A PRIMER ON ALABAMA EMINENT DOMAIN AND CONDEMNATION LAW

by

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I. Overview of Law of Eminent Domain

A. Definition

"Eminent domain" is the power of the sovereign, or those on whom such power has been conferred, to take property, or interests in property, for public use and upon payment of just compensation. Pollard v. Hagan, 44 U.S. 212 (1845). It is through the procedure of "condemnation" that the power of eminent domain is exercised.

B. Source of Eminent Domain Power

The power of eminent domain "is one of the highest powers of government, an attribute of sovereignty, inherent therein as a necessary and inseparable part thereof." Brock v. City of Anniston, 14 So. 2d 519 (Ala. 1943). While it is a power that "antedates constitutions, [is] inherent in society and superior to all property rights," it is limited in its exercise by the Federal and State Constitutions. Id.; see Gober v. Stubbs, 682 So. 2d 430 (Ala. 1996) (the power of eminent domain is a power inherent in every sovereign state, and the constitution merely places certain limits on the exercise of the power).

C. Federal and Alabama Constitutional Provisions Relating to Eminent Domain

The Fifth Amendment to the United States Constitution provides that private property shall not be "taken for public use, without just compensation." U.S. CONST. amend. v. The Alabama Supreme Court has observed that this federal "takings clause" operates primarily to protect the owner of private property from having his property taken under compulsion by the government (whether federal or state) without just compensation. Ex parte Alabama Dept. of Transp., 143 So. 3d 730 (Ala. 2013); Alabama Power Co. v. Citizens of the State of Alabama,

740 So. 2d 371 (Ala. 1999). But, the Fifth Amendment does not require payment in advance of the taking. Garrow v. U.S., 131 F.2d 724 (5th Cir.), cert. denied 318 U.S. 765 (1942).

There are two primary provisions in the Alabama Constitution relating to the power of eminent domain:

Section 23 provides, in part, that "private property shall not be taken for, or applied to public use, unless just compensation be first made therefor." Ala. Const. art I, § 23. Section 23 also provides that the legislature may confer the right to exercise eminent domain powers on persons and corporations, and may regulate the exercise thereof by statute. Id. Thus, this provisions is the foundation upon which the Alabama Eminent Domain Code, codified at §§ 18-1A-1, et seq., Code of Alabama ("AEDC") rests, and (as will be discussed below) is the basis for an "inverse condemnation" claim against the State and its agencies or universities. Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002).

Section 235 provides, in relevant part:

> Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction.

Ala. Const. art. XII, § 235. As will be discussed in greater detail below, Section 235 provides the basis for an "inverse condemnation" claim against municipal governments and other corporations invested with the power of eminent domain. See Housing Auth. of the Birmingham Dist. v. Logan Properties, Inc., 127 So. 3d 1169 (Ala. 2012). It also provides the basis for the condemning authority's right to enter upon the property, which has been condemned, in order to build the project, so long as the "amount of damages assessed shall have been paid into court in

money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain . . . ." Ala. Const. art. XII, § 235.

D. Legislative Delegation of Eminent Domain Power to Others

Because eminent domain is an attribute of sovereignty inherent in the state, the legislature may prescribe who may exercise the power. Dean v. County Board of Education, 97 So. 741 (Ala. 1923). The legislature has conferred the right to exercise eminent domain powers on counties and municipal corporations. Ala. Code §§ 11-14-3, 11-47-170, 11-80-1. It has also conferred the right of eminent domain on corporations formed for the purpose of constructing, operating, or maintaining railroads, street railroads, gas or electric works, water companies, power companies, canals, terminals, bridges, viaducts, wharves, tiers, telegraph or telephone lines, pipelines, or any other work of internal improvement or public utility. Ala. Code § 10A-21-2.01; see also Ala. Code § 10A-21-2.04 and -2.05; § 37-4-130.

In addition, the legislature has provided that private owners of landlocked property may acquire, by condemnation, "a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto . . . ." Ala. Code § 18-3-1. The legislature has also provided that access to a cemetery or graveyard, which has been used by the public for burying the dead for twenty years or more, may be condemned. Ala. Code § 18-3-20.

The delegation of the power to condemn brings with it the power to determine whether, and to what extent (including the selection of the route therefor), certain property will be taken, and that decision will not be interfered with by the courts unless it is shown (by clear and convincing evidence) to have been made in bad faith or in an arbitrary, capricious or wantonly

injurious manner. Berry v. Alabama Power Co., 60 So. 2d 681 (Ala. 1952); see Alabama Electric Co-op, Inc. v. Watson, 419 So. 2d 1351 (Ala. 1982).

II. Key Concepts in Eminent Domain Law

As noted above, eminent domain is the power to "take" property for "public use" and upon payment of "just compensation." The concepts of "taking," "public use," and "just compensation" will now be briefly discussed.

A. "Taking"

A "taking" of property seems, at first blush, to be a rather simple, straightforward concept: a parcel of property, or some portion thereof, is being acquired for a public project/use, or a right-of-way over a parcel of property is being acquired for the construction, operation and maintenance of a railroad, a pipeline, or an electric power line, through exercise of the power of eminent domain. In each instance, all or some portion of the right, title or interest in the involved property is being "taken" by the State, or another entity having the power of eminent domain, for the occupancy and use of the public project by means of a condemnation action.[1] From the standpoint of the transfer of the rights from the owner to the condemnor, this aspect of the "taking" is effectuated by payment of the condemnation award into court, pursuant to an order of condemnation, whereupon the right, title or interest, as condemned, is divested out of the owner and vested in the condemnor. See Samford Univ. v. City of Homewood, 959 So. 2d 64, 68-69 (Ala. 2006).

[1] As will be discussed in Part III, below, the question whether there has been a "taking" of property often arises in the context of an inverse condemnation claim. See, e. g., Ex parte Alabama Dept. of Transp., 143 So. 3d 730 (Ala. 2013) (use of a portion of private land for water treatment pond in connection with ALDOT's remediation of groundwater contamination recognized as a "taking" for purpose of an inverse condemnation claim against the director of ALDOT).

Over the years, the courts have been called upon to consider whether other types of governmental activities, apart from the filing of a direct condemnation action, may constitute a "taking" of property. Early on, the courts held that taxation is not a "taking" of property. Mobile County v. Kimbrall, 102 U.S. 691 (1880). Similarly, the imposition of user fees is not a "taking"." St. Clair County Home Builders Ass'n v. City of Pell City, 61 So. 3d 992 (Ala. 2010). More recently, the U.S. Supreme Court as well as the Alabama appellate courts have been called upon to determine whether, and to what extent, land use regulations may constitute a "regulatory taking" of property. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Town of Gurley v. M&N Materials, Inc., 143 So. 3d 1 (Ala. 2012). The concept of a "regulatory taking" is part of the broader topic of "inverse condemnation" - - the taking of private property for public use without formal condemnation proceedings and without payment of just compensation - - that will be discussed below.

B. "Public Use"

The exercise of eminent domain power is limited, by the Fifth Amendment of the U.S. Constitution and Sections 23 and 235 of the Alabama Constitution, to takings for a "public use." In Alabama, there are at least two main categories of appellate case law on the issue of "public use:" (1) challenges to the right of municipal and county governments to condemn land that will benefit, in some fashion, a private company or individual, and (2) challenges to the right of non-governmental entities to exercise the power as conferred by the legislature. In deciding cases that have arisen under both categories, the Alabama courts have consistently stated that the term "public use" should be given a liberal and elastic meaning. Florence v. Williams, 439 So. 2d 83 (Ala. 1983). Moreover, in Lockridge v. Adrian, 638 So. 2d 766, 771 (Ala. 1994), the Supreme Court, in upholding the constitutionality of the "private condemnation" statute, Ala. Code § 18-

3-1, stated that the "taking of private property for a private use is constitutional provided that there exists a valid public purpose for the taking." The Court concluded that there was a "public interest" in every landowner's having access to a public road, which satisfied the "public use" requirement of Section 23 of the Alabama Constitution.

In the first category of cases, the courts have held that a county has the right to condemn land for a toll road/bridge project that would be constructed and operated by a private company, Gober v. Stubbs, 682 So. 2d 430 (Ala. 1996); that a city may condemn for a downtown redevelopment, Palughi v. City of Mobile, 526 So. 2d 1 (Ala. 1988); that a city may condemn for a parking deck that will operated by a private company, Florence v. Williams, 439 So. 2d 83 (Ala. 1983); and, that a city may condemn a strip of land for the installation of an industrial outfall pipeline that would be financed through an agreement with a private company, Parrish v. City of Bayou La Batre, 581 So. 2d 1101 (Ala. Civ. App. 1990).

In the second category of cases, the courts have held that public utility companies may properly exercise the power, as conferred by the legislature, because their projects are of benefit to the public. See e.g., Alabama Power Co. v. Hamilton, 342 So. 2d 8 (Ala. 1977); Opinion of the Justices, 48 So. 2d 757 (Ala. 1960); and that private owners of landlocked property may condemn an access easement across intervening property to the nearest public road. Ex parte Cater, 772 So. 2d 1117 (Ala. 2000); Lockridge v. Adrian, supra.

The "public use" requirement under the Fifth Amendment was the subject of the U.S. Supreme Court's controversial 5-4 opinion in Kelo v. City of New London, 545 U.S. 469 (2005). In that case, the Court held that a city's decision to take property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment. Consistent with how the Alabama Supreme Court has approached the issue, Justice Stevens, writing for the

majority, stated that "public use" is to be defined broadly and with great deference to the legislative determination. Thus, because the City of New London's redevelopment plan, which followed from the State of Connecticut's legislative finding that the city had fallen into economic distress, would increase tax revenues and boost employment, the taking served a public purpose. 545 U.S. at 483-84. The majority observed, however, that nothing in its opinion would prevent a state from enacting a stricter interpretation of "public use" in the exercise of eminent domain.

In the wake of Kelo, most states, including Alabama, enacted measures to impose some limits on the exercise of eminent domain power. See Ala. Code §§ 18-1B-1 and -2; 11-47-170; 11-80-1.

C. "Just Compensation"

"Just compensation" means the payment of such sum of money to the owner of property such that the owner "would be saved harmless as near may be, and put in as near the same condition as such owner would have been but for the taking." APJI 14.05. The compensation that is to be paid in a condemnation case is for "damage to property," rather than "damage to people having an interest in property." State v. Ward, 706 So. 2d 1248 (Ala. Civ. App. 1997).

The Alabama Supreme Court has stated that the legislature has the right, within due limitations, to fix the rules for the ascertainment of just compensation. Pickens County v. Jordan, 196 So. 121 (Ala. 1940). This has been done in the AEDC, wherein the legislature has provided that if there is a partial taking, "the valuation rule is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking." Ala. Code § 18-1A-170(b); see City of Cullman v. Moyer, 594 So. 2d 70 (Ala. 1992).

III. Inverse Condemnation and Regulatory Takings

Inverse condemnation has been defined by the Alabama Supreme Court as '"the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation.'" Alabama Dept. of Transp. v. Land Energy, Ltd., 886 So. 2d 787, 792 (Ala. 2004) (quoting Ex parte Carter, 395 So. 2d 65, 67 (Ala. 1980)); see Ala. Code § 18-1A-32. In Carter, the Supreme Court pointed out that an action claiming inverse condemnation "is very limited and that all the elements must be present." 395 So. 2d at 67. A claim for inverse condemnation is subject to a two-year statute of limitations that begins to run at the time the taking is complete. Long v. City of Athens, 24 So. 3d 1110 (Ala. Civ. App. 2009) (cause of action accrued when property first flooded from nearby development).

A. Section 235 Inverse Condemnation Claim.

Section 235 of the Alabama Constitution makes municipal and other corporations invested with the power of eminent domain liable for just compensation "for the property taken, injured, or destroyed by the construction or enlargement of its works, highways or improvements."[2] This constitutional provision has been interpreted to support a cause of action by a private landowner whose property is taken or damaged by a municipality (or other corporation invested with the power of eminent domain) as a consequence of acts of construction and enlargement. Mahan v. Holifield, 361 So. 2d 1076 (Ala. 1978). Thus, an inverse condemnation claim predicated on § 235 requires a showing of physical injury to or destruction of property caused by the municipality's or other entity's construction or enlargement of its works, highways, or improvements. See Woods Knoll, LLC v. City of Lincoln, 548 Fed. Appx.

[2] The Alabama Supreme Court has also held that § 235 does not apply to the State or its agencies or universities. Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002).

577 (11th Cir. 2013) (inverse condemnation claim not actionable against city when plaintiff failed to show that city's actions caused the alleged damage to the property); Housing Auth. of the Birmingham Dist. v. Logan Properties, Inc., 127 So. 3d 1169 (Ala. 2012) (inverse condemnation claim under Section 235 not actionable in the absence of physical injury to or destruction of property); Jefferson County v. Southern Natural Gas Co., 621 So. 2d 1282 (Ala. 1993) (evidence established that county's widening of a creek resulted in the diversion of water onto plaintiff's pipelines, resulting in a direct physical injury); Reid v. Jefferson County, 672 So. 2d 1285 (Ala. 1995) (city and county were not liable under § 235 for construction of a pedestrian bridge over highway that allegedly obstructed exposure of plaintiff's property, where there was no direct or indirect physical disturbance of plaintiff's property); Sima Properties, LLC v. Cooper, __ So. 3d ___ (Ala. Civ. App. 2017), 2017 WL 1291130 (closing of driveway access from highway to service station, as a result of road construction project, was basis for inverse condemnation claim).

Damages alleged to have been caused by the "construction or enlargement" must be ascertainable at the time of such construction/enlargement activity. City of Tuscaloosa v. Patterson, 534 So. 2d 283 (Ala. 1988). For example, in Mahan v. Holifield, the alleged "taking" event was the reconstruction of a dam in 1961, but the injury to the plaintiffs' land did not occur until 1973. Mahan, 361 So. 2d at 1079. The Court held that the injury to plaintiffs "was not ascertainable at the time of the alleged taking 12 years earlier and was not the type of taking, injury or destruction contemplated by § 235." Id. at 1080. Moreover, a § 235 claim is not actionable for the operation or maintenance of the municipal or other public project. City of Bessemer v. Chambers, 8 So. 2d 163 (Ala. 1942) (operation of garbage dump); Meharg v. Alabama Power Co., 78 So. 909 (Ala. 1918) (maintenance of dam).

B. Section 23 Inverse Condemnation Claim

As discussed above, Section 23 of the Alabama Constitution provides, in pertinent part, that "private property shall not be taken for, or applied to public use, unless just compensation be first made therefor." In Willis v. University of North Alabama, 826 So. 2d 118 (Ala. 2002), plaintiff Willis, who owned a house across the street from a parking lot owned by UNA, on which constructed a multi-level parking deck, sued on an inverse condemnation theory, arguing that UNA "took" his property without payment of just compensation, in violation of § 23 and § 235 of the Alabama Constitution. Willis contended that the construction of the parking deck, across the street from his house, "caused the value of his property to decrease substantially." The trial court, granting summary judgment in favor of UNA, ruled that § 235 did not apply to UNA because it was an agency of the State.

On appeal, the Supreme Court affirmed, agreeing that § 235 was inapplicable, and also concluding that an inverse condemnation claim under § 23 failed, "because UNA did not physically take Willis's property or apply Willis's property to public use during the construction of the parking deck." Id. at 121. The Court also overruled its prior decisions in Foreman v. State, 676 So. 2d 303 (Ala. 1995) and Barber v. State, 703 So. 2d 314 (Ala. 1997), to the extent those decisions intimated that an inverse condemnation claim would lie under § 23 if the governmental authority occupied or "injured" the property in question.

While Willis has been followed in Town of Gurley v. M&N Materials, Inc., 143 So. 3d 1 (Ala. 2012) and in Ex parte Alabama Dept. of Transp., 143 So. 3d 730 (Ala. 2013), three Justices have argued, in concurring or dissenting opinions therein, that Willis was "wrongly decided," and that an inverse condemnation claim under § 23 should not require an "actual physical injury" to the property.

C. Regulatory Takings

The concept of a so-called "regulatory taking" is that when a governmental body so restricts the use of property as to render it worthless, there is a "taking" for purposes of inverse condemnation. Much of the jurisprudence in this area of the law is at the federal level, under the Fifth Amendment. See Murr v. Wisconsin, 582 U.S. ___ (June 23, 2017) (state regulation that imposed restrictions on development and sale of land along St. Croix River held not to be a taking); Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005) (in a case involving state-enacted limit on the rent that oil companies could charge their dealers, who lease oil company–owned service stations, Court reversed judgment in favor of Chevron, holding that a regulatory failure to substantially advance a legitimate state interest, without more, is not a violation of the Takings Clause); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (state moratorium on residential development in Lake Tahoe Basin held not to be a taking); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (in case involving state regulation designated salt marshes as protected "coastal wetlands," thereby affecting ability to develop land, Court held that plaintiff had standing to challenge the regulation even though he acquired the land after the enactment of the regulation); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (where state legislation had direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels of beach property, there is a taking); and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (city's "landmarks law" on basis of which landowners' proposal to construct high rise building above the Grand Central Terminal was rejected, held not to constitute a taking).

In Ramer v. City of Hoover, 437 So. 2d 455 (Ala. 1983), plaintiff claimed that Jefferson County, through its sewer moratorium and denial of sewer access to the plaintiff, took plaintiff's

property without just compensation in violation of the Fifth Amendment to the U.S. Constitution. In holding that plaintiff could not recover on this theory, the Court observed that even though governmental interference, by regulation of the use of private property, can constitute a de facto or constructive taking, "there is not a taking in the constitutional sense unless the interference is so substantial as to render the property worthless or useless . . . . It is not enough that the regulation deprives the property owner of the most profitable use of the property . . . , or that the regulation causes a severe decline in the property's value." Id. at 461.; see also Matthews v. Shelby County Comm., 615 So. 2d 605 (Ala. Civ. App. 1992) (holding that zoning ordinance did not effectuate a taking under the Fifth Amendment, even if there was diminution in property value). In these cases, as noted, the plaintiffs predicated their inverse condemnation claims on the Fifth Amendment.

In Town of Gurley v. M&N Materials, Inc., 143 So. 3d 1 (Ala. 2012), the Court held that a claim for "regulatory taking" could not be made under § 23 or § 235 of the Alabama Constitution. The Court noted that the plaintiff had dismissed its claim under the Fifth Amendment, and was thus limited to claims under Alabama law, which required evidence of an actual taking.

IV. Private Condemnation

A. Statutory Basis

Section 18-3-1, Code of Alabama, provides that the owner of landlocked property "shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality."

Before July 8, 1982, this statute applied only to property lying outside the corporate limits of the municipality. In 1982, the legislature amended the statute to delete the phrase "outside the corporate limits of a municipality," but then added the language appearing as the last clause of the statute, which refers to the obtaining of "written approval" from the municipality and planning board. While the intention of the 1982 amendment was to make the statute apply to lands both inside and outside municipal limits, the inclusion of the final clause appeared to restrict this application to land lying within the corporate limits of a municipality. The statutory intent, however, was clarified by the Court of Civil Appeals in Hawkins v. Griffin, 512 So. 2d 109 (Ala. Civ. App. 1987), when it noted that the amended statute, while "inartfully drafted," reflected an effort by the legislature "to permit those landowners within the boundaries of the municipality who have no access to a public road or street to condemn private rights-of-way just as landlocked landowners outside the municipalities are permitted to so condemn . . . ." This interpretation was approved by the Supreme Court in Lockridge v. Adrian, 638 So. 2d 766 (Ala. 1994).

B. Procedure for Private Condemnation

Section 18-3-3 provides that the right of eminent domain, as conferred by this article, "shall be exercised by application to the probate court of the county in which the lands over which such right-of-way is desired, or a material portion thereof are situated, and the same proceeding shall be had as in cases of condemnation of lands for public uses as provided for by Chapter 1 of this title." In 1985, however, Chapter 1 of Title 18 was repealed and replaced with Chapter 1A (which is the Alabama Eminent Domain Act), which has been effective since January 1, 1986. While the legislature failed to revise § 18-3-3 to reflect this amendment, it did update the related provisions concerning condemnation for certain cemeteries or graveyards.

Thus, it seems clear that the legislature intended that the procedures for private condemnation are to be governed by the AEDC, codified at § 18-1A-1, et seq., Code of Alabama.

While private condemnations are treated as other condemnations under the AEDC, there is an important exception contained in § 18-1A-20(c)). That subsection provides that §§ 18-1A-21 through -30 "shall not apply to the purchase of lands under Chapter 3 of this title." Thus, a condemnor in a private condemnation action need not comply with those statutory provisions which require, among other things, the preparation of a pre-acquisition appraisal and the making of an offer to purchase at full appraised value. See Williams v. Deerman, 587 So. 2d 381 (Ala. Civ. App. 1991). The action must be commenced in the probate court, not the circuit court. Kish Land Co. v. Thomas, 42 So. 3d 1235 (Ala. Civ. App. 2010); Ala. Code § 18-1A-71.

C. Establishing the Right to Condemn

The right of private condemnation is only available for property that is "landlocked." Additionally, the proposed route over the defendant's land must connect the landlocked property to the "public road nearest or most convenient thereto." Finally, the proposed route must not fall within the restrictions set forth in § 18-3-2. These three requirements will be briefly discussed in this order.

First, the key question in any private condemnation case is whether the plaintiff's property is or is not landlocked. Many cases wrestle with the question whether there is, or is not, an unobstructed and reasonably sufficient means of access already available to the plaintiff. If an asserted means of access to plaintiff's property lacks permanency, or is subject to being cut off or obstructed, a right to condemn has been recognized. Crabtrey v. Tew, 485 So. 2d 726 (Ala. Civ. App. 1985). Similarly, it is been held that property lying adjacent to an interstate highway is landlocked when there is no legal means of access to the highway under highway department

regulations. Loveless v. Joelex Corp., 590 So. 2d 228 (Ala. 1991). At the same time, the law is also clear that an owner of property is not entitled to bring private condemnation as a matter of mere convenience. Southern Railway Co. v. Hall, 100 So. 2d 722 (Ala. 1957). In Ex parte Cater, 772 So. 2d 1117 (Ala. 2000), the Supreme Court held that a plaintiff was not entitled to condemn a right-of-way over a neighbor's intervening land if the plaintiff "has an existing, reasonably adequate means of access to his property, or if he could construct such access without prohibitive cost."

Assuming plaintiff can establish that his property is landlocked, the inquiry shifts to whether the proposed right-of-way secures access from that property to the public road "nearest or most convenient thereto." In DeWitt v. Stephens, 598 So. 2d 849 (Ala. 1992), the defendant argued that there were two alternate routes, which were shorter in distance to the public highway, one of which crossed the land of a neighbor who was not a party to the case. The probate court denied the complaint, concluding that there were nearer and more convenient ways to the public road. After circuit court, on appeal, denied the right to condemn, the plaintiff appealed to the Supreme Court. In affirming the rulings below, the Supreme Court pointed out that it is up to the probate court (and, later, the circuit court) to consider all the physical facts of both properties as to the proper location of the right-of-way, because physical convenience of both landowners is a material consideration in determining whether to condemn a right-of-way.

Finally, § 18-3-2 imposes certain restrictions on the right to condemn, providing that no right-of-way may be condemned through any "yard, garden, orchard, stable lot, stable, gin house or curtilage without the consent of the owner." In Romano v. Thrower, 74 So. 2d 235 (Ala. 1954), the court rejected defendant's contention that a field in which he grew vegetables as a

cash crop was a "garden." In Wright v. Tallant, 668 So. 2d 262 (Ala. Civ. App. 1996), the Court of Appeals held that a pine plantation was not an "orchard" for purposes of § 18-3-2.

V. Pre-Condemnation Entry onto Land for Surveys, etc.

The AEDC provides that a condemning authority, as well as its agents and employees, "may enter upon real property for a reasonable time and make surveys, examinations, photographs, tests, soundings, borings, and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use." Ala. Code § 18-1A-50(a). Such entry is to be:

- Preceded by reasonable efforts to notify the owner, and any other person known to be in actual occupancy of the property, of the time, purpose, and scope of the planned entry and activities; and
- Undertaken during reasonable daylight hours and for reasonable times; and
- Accomplished peaceably and without inflicting substantial injury; and
- Not in violation of any other statute.

If reasonable efforts to accomplish the entry have been obstructed or denied, or would be futile, the condemnor may apply to the circuit court in the county where the property is located for an order permitting entry. Ala. Code § 18-1A-51. Unless the defendant shows "good cause" to the contrary, the court is to make an order permitting the entry and setting forth the nature and scope of the activities that may be performed.

The Alabama Supreme Court has held that the right of entry under § 18-1A-50 cannot be defeated by the assertion that the condemning authority cannot establish its "right to condemn" the particular land. Walker v. Gateway Pipeline Co., 601 So. 2d 970 (Ala. 1992). Indeed, the purpose of "pre-condemnation" entry is to allow the condemning authority to decide whether to

invoke its right to condemn in the first place. Alabama Interstate Power Co. v. Mt. Vernon Cotton Duck Co., 65 So. 287 (Ala. 1913).

During the course of the hearing, the court is to make a preliminary assessment of the "probable amount that will fairly compensate the owner for physical injury to the property likely to be caused by the entry and the activities authorized by the order." Ala. Code § 18-1A-52. Once that is done, the condemnor must post a bond, in double this amount, in order to obtain entry. Damage from entry to the property, according to the statute, shall be merged with and included within the compensation and damages ascertained in the condemnation proceeding. Ala. Code § 18-1A-52(c).

VI. Anatomy of a Condemnation Action in Probate Court

A. Statutory Prerequisites

Before a condemnation action may be filed in the probate court, the condemning authority must:

- Cause the property to be appraised to determine the amount of compensation.
- Offer to purchase the interest at the full appraised value.
- Provide the owner a written statement and summary showing the basis for the amount established as the just compensation for the property.

Ala. Code §§ 18-1A-21 & 22. Additionally, the AEDC provides that the condemnor may not arbitrarily advance the time for condemnation, arbitrarily defer negotiations, or take other action coercive in nature. Ala. Code § 18-1A-26. The failure to comply with these prerequisites may result in the condemnation action being dismissed, and an award of litigation expenses to the owner. Ala. Code §§ 18-1A-55 and -91.

B. Commencement of Action

A condemnation action is commenced by filing a complaint "with the probate court in the county in which the property or any part thereof sought to be taken is located." Ala. Code § 18-1A-71. Thus, when a parcel of land involved in a condemnation lies in more than one county, the condemnor can file the action in either county. See Whitney v. Central Georgia Power Co., 67 S.E. 197 (Ga. 1910); Ala. Code § 18-1A-270. The condemnor may join in the same complaint several tracts of lands "lying within one county of which portions are proposed to be taken, or in which an interest or easement is proposed to be acquired." Ala. Code § 18-1A-73(a). But the owners may request separate hearings as to the right to condemn. Ala. Code § 18-1A-73(b). There is also authority that a claim of condemnation may be presented, by way of counterclaim to a claim of trespass, in a circuit court action. Montgomery v. Alabama Power Co., 34 So. 2d 573 (Ala. 1948).

C. Complaint/Service of Process

The complaint for condemnation must (1) designate, as plaintiff, each person on whose behalf the action is brought; (2) name, as defendants, all persons who, to plaintiff's knowledge are owners of or have or claim any interest in the property sought to be taken, specifying the nature of each defendant's interests;[3] (3) contain a legal description of the property and of the interest therein sought to be taken; (4) allege the basis of the plaintiff's right to take the property by eminent domain; and (5) list all items which the condemnor proposes to acquire and which it deems to be equipment or fixtures attached to, or a part of, the realty. Ala. Code § 18-1A-72(a).

[3] The complaint should name as defendants anyone shown by the public records to have an interest in the land, or anyone known to the condemnor to have such interest. See Agricola v. Harbert Const. Corp., 310 So. 2d 472 (Ala. 1972); State v. Howze, 25 So. 2d 433 (Ala. 1945). This provision does not mean that a condemnation complaint, which omits a person having an interest, is subject to dismissal for that reason; rather, it means that the action will not be effective to condemn the rights of such omitted person. See Adams v. State, 279 So. 2d 488 (Ala. 1973).

Defendants whose names are not known may be included under the designation "unknown claimants," provided that reasonable diligence has been used to ascertain same. Ala. Code § 18-1A-72(a)(2). For purposes of information and notice, the complaint is to be "accompanied by a map or diagram portraying the property sought to be taken and the remainder, if any." Ala. Code § 18-1A-72(d). The AEDC authorizes a plaintiff to join "several tracts of land lying within one county . . . in separate paragraphs in the same complaint." Ala. Code § 18-1A-73(a).

Upon the filing of the complaint, "the probate court must enter an order appointing a day for the hearing thereof and must issue to the defendants a copy of the complaint and notice of the day set for hearing unless such notice is waived." Ala. Code § 18-1A-76(a). Service is to be made in accordance with Rule 4, Ala. R. Civ. P. Ala. Code § 18-1A-74(b).

D. Property Devoted to Prior Public Use

If the property sought to be condemned is already devoted to a public use, the land may not be taken for another and different character of public use unless (1) an actual necessity for taking the specific land or portion shall be alleged and proven, and (2) such other and different character of public use will not materially interfere with the existing public use. Ala. Code § 18-1A-72(b). The federal and state governments have sovereign immunity and may not be sued unless they waive their immunity or otherwise consent to be sued. United States v. Mitchell, 445 U.S. 535 (1980); Ala. Const. art. I, § 14.

While Alabama case law has identified a number of uses (such as public school property, public parks or walkways; and railroad tracks and other property associated with common carriage of freight) as being a "public use" for purposes of § 18-1A-72(b), the concept of "public use" should include all property "used in immediate and necessary connection with a public trust, or when acquired by a public service corporation for a necessary purpose pertaining to its

franchise and held in reasonable anticipation of its future needs." Vermont Hydro Elec. Corp. v. Dunn, 112 A. 223 (Vt. 1921).

Condemnation of rail corridors has been the subject of a number of reported cases. See, e.g., Southern Railway Co. v. Todd, 184 So. 2d 341 (Ala. 1966); Louisville & N. R. Co. v. Western Union Tel. Co., 71 So. 118 (Ala. 1915). Condemnation of railroad corridors/property presents an additional issue of possible preemption by federal law, specifically, the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), which abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board ("STB"). While the ICCTA generally recodified existing law, it also made some changes in an effort to reduce regulation of railroads. The ICCTA also has a preemption clause which states: "Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of all rail transportation are exclusive and preempt the remedies provided for under Federal or State law." 49 U.S.C. 10501(b). But, the STB has explained that "routine, non-conflicting uses, such as non-exclusive easements for at-grade crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks." Eastern Alabama Railway LLC – Pet. For Declaratory Order, FD 355 83, Slip op. at 5. (Mar. 9, 2012).

E. Notice of Pending Action

After commencement of a condemnation action, the condemnor must cause a notice of pendency of the proceedings to be recorded in the probate court in each county where the involved property is located. Ala. Code § 18-1A-75.

F. Answer/Objections of Defendant

While a defendant is not required to file an answer, he must do so if he challenges the right to condemn. Ala. Code § 18-1A-90. In the answer, the defendant may raise certain "preliminary objections," such as a contention that the plaintiff is not entitled to take the property for the purpose described in the complaint, or that a mandatory condition precedent to the commencement of the action has not been met. It is also through these objections that the defendant may seek to challenge the action of the condemnor for alleged fraud, bad faith, or gross abuse of discretion. In the event that such allegations are made, the defendant bears the burden of proof of same by clear and convincing evidence. Ala. Code § 18-1A-94.

G. Hearing on Complaint

The probate court is to conduct a hearing on the complaint within 45 days after filing, but may continue the date of hearing "when necessary to provide reasonable notice or for other compelling reasons." Ala. Code § 18-1A-276. Then, within ten (10) days, the court is to make an order either granting or refusing the complaint. Id. Thus, it is the probate judge who rules on the issue of the right to condemn, and who considers and rules on any preliminary objections raised by the defendant. Ala. Code § 18-1A-93. If the probate court refuses to grant the complaint, then the condemnor has a right of appeal from that order to the circuit court. Ala. Code § 18-1A-286. But, a probate court's order granting a condemnation complaint is not appealable to the circuit court or an appellate court. Ex parte City of Irondale, 686 So. 2d 1127 (Ala. 1996); McCoy v. Garren, 384 So. 2d 1113 (Ala. Civ. App. 1980). Instead, the only "appealable" order is the order of condemnation made pursuant to § 18-1A-282. Id.

H. Commissioners: Appointment, Hearing and Assessment

The probate court must, within ten (10) days after the complaint is granted, appoint three citizens of the county to serve as commissioners for the purpose of assessing the compensation due the defendant. Ala. Code § 18-1A-279. The commissioners may view the land, but must hold a hearing after giving notice to all parties, in order to receive legal evidence concerning the issue of compensation. Ala. Code § 18-1A-281. The commissioners must make their report of compensation to the probate court within 20 days from the date of their appointment. Ala. Code § 18-1A-282. If the commissioners make their report of compensation beyond the time allowed, the probate court should not accept that report, but may remedy the situation by reappointment of the commissioners. See State Dept. of Transp. v. McLelland, 639 So. 2d 1370 (Ala. 1994).

I. Is Discovery Allowed in Probate Court?

The amended version of Rule 1(a), Ala. R. Civ. P., which became effective January 1, 2013, provides that the Rules govern proceedings "in probate courts so far as the application is appropriate except as otherwise provided by statute." Ala. R. Civ. P. 1(a). Prior to this amendment, Rule 1(a) excepted the probate courts from the scope of the Rules. In announcing this change, the Committee Comments assert that the original version of Rule 1(a) is "outdated and outmoded" because, according to the Committee, since the Rules took effect in 1973, the legislature "has adopted numerous statutes applying the Alabama Rules of Civil Procedure in probate courts." One of the statutes cited is Ala. Code § 18-1A-70, which is part of the AEDC that was enacted in 1985. While the first sentence of that Code section does state that the "procedure for condemnation . . . is governed by the Alabama Rules of Civil Procedure except as otherwise provided in this chapter," the second (and more relevant) sentence states: "The procedure in the probate courts shall be as provided in this chapter." Id. While, for example, the

AEDC expressly provides that service of the complaint for condemnation is to be made in accordance with Rule 4, Ala. R. Civ. P., Ala. Code § 18-1A-74(b), there is no reference at all to discovery in the AEDC sections pertaining to probate court procedures.

Moreover, the 2016-17 edition of the Rules leaves intact the Committee Comments explaining the omission from the Rules of a "condemnation rule" comparable to Rule 71A of the Federal Rules. The Committee Comments, which are found where an Alabama version of Rule 71A would appear, state that "[t]hese rules do not apply to the probate courts where condemnation proceedings originate." This view is likewise supported by Ala. Code § 18-1A-130, which provides that "[d]iscovery and pretrial conferences in condemnation actions in the circuit court are governed by the Alabama Rules of Civil Procedure." (emphasis added).

J. Order of Condemnation

Within seven (7) days after the making of the commissioners' report, the probate court must issue an order that the report be recorded, and the property be condemned "upon payment or deposit into probate court of the damages and compensation so assessed." Ala. Code § 18-1A-282. The "order of condemnation" made pursuant to § 18-1A-282 is the appealable order, and thus is the trigger for the running of the time for appeal. Ala. Code § 18-1A-283; see Ex parte City of Irondale, 686 So. 2d 1127 (Ala. 1996).

K. Appeal/Effect of No Appeal

Any party "may appeal from the order of condemnation to the circuit court of the county within 30 days from the making of the order of condemnation by filing in the probate court rendering that judgment a written notice of appeal, a copy of which shall be served on the opposite party or his attorney . . . ." Ala. Code § 18-1A-283 (emphasis added). The phrase "making of the order" has been interpreted to mean "signing of the order," and thus the appeal

time begins to run from the date that the probate court signs the condemnation order, rather than the date on which the order is recorded. Boutwell v. State, 988 So. 2d 1015 (Ala. 2007). If the notice is not timely filed in the proper court (i.e., the probate court), then the circuit court is deprived of jurisdiction to hear it. Worrell v. Shell, 68 So. 3d 862 (Ala. Civ. App. 2011).

If no appeal is taken, then the probate court's order becomes the final judgment that effectuates the taking and awards the compensation. The condemnor must pay the amount into court within 90 days of its assessment. Ala. Code § 18-1A-290. The probate court then may proceed with distribution of the award to the owner or owners. Ala. Code § 18-1A-291.

L. Right of Entry

Once the plaintiff/condemnor pays the award into court, it obtains the right to enter upon the condemned property and begin the construction of the project. Ala. Code § 18-1A-284. The filing of a notice of appeal, whether by plaintiff or any of the defendants, does not deprive the plaintiff of the right of entry, provided that the amount of compensation is paid into court (pursuant to § 18-1A-290), and bond has been given in double the amount of such award. Ala. Code § 18-1A-284; see Ala. Const. art. XII, § 235. This means that the condemnor may continue with the construction of the project, during the pendency of the appeal, even though it must be borne in mind that the issue of the right to condemn will be considered, de novo, by the circuit court in the context of the appeal. Ex parte Lance, 103 So. 2d 753 (Ala. 1958); Jefferson County v. Adwell, 103 So. 2d 143 (Ala. 1956).

VII. Anatomy of a Circuit Court Condemnation Appeal

Once an appeal (by either the condemnor or any one of the defendants with respect to the award made for any parcel) is taken from the order of condemnation in the probate court, pursuant to § 18-1A-283, or (by the condemnor) from the probate court's order denying the

complaint for condemnation, pursuant to § 18-1A-286, then the entire case - - both the plaintiff's right to condemn and the issue of the compensation payable to the defendant - - is tried de novo. Cloverleaf Land Co. v. State, 163 So. 2d 602 (Ala. 1964); State v. SouthTrust Bank of Baldwin County, 634 So. 2d 561 (Ala. Civ. App. 1994); Ala. Code § 18-1A-283.

A. Right to Condemn Determined by Circuit Judge

The condemnor's right to condemn is determined by the circuit court "without a jury." Ala. Code § 18-1A-151(a) (second sentence). In many instances, there is no dispute over the condemnor's right to condemn, which can be handled by way of stipulation or other notice to the court, so that the judgment that may eventually be entered will reflect same. The issue may also be determined on motion for summary judgment. See Samford Univ. v. City of Homewood, 959 So. 2d 64, 65 (Ala. 2006).

B. Right to Jury Trial on Compensation

A party who appeals from probate court to circuit court is entitled to a jury trial on the issue of compensation only if that party expressly demands same. Ala. Code § 18-1A-151 (first sentence). While the appealing party, assuming a jury trial is desired, will often include a jury demand in the notice of appeal filed in the probate court, Rule 38(b), Ala. R. Civ. P. provides that an appealing party to circuit court has ten (10) days after the filing of the appeal to make the jury demand. See Ala. R. Civ. P. 6(a) (intermediate Saturdays, Sundays and legal holidays are not included in computation). Moreover, if the appealing party has not included the jury demand in the notice filed with the probate court, the non-appealing party may file its demand within ten (10) days after service of the notice of appeal. Ala. R. Civ. P. 38(b); see Ala. R. Civ. P. 6(a).

C. Discovery

The Alabama Rules of Civil Procedure apply in a circuit court condemnation appeal, which means that discovery, at this stage, is the same as in any other civil action, but with one

significant exception relating to an expert appraiser. The AEDC precludes discovery of an appraisal report prepared for either party. Ala. Code § 18-1A-130. In Ex parte Tuscaloosa County, 825 So. 2d 729 (Ala. 2001), the condemnor sought to propound interrogatories about the specifics of the basis for the opposing expert's opinion, namely, requesting information regarding the recording data, date, acreage and sale price of each of the expert's comparable sales, as well as any adjustments made by the appraiser. The Supreme Court held that this information could not be obtained through interrogatories, on the theory that because the appraisal report is not subject to discovery under § 18-1A-130, neither is the content of that report. In practice, however, the attorneys for both sides in a condemnation case should want to cooperate in conducting full expert discovery, even though the written appraisal report is not produced.

D. Motion in Limine

Prior to the start of trial, a party may wish to seek a ruling from the trial court on matters relating to the qualification of witnesses and the admissibility of certain evidence. For example, if a witness, in deposition testimony or other discovery responses, were to base opinion testimony on inadmissible evidence, such as those items set forth in Ala. Code § 18-1A-197, then a motion in limine would be an appropriate way to challenge same.

E. Right to Open and Close

The condemning authority, as plaintiff, has the right to open and close in the circuit court trial. Ala. Code § 18-1A-151(b). Thus, as does the plaintiff in any civil action, the condemnor is the first to conduct voir dire, the first to present opening statements, the first to present its case to the jury, and the last to present closing argument.

F. Jury View

Upon motion of a party or sua sponte, the trial court may allow the jury to be "taken personally to view the property sought to be taken." Ala. Code § 18-1A-191(a). Similarly, if the issue of compensation is being tried by the court without a jury, the court itself may view the property. Id. That which is observed by either the jury or judge "may be considered by the trier of fact solely for the purpose of understanding and weighing the valuation evidence received at the trial, and [does] not constitute independent evidence on the issue of the amount of compensation." Ala. Code § 18-1A-191(d). The effect of this rule is that the jury's verdict (or trial court's finding) cannot be outside the range of the valuation testimony in the record.

G. "Undivided Fee Rule" for Award of Compensation

When multiple defendants have or claim an interest in the property that is being condemned, the award of compensation is to be made as if the property were owned by one person. State v. Ward, 706 So. 2d 1248 (Ala. Civ. App. 1997); State v. SouthTrust Bank of Baldwin County, 634 So. 2d 561 (Ala. Civ. App. 1994); Ala. Code § 18-1A-154 ("The circuit court or jury shall first determine the total compensation as between the plaintiff and all defendants claiming an interest in the property. The circuit court shall determine the apportionment of the amount awarded in a subsequent proceeding.").

H. Circuit Court Judgment/Prejudgment Interest/Post-Judgment Interest

After the jury (or the circuit court sitting without a jury) finds the amount of the compensation, then the circuit court enters a judgment or order of condemnation upon such finding. The judgment should (1) describe the property condemned and declare the right of the plaintiff/condemnor to take it by eminent domain; and (2) recite the amount of compensation and damages, if any, and declare that title to the property will be transferred to plaintiff upon

payment of the compensation and damages to the defendant, or to the court for the benefit of the defendant. Ala. Code § 18-1A-210.

Under Alabama law, prejudgment interest is part of the just compensation due the defendant. Williams v. Alabama Power Co., 730 So. 2d 172 (Ala. 1999). The AEDC, however, contains no provision prescribing a rate for prejudgment interest. Instead, the rate is to be determined on a case-by-case basis by the trial court, though it is not uncommon for the parties, through counsel, to agree on a rate of prejudgment interest, following the guidelines in Williams v. Alabama Power. There, the Supreme Court noted that the rate of prejudgment interest "should loosely reflect the rate of return that would have been available to the landowner while [the] action was pending had the landowner received the value of his or her land at the time of the taking." 730 So. 2d at 177. The Court further noted that statutorily "prescribed prejudgment interest rates are usually linked to a market standard or are periodically changed by the legislature [and thus] are presumed to be reasonable to fulfill the requirements of just compensation." Id.

Prejudgment interest runs from the date that the condemnor had right of entry onto the property, such as by paying the probate award into court and, in the event on an appeal, the posting of an appeal bond. Samford Univ. v. City of Homewood, 959 So. 2d 64 (Ala. 2006). The owner is entitled to prejudgment interest from that date through the date of the judgment in circuit court. But, the amount of the award deposited into probate is excluded from the calculation from prejudgment (and post-judgment) interest. This is because the owner has the ability to withdraw, from those funds, the amount of the condemnor's approved offer, pursuant to Ala. Code § 18-1A-110, and has the right to have the balance of the funds deposited into an interest-bearing account pursuant to Ala. Code § 18-1A-111, which interest ultimately is

allocated, pro rata, in relation to the final judgment. Indeed, § 18-1A-211(b) provides that "[e]xcept as provided by Section 18-1A-111, the judgment may not include any interest upon the amount represented by the funds deposited into probate court by the plaintiff for the period after the date of deposit." See State v. Marble City Plaza, Inc., 989 So. 2d 1059 (Ala. Civ. App.), affirmed, 989 So. 2d 1065 (Ala. 2006).

Post-judgment interest is provided for in Ala. Code § 18-1A-211, which states that the judgment "shall include interest at a rate equal to the most recent weekly average one-year constant maturity yield, as published by the Board of Governors of the Federal Reserve System, upon the unpaid portion of the compensation awarded. The interest shall commence to accrue on the date of entry of the judgment." Ala. Code § 18-1A-211(a). While prejudgment interest must be included as part of the just compensation, post-judgment interest is a statutorily created right which can be changed by the legislature. Alabama Dept. of Transp. v. Williams, 984 So. 2d 1092 (Ala. 2007) (finding that the rate for post-judgment interest adopted in § 18-1A-211(a) is reasonable and acceptable).

I. Appeal from Final Judgment of Circuit Court

After entry of final judgment in the circuit court, any party may, within 42 days thereafter, and upon giving bond or security for costs as in other cases, file a notice of appeal to the Court of Civil Appeals, if the amount involved, exclusive of interest and costs, does not exceed $50,000; and, when in excess of $50,000, such appeal shall be to the Supreme Court. Ala. Code § 18-1A-288. The State does not have to give the bond or security for costs as required by this section. Southern Natural Gas Co. v. Ross, 275 So. 2d 143 (Ala. 1973).

J. Recordation of Condemnation Judgment

The Alabama Supreme Court has held that because "[a]n order of condemnation is a transfer of title to land," it must be recorded in the probate court land records in order to be valid

against good faith purchasers for value without notice. State v. Abbott, 476 So. 2d 1224 (Ala. 1985). Depending on whether one or more parcels are appealed to the circuit court, the order/judgment to be recorded could be either the probate court's order, or the circuit court's judgment, or both.

VIII. Dismissal of Complaint/Award of Litigation Expenses.

If a condemnation action is "wholly or partly dismissed for any reason," then the court shall award the defendant his litigation expenses, in addition to any other amounts authorized by law. Ala. Code § 18-1A-232(a). "Litigation expenses" are defined as the "sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual probate or circuit court proceedings." Ala. Code § 18-1A-3(12). The defendant's claim for litigation expenses does not accrue until the action is dismissed. Russell v. State, 51 So. 3d 1026 (Ala. 2010); Williams v. Deerman, 724 So. 2d 18 (Ala. Civ. App. 1998).[4]

IX. "Claim Preclusion" Effect of Condemnation Judgment

A condemnation judgment has been held to be conclusive with respect to matters actually declared and expressly determined, and also with respect to the grounds or facts upon which such judgment is founded. Hillcrest, Ltd. v. City of Mobile, 76 So. 3d 252 (Ala. Civ. App. 2010); City of Huntsville v. Goodenrath, 68 So. 676 (Ala. Civ. App. 1915). In Hillcrest, the Court held that the State's condemnation of a portion of a tract of land precluded the landowner's claims for damages against the City of Mobile "arising from" the State's taking, including the claim that

[4] If a probate court were to enter an order, under Ala. Code § 18-1A-276, "refusing" the complaint for condemnation, and the condemnor then exercises its right, under Ala. Code § 18-1A-286, to appeal to the circuit court, then the probate court's order ought not constitute a "dismissal" for purposes of Ala. Code § 18-1A-232(a). On appeal, the action is treated as if it originated in circuit court. Housing Authority of Jasper v. Deason, 225 So. 2d 838 (Ala. 1969).

installation of a drainage ditch within the condemned strip blocked access to the street. But the Court also held that the landowner was not precluded from asserting claims of negligence, nuisance and trespass arising from the intrusion of surface water prior to the condemnation action and the subsequent construction of the drainage ditch. See Sophocleus v. Alabama Dept. of Transp., 371 Fed. Appx. 996 (11th Cir. 2010) (res judicata barred landowner's subsequent federal court § 1983 action, asserting that his land had been taken for a non-public use, because that claim could have been asserted in the state court condemnation action).