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Route to: ☐ _____ ☐ _____ ☐ _____ ☐ _____
☐ _____ ☐ _____ ☐ _____ ☐ _____

Nichols on Eminent Domain[®]

Publication 460

Release 130

July 2018

HIGHLIGHTS

Case Updating—Recent cases have been added.

Revised Chapters

- Ch. 12A, *Market Value—Time of Valuation*.
- Ch. 13, *Fair Market Value—Physical Character*.
- Ch. 36, *Inverse Condemnation—Aircraft Flights*.

Case Updating

Case Law Developments have been added, including coverage of the following cases:

- *Board of Water Works Trs. of City of Des Moines v. Sac Cty. Bd. of Supervisors*, 890 N.W.2d 50 (Iowa 2017), where the Iowa Supreme Court rejected a state agency’s “takings” claim against drainage districts where the state constitution’s takings clause provides that “*Private* property shall not be taken for public use without just compensation first being made . . .” (emphasis in original).

Here, no private property was involved in case, which instead was a dispute among various public subdivisions that only existed by grace of the state Legislature. *See* § 2.17.

- *Creegan v. State*, 391 P.3d 36, 47 (Kan. 2017), where the Kansas Supreme Court held that “[A] physical taking is not inevitably required. The protections of eminent domain extend beyond tangible property and include protection of intangible types of property such as patents, mineral rights, and contract rights.” The court also found that violation of restrictive covenants can support the taking of a compensable real property interest in an inverse condemnation action. *See* §§ 5.03[1], 5.07[4][a].
- *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970, 974 (Nev. 2017). Here, the Nevada Supreme Court held that there are two ways in which the state may effectuate a

“taking”: (1) through “direct government appropriation or physical invasion of private property”; or (2) through enacting regulation that is “so onerous that its effect is tantamount to a direct appropriation or ouster.” *See* § 6.01[6].

- *Regan v. Spector*, 158 A.3d 311, 317 (Vt. 2016), where the Vermont Supreme Court held that property owners had no inverse condemnation claim absent a permanent physical occupation or temporary incursions by the town amounting to an easement, and where a substantial cause of an ongoing minor erosion on plaintiffs’ land was due almost entirely to natural evolution of seepage wetland rather than the town’s repositioning of a drainage culvert. *See* § 6.01[12][c].
- *Bush Land Dev. Co. v. Crook Cty. Weed & Pest Control Dist.*, 388 P.3d 536 (Wyo. 2017), where the Wyoming Supreme Court held that inverse condemnation is distinct from eminent domain finding that eminent domain refers to the legal process by which government asserts authority to condemn property, while inverse condemnation is a cause of action a landowner may pursue to recover just compensation for the taking of property when condemnation proceedings have not been instituted. The court also observed that very compelling reason require a landowner’s compliance with the statutory procedure for asserting an administrative remedy against a weed and pest control district, namely that if the district compensated an owner for alleged damage

to property, there would be no taking or damage to private property without just compensation, and thus the property owner’s inverse condemnation claim was properly dismissed pending pursuit of an administrative remedy. *See* §§ 6.01[15][j], 6.03[9][c].

- *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 817–822 (6th Cir. 2017), where the court, reviewing principles of ripeness in the takings context, concluded that the landowners’ claims were not ripe for federal review for failure to bring a Takings Clause claims under state statutes that offered a means for resolution of such claims in state court. *See* § 6.03[9][b].
- *State v. Beach Grp. Invs., LLC*, 201 So. 3d 679, 686 (Fla. Dist. Ct. App. 2016), where a court of appeal in Florida found that ripeness is the threshold question in an as-applied regulatory takings claim; for ripeness purposes, unless the permitting authority has already reached a decision on pursuit of a variance or such pursuit is futile, the owner must pursue administrative remedies to obtain the variance. Because a variance is a reasonably possible means of allowing additional flexibility in the agency’s permit decision, the owner must apply not only for a permit but also for a variance wherever possible. *See* § 6.03[9][b].
- *Mt. Water Co. v. Dep’t of Revenue*, 394 P.3d 922, 925 (Mont. 2017), where the Montana Supreme Court held that “It is the general rule that a taking does not

occur until: (1) legal title vests in the condemnor, (2) the condemnor enters into actual possession, or (3) the condemnor takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land.” *See* § 8.05[2].

- *Stephens Prod. Co. v. Larsen*, 394 P.3d 1262, 1267 (Okla. 2017). Here, the Oklahoma Supreme Court found that in eminent domain proceeding, property owners must be placed as fully as possible in the same position they occupied before the taking, and all presumptions must favor the landowner, not the condemnor, with eminent domain statutes being strictly construed in the landowner’s favor. *See* § 8.07.
- *Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795, 799–803 (8th Cir. 2017), where the Eighth Circuit held that a rural electric cooperative’s easements did not allow the installation and use of fiber-optic cable alongside electrical lines to serve the general public as a commercial telecommunications enterprise distinct from the cooperative’s electricity business, as this reflected an impermissible expanded use of the easement prohibited by state law. *See* § 11.08[2].
- *Harris Cty. Flood Control Dist. v. Taub*, 502 S.W.3d 320, 330–331 (Tex. Ct. App. 2016), where the court found that as a matter of long-established state law, evidence of the price for which comparable property was sold to an entity with the power of eminent domain is not competent evidence

of the value of condemned property. It held that Texas courts exclude evidence of a sale to an entity with the power of eminent domain even when testimony is offered that the sale was voluntary. The court also found that admissibility of evidence of a comparable real estate transaction does not depend on whether the sale was consummated. Rather, the rule in condemnation cases is that unaccepted offers to buy or sell, including unexercised options, are not competent evidence of the property’s value, while the fact that an agreed sales contract was not performed goes to its weight rather than its admissibility. *See* § 12B.04[2].

- *Johnson Propane, Heating & Cooling, Inc. v. Iowa DOT*, 891 N.W.2d 220, 224 (Iowa 2017), where the Iowa Supreme Court held that if an acquiring agency takes the whole property, the property’s fair market value before the taking is the measure of damages, but if the acquiring agency takes only part of the property, then the owner’s measure of damages is the difference between the fair market value of the whole property before acquisition and the fair market value of the property remaining after acquisition. Similarly, in *Pener v. King*, 391 P.3d 27, 30 (Kan. 2017), the Kansas Supreme Court held that under K.S.A. § 26-513(b), if an entire tract of land or interest in land is taken, the measure of compensation is the fair market value of the property or interest at the time of taking, but if only part of the tract

of land or interest is taken, the compensation and measure of damages is the difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion or interest remaining immediately after the taking. *See* § 14.02[2].

- *Cty. of Kaua'i v. Hanalei River Holdings Ltd.*, 394 P.3d 741, 750 (Haw. 2017), where the Hawaii Supreme Court held that the test generally used to determine whether a parcel to be acquired by eminent domain is part of larger tract of land to entitle the owners to severance damages is that there must be unity of title, physical unity, and unity of use of the parcel taken and the parcel left. The court found that the three unities should be evaluated and weighed against one another as factors, and should not be viewed as essential elements, and unity of use should be accorded more weight compared to unity of title and physical unity. Thus, lack of physical unity will not be dispositive of the condemnee's claim for severance damages. *See* § 14.02[3][b][i].
- *State ex rel. Cuyahoga Lakefront Land, L.L.C. v. City of Cleveland*, 71 N.E.3d 1016, 1019–1020 (Ohio 2016). Here, the Ohio Supreme Court noted that Ohio courts have held that the temporary interference with access to property during highway construction or repair does not rise to the level of a compensable taking, and thus a parking lot owner similarly suffered no compensable taking

where access to the lot was partially blocked for a temporary period of 16 days to allow filming of motion picture. *See* § 16.03[2].

- *W. Va. DOT v. Newton*, 797 S.E.2d 592, 599–600 (W. Va. 2017), where the court held that the proper and only course of action for an aggrieved property owner who believes property has sustained damage due to highway construction or improvement, after reasonable time without eminent domain action by Department of Highways, is to file a complaint in the circuit court seeking a writ of mandamus to require the institution of such proceedings. *See* § 28.02[4][a], [c].

Revised Chapters

Ch. 12A, *Market Value—Time of Valuation*, has been updated. The revised chapter covers the following areas:

- The general rule that the value of condemned property is ascertained at the time of appropriation. *See* § 12A.01.
- The difference in jurisdictions as to when appropriation of the condemned property has occurred. *See* § 12A.02.
- The majority rule that condemned property is assessed at the date of the taking, and the minority rule that valuation of condemned property occurs before the day of the taking. *See* §§ 12A.03, 12A.04.
- That the date for the valuation of property illegally taken is when the property is recognized as legally taken under the jurisdiction's law. *See* § 12A.05.
- The setting of the date of valuation under the Model Eminent Do-

main Code. *See* § 12A.06.

- Using knowledge about the property that was obtained after it was acquired for use in ascertaining value. *See* § 12A.07.

Ch. 13, *Fair Market Value—Physical Character*, has been fully revised and updated. The revised chapter covers the following areas:

- Real estate appraisals in the eminent domain process, including coverage of:
 - Why appraisals are important in eminent domain cases;
 - Valuation law in eminent domain;
 - Lawyering the appraisal process;
 - What constitutes an appraisal and an appraiser;
 - A property's highest and best use and its effect on value;
 - Just compensation and fair market value;
 - Accepted appraisal methods, such as sales or market comparisons;
 - Other issues such as special use valuations, the substitute facilities doctrine, and the use of tax appraisals. *See* § 13.01.
- That the condemnor must condemn the land and its improvements. *See* § 13.02.
- The Uniform Eminent Domain Code's approach to compensation. *See* § 13.03.
- Zoning issues. *See* § 13.04.
- Assessing the fair market value of: buildings and fences (*see*

§§ 13.05, 13.06), fixtures (*see* § 13.07), leasehold interests (*see* § 13.08), tenant trade fixtures (*see* § 13.09), environmentally contaminated land (*see* § 13.10), personal property (*see* § 13.11), improvements made before condemnation (*see* § 13.12), vegetation and minerals (*see* §§ 13.13, 13.14), easements and property subject to easements (*see* § 13.15), water rights (*see* § 13.16), airspace (*see* § 13.17), business premises (*see* § 13.18), incidental losses (*see* § 13.19), public service corporations (*see* § 13.20), loss of visibility and view (*see* §§ 13.21, 13.22), roadways (*see* § 13.23), wind power rights (*see* § 13.24), access to sunlight for solar energy (*see* § 13.25), utility transmission lines (*see* § 13.26), mortgages (*see* § 13.27), highway advertising signs (*see* § 13.28), and restrictive covenants (*see* § 13.29).

- Federally related transactions and federally directed appraisal requirements. *See* § 13.30.
- The federalism paradigm for real Estate appraiser regulation. *See* § 13.31.
- Federal authority over real property valuation, with coverage of federally-related transactions (FRTs); federal agency appraisal guidelines; federal and state law on alternative valuations in eminent domain; and the interaction between the federal government and a state real estate appraiser regulatory agency. *See* § 13.32.

Ch. 36, *Inverse Condemnation—Aircraft Flights*, has been fully revised and updated.

The revised chapter covers the following areas:

- An introduction to aircraft flights and inverse condemnation, including discussion of
 - The development and expansion of air travel;
 - The public's right to use of airspace; and the individual's right to use his or her property;
 - A determination of whether a particular governmental action constitutes a taking;
 - Elements of a taking; date of taking; additional takings; and physical invasion of property;
 - Additional remedies; federal preemption; and class actions. *See* § 36.01.
- An overview of inverse condemnation law. This section covers a description of inverse condemnation; a comparison of *de jure* condemnation proceedings and inverse condemnation actions; governmental activities that may give rise to inverse condemnation actions; and the applicability of statutes of limitations to inverse condemnation actions. *See* § 36.02.
- Airspace Rights including coverage of navigable airspace, aviation easements, clearance easements, and prescriptive easements. *See* § 36.03.
- The landmark U.S. Supreme Court decisions in *United States v. Causby*, and its legacy, and *Griggs v. Allegheny County*. *See* §§ 36.04–36.06.
- The elements of a taking. *See*

§ 36.07.

- Determining the date of the taking. *See* § 36.08.
- Entitlement to compensation for the taking of additional aviation easements. *See* § 36.09.
- Liability for aircraft operations other than direct overflights, with coverage of the trespass and nuisance concepts and the decision in *Batten v. United States*. *See* § 36.10.
- Additional remedies available, such as injunctive relief. *See* § 36.11.
- Federal preemption issues. *See* § 36.12.
- Class actions. *See* § 36.13.
- Miscellaneous topics, including the threat of condemnation; persons entitled to compensation; federal jurisdiction; and 42 U.S.C. § 1983 actions. *See* § 36.14.

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July 2018

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VOLUME 1

Revision

☐	Publication Table of Contents page 1 thru Title page.	Publication Table of Contents page 1 thru Title page
☐	1-23 thru 1-25	1-23 thru 1-26.1
☐	1-201 thru 1-217	1-201 thru 1-213
☐	1-359 thru 1-381	1-359 thru 1-381

VOLUME 1A

Revision

☐	Title page.	Title page
☐	2-55 thru 2-60.1.	2-55 thru 2-60.1
☐	3-7 thru 3-13	3-7 thru 3-13
☐	3-36.1 thru 3-37.	3-37 thru 3-38.1
☐	3-85 thru 3-93	3-85 thru 3-94.1
☐	3-155 thru 3-158.1	3-155 thru 3-158.1
☐	4-69	4-69

VOLUME 2

Revision

☐	Title page.	Title page
☐	5-111.	5-111 thru 5-112.1
☐	5-367.	5-367 thru 5-368.1

VOLUME 2A

Revision

☐	Title page.	Title page
☐	6-8.1 thru 6-29	6-9 thru 6-30.1
☐	6-47 thru 6-49	6-47 thru 6-50.1
☐	6-87 thru 6-89	6-87 thru 6-90.1
☐	6-128.1 thru 6-129	6-129 thru 6-130.1
☐	6-199 thru 6-211	6-199 thru 6-211
☐	7-87 thru 7-88.1.	7-87 thru 7-88.1
☐	7-109 thru 7-110.1	7-109 thru 7-110.1

VOLUME 3

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Revision

☐	Title page.	Title page
☐	8-53	8-53 thru 8-54.1
☐	8-81	8-81 thru 8-82.1
☐	8-99 thru 8-101	8-99 thru 8-102.1
☐	9-11	9-11 thru 9-12.1
☐	9-67	9-67 thru 9-68.1
☐	10-100.1 thru 10-104.1	10-101 thru 10-104.1
☐	11-48.1	11-48.1

VOLUME 4

Revision

☐	Title page thru v	Title page thru v
☐	CT12-1 thru CT12-11	CT12-1 thru CT12-9
☐	12-45.	12-45 thru 12-46.1
☐	12-57 thru 12-58.1	12-57 thru 12-58.1
☐	CT12A-1 thru 12A-15.	CT12A-1 thru 12A-15
☐	12B-15 thru 12B-17.	12B-15 thru 12B-18.1
☐	12C-1	12C-1 thru 12C-2.1
☐	CT13-1 thru 13-217	CT13-1 thru 13-317

VOLUME 4A

Revision

☐	Title page.	Title page
☐	14-5 thru 14-14.1	14-5 thru 14-14.1
☐	14B-9 thru 14B-17	14B-9 thru 14B-18.1

VOLUME 5

Revision

☐	Title page.	Title page
☐	16-29.	16-29 thru 16-30.1
☐	16-75 thru 16-85	16-75 thru 16-86.1

VOLUME 6

Revision

☐	Title page.	Title page
☐	26E-35 thru 26E-46.3	26E-35 thru 26E-46.3

VOLUME 6A

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☐	Title page thru v	Title page thru v
☐	28-9 thru 28-15	28-9 thru 28-16.1
☐	28-25 thru 28-29	28-25 thru 28-30.1
☐	35-13.	35-13 thru 35-14.1
☐	36-1 thru 36-191	36-1 thru 36-145

VOLUME ★

Revision

☐	Title page.	Title page
☐	I-17 thru I-57	I-17 thru I-58.1
☐	I-85 thru I-105	I-85 thru I-106.1
☐	I-125 thru I-129.	I-125 thru I-129
☐	TC-1 thru TC-539.	TC-1 thru TC-569

VOLUME ★★

Revision

☐	Title page.	Title page
☐	TC-541 thru TC-1183	TC-571 thru TC-1181

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