action to stop the entry.

For what must compensation be paid?

Broadly speaking, an owner is not entitled to compensation simply because his use of the property is curtailed by laws or regulations. For example, a zoning law may restrict the type of structure which an owner may build on his land. A railroad may be required to fence its right of way. Dumping garbage into a stream may be declared a
To find the U. S. 1 where cattle used, feeding operation. riparian rights (where a stream channel is altered, for example). Trees and shrubbery, springs and wells, minerals, underground waters. Natural drainage rights (if natural drainage is altered, damages may be due to the landowner). Easements (a right of way across the condemned land, for example). Covenants and contractual rights are not compensable — there must be an interest in the land itself. An additional use of a right previously acquired by the public (for example, erecting a telephone pole on a right of way previously acquired for use as a highway).

To whom must compensation be paid?

Those who own all or some of the rights taken are entitled to payment. According to the courts, compensation must be paid to all of the following:

- Fee-simple owners holding the whole interest in the property.
- Joint owners, whether tenants in common (as heirs generally are) or joint tenants with the right of survivorship (usually husband and wife).
- Trustees and the beneficiaries of trust.
- Life tenants.
- Remaindermen and reversioners (those who own the fee during the time possession is held by a life tenant).
- The grantees of property conveyed during condemnation proceedings.
- Mortgages. The award is a substitute for the property taken and the mortgage creates an equitable lien against the award. However,
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failure to make the mortgagee a party does not entitle the mortgagor to have the proceedings dismissed.

Guardians and conservators and those they represent.

 Receivers and those holding rights of redemption.

Holders of tax titles.

Tenants. A farmer who leases land from another is entitled to the value of his lease or estate in the land for as long as he has leased it, whether or not he has a written agreement. He is not entitled to any compensation if his term is up before his possession is disturbed. If the whole property is not affected, he is paid only for the portion of his interest that is taken. The condemning agency is not required to make a separate payment for permanent improvements made by a tenant; the tenant and landlord must agree on the amount to be allowed the tenant — if any — out of the award.

It is well established that every person with an interest, whether partial, temporary, permanent, or absolute, has a right to damages in proportion to the injury his interest has received. Also the condemning agency cannot be made to pay more than would be necessary if one person had a complete and perfect title to the property. This is sometimes called the unit rule, meaning that the property must be evaluated as a whole.

When may an owner be compensated for property not taken?

The theory of compensation when private property is taken by the public is that the owner shall be left “whole” or in as good a position as he was before his property was taken. Often he must be paid for something besides the fair value of the property taken. This “something besides” is called compensation for damage not taken. Benefits such as an improved road also are to be considered and if they equal damages, the owner does not receive any compensation. If there is no damage beyond the loss of property, there is, of course, no additional compensation.

Damage to property not taken is generally measured by its depreciation in value. For example, when a drainage district takes land to widen a ditch and places the excavated earth on the banks, the property owner is entitled to one recovery — the difference in cash value of his farm before and after the improvement. If it is worth as much as it was originally, there are no damages. However, all past, present, and future damages which may reasonably be attributed to the improvement may be considered by the jury. Expert testimony may be brought
in when needed (to render an opinion on danger from power lines, for example).

Some of the items which may depreciate property not taken, and for which the courts have said that an owner is entitled to damages, are:

- Power, telephone, or telegraph lines running over a strip of land. (The only property taken is that necessary for poles or towers.)
- Gas or pipe lines running through a strip of land. (The surface is not taken, but the owner’s use may be affected.)
- Lines damaging trees.
- Cutting land off from water supply.
- Shrinkage in farming area. This is sometimes called “severance damage,” and is regarded by some as an exception to the rule that “consequential” damages cannot be allowed.
- Division of farming area, or change in shape of the area.
- Obstruction of drainage when a road is built, forcing water onto one’s land.
- Changes in the grade of a road, affecting access to property.
- Removal of lateral support.
- Cost of new fencing, resulting from a new road or drainage works.
- Necessary cost of moving buildings.
- Weeds and insects around the base of towers.
- Damage to crops and livestock.
- Loss of time in plowing, cultivating, and reaping.
- Inconvenience, danger, and depreciation in value of land not taken when it is necessary to drive livestock back and forth across a highway. (The danger of loss must be clear and the evidence specific.)
- Damage to business and income.
- Any special damages that an owner can prove and that most other owners may not have. (Increase in insurance rates, for example.)

What damages cannot be compensated?

There are some damages and inconveniences for which the courts have refused to allow compensation. These are known as “consequential” damages. Some of them are:

- The vacating of a road by the public (special damage must be shown).
- Damages caused by the taking of adjoining property belonging to another. (If damages actually result, there are legal remedies outside the eminent-domain act.)
- “Mere conjecture, speculation, fancy, or imagination” (damage must be real).
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Fear of danger from a power line.
Remote possibility that there will be trespass, danger, a need for fencing, or other inconveniences.

Possibility of having undesirable power lines due to the nearness of a highway.
Possible difficulty of settling future claims.
Future loss of profits.
Possible loss of good will.
Loss of aesthetic or sentimental value (removal of trees or shrubs).
Unsightliness of poles and lines.
Expense of removing personal property.
Dust, fumes, noise, traffic, and annoyance from a highway or railroad.
Loss of business during the progress of work.
Necessity of more costly fencing around towers.
Danger to owner or his family in crossing a highway.

When the owner conveys his land by deed as a result of agreement with the public agency it is assumed that the purchase price includes damage to land not taken. He cannot, therefore, claim a separate allowance for such damages.

How can value be established?

The courts have agreed that “just compensation” means the full and perfect equivalent in money of the property taken. The owner is to be placed in as good position financially as though his property had not been taken. Values are to be set as of the time the petition is filed. About establishing the value of land, the courts have said:

The fair cash market value is the test. This is frequently defined as the amount a willing buyer will pay a willing seller.

The value of the land for the highest, best, and most profitable use to which it could be put, either now or later, may be shown.

Special value to the owner is admissible, but with limitations.

Rental value is an important test but not the only one.

Buildings, minerals, and timber are to be considered, though the land must be valued as a whole. Improvements not permanently “affixed” so they become a part of the real estate are not to be considered.

Sales of similar property may be introduced as evidence of value, but such questions as the degree of similarity and whether the time and place of sale would affect the similarity must be considered by the trial judge.

For example, the courts have excluded evidence of sales made several years earlier.
Expert testimony on value may be admitted, such as that of a soil scientist or professional farm manager. The jury decides whether the witnesses are trustworthy judges of value.

Bona-fide offers to purchase for cash by parties able to buy are some evidence of value, but must be carefully examined. Offers made for similar property are not, in general, admitted as evidence. Neither is the amount paid in other eminent-domain proceedings.

Profits or expected profits are not good evidence of value unless the property is designed for such a special use that its value cannot be determined in any other way. A tract of farm land may be shown to have added value because it is part of a larger unit. Also testimony that the highest and best use of the property is for residential purposes may be admitted.

Evidence of crop yields may be admitted.

Reproduction costs, photographs, and other testimony which would add nothing to more acceptable evidence of value may not be admitted.

The value placed on property by the assessor is immaterial.

Compensation cannot be reduced by deducting taxes which will fall due after the petition is filed.

When the jury examines the property by going on the premises, it couples its own judgment of value with all the testimony received before arriving at a determination. This may include evidence to show the condition of land throughout the year, regardless of the condition at the time the jury viewed it.

The jury's determination will not be disturbed on appeal if its findings are "within the range of testimony." For example, a verdict of $17,125 was considered fair where the testimony ranged from $12,500 to $38,000.

What rights does the owner retain?

When the public acquires farm land, it may take either the fee or title interest or an easement giving it the needed rights. When the complete interest is taken, the owner has no further rights in the property except as a member of the public or perhaps as an adjoining owner. But when the agency takes only an easement, the owner may use the property in any manner not interfering with the public use. He may, for example, farm the land under which pipes are laid or over which lines are placed.

If an easement is taken for highway purposes, he may use the untraveled part of the road. Such use may be limited by highway authorities to the extent necessary to insure the safety of users and to maintain the highway. Likewise, the owner of the fee may use a rail-
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road right of way for any use that does not interfere with that of the railroad. A farm owner may pasture his animals along a drainage ditch or use water from the ditch, so long as the banks are not injured or the flow of water obstructed.

An owner is entitled to damages to the fee interest, except for damages arising naturally or reasonably expected to arise out of the use of the public easement. When a public easement is abandoned, the owner of the fee or his successors are entitled to possession.

How can an owner prevent an unauthorized use?

The Illinois courts consider it a violation of a property owner's rights when his property is taken for a public use and he is forced to begin action at his own expense. If an agency goes ahead as though it had the right to make a particular use of a man's land but has not yet acquired that right, the owner is entitled to damages and to an injunction preventing further use until the right is legally acquired and fair compensation paid. This situation is most likely to arise when the agency has an easement and makes some additional or extended use involving other land of the owner. For example, the courts have held that when a drainage ditch is widened and the spoil materials deposited on the edge, the landowner is entitled to an assessment of damages by a jury.

There are situations, however, in which the public may acquire a permanent right to the use of property which has already been used for public purposes over a long time. For example, after a highway has been used for the statutory period of 15 years, the owner cannot get compensation.

Damage that occurs again and again, such as that caused to crops by a dam, may be recovered in an action for that damage. However, if the land is rented, such an action may be begun only by the tenant. The owner may sue for any damage to parts of his property that are certain to revert to him, such as fences, tile lines, buildings, or grass waterways.

The rights of third parties (people who are not owners of the land taken) who are injured by the public may be protected legally, but not in an eminent-domain proceeding. Such action is limited to people whose property interests have been taken. If, for example, the construction of ditches by the highway department undermined a farmer's land and fence, he would be entitled to damages from the highway department, but he could not have his rights determined in an eminent-domain proceeding.
WHEN THE PUBLIC WANTS YOUR LAND

- Consider carefully the offer you receive. It's likely to be a fair one. You may do better through agreement than through eminent domain proceedings.
- Try to negotiate for a better settlement if you honestly feel that a fair price has not been offered. Before deciding, take into account all the damages involved.
- Engage an attorney immediately if your efforts at negotiating fail. Then when your case comes to trial, you can present the best evidence possible to establish the true value of your rights.

To find the U.S.I., where cattle are chosen on work of cattle feeding, consider carefully the offer you receive. It's likely to be a fair one. You may do better through agreement than through eminent domain proceedings.

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