

Sanguine Doves in the  
Hands of the State or  
How the Power of  
**EMINENT DOMAIN**  
has Few Practical Restraints

*we the People*  
of the United States  
Article 1  
Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

*5th Amend*

By Chris Burger

shall be held to answer for a capital, or other crime, except by a Grand Jury, except in the case of W...

"I believe the Kansas basketball coach had the power to hold his athletics director in his hand like a dove. And he had a choice to either crush me with his power of influence or let me fly with my vision for a better, total program. He chose to crush me." - Al Bohl, April 9, 2003...from his driveway...before his garage sale...of all his KU apparel.<sup>1</sup>

### The Power to Take has Few Restraints

Your property can be taken through the exercise of the power of eminent domain, which is a power that has few restraints upon it. That does not mean the power can be exercised indiscriminately—a trial court must review and affirm the authority of the condemning authority, and the Kansas Eminent Domain Procedure Act ("EDPA") requires all affected parties to be notified of the rights and interests to be taken and the hearings to be held through actual notice (such as service of process) or publication. But these procedural safeguards alone do little to limit the nature or extent of what can be taken. Instead, the practical limit on the nature and extent of a taking comes through "the purse," namely the amount that the condemning authority must pay under the Fifth Amendment's requirement that the condemning authority pay "just compensation" for the taking<sup>2</sup> and the EDPA requirement for payment of damages caused by the taking,<sup>3</sup> as defined under the EDPA.<sup>4</sup>

The determination of a taking's compensable value is complicated and sometimes contentious. Kansas law, as stated by the Kansas Supreme Court, gives condemning authorities the power to define and exclude what is being taken, who might be an affected party, and what can be considered in the calculation of the award for such taking. In response, good practitioners for affected parties try to look through the condemner's description of the taking in light of the use and characteristics of the property and its environs in order to help ensure just compensation.

### Restraints: Real or Imagined

The power of eminent domain is an inherent power of the sovereign, but the state of Kansas has legislatively shared it with various private and public entities and political subdivisions (e.g. cities, counties, school districts, public wholesale water supply districts, public utilities, cemetery corporations, and railroads).<sup>5</sup> The power therefore is more widely possessed than is commonly known, and rests with some unelected bodies that may be largely insulated from political pressures seeking to limit their exercise of the power.

The power of eminent domain must be exercised for a "public use." While this concept is comforting, the "public use" requirement fails in practice to impose a meaningful limit to the power. As *Kelo v. City of New London*<sup>6</sup> made clear, the necessity that a taking must be for a "public use" does not assure restraint by the condemner because the "public use"<sup>7</sup> term is open to great latitude in interpretation and application. The Kansas Supreme Court expressly "has held that there is no precise definition of what constitutes a valid public use, and what may be considered a valid public use or purpose changes over time. Further, this court has noted that as long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts."<sup>8</sup>

The procedures of the EDPA must be followed since it is "the only avenue through which the government can exercise its eminent domain power,"<sup>9</sup> but (with the exception of some limited post-*Kelo* limitations on municipalities)<sup>10</sup> the EDPA does not substantively limit the power to take. Instead, the EDPA helps to ensure that affected persons are given notice of the actions to be taken by the condemning authority and have the opportunity to participate in the process of valuing the property taken.<sup>11</sup> For example, the EDPA requires the condemning authority to identify in writing what rights are being taken and to give notice to all affected owners, possessors, and lienholders<sup>12</sup> of all hearings at which the

petition is considered, the appraiser panel is appointed, or the panel receives evidence about the value of the taking.<sup>13</sup>

The procedure applicable to eminent domain proceedings depends upon the stage of the proceedings, with different powers attached to each. They can occur in two stages: a) the initial administrative proceeding in which Chapter 60 does not govern, and b) an appeal of an initial award to the district court. The initial administrative proceeding "is a special statutory proceeding and is not a civil action covered by the code of civil procedure. The proceeding is administrative rather than judicial."<sup>14</sup> In appeals to the district court, the only issue to be decided (by a jury, if so elected) is the amount of just compensation and damages due the affected party, but not the scope or legitimacy of the taking. The appeal in district court is governed by Chapter 60, including its discovery rules.

### The Amount to be Paid, and Not Paid

"Just compensation" must be paid for property taken.<sup>15</sup> The EDPA legislatively establishes "just compensation" and damages as the "fair market value" of the property taken (if a total taking)<sup>16</sup> or (if a partial taking), the difference in the fair market value of the property before the taking and the value of the property remaining after the taking.<sup>17</sup> "Fair market value" is defined [by the EDPA] as: "the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion."<sup>18</sup> "The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods."<sup>19</sup> "Value," as interpreted by *Strong*, does not require the application of these appraisal methods but rather allows for any competent evidence bearing on market value.<sup>20</sup>

Unpegging "value" from approved appraisal methodologies gives greater, but not unfettered, liberty in asserting compensation claims. *Daubert* should remain applicable, as does the panel's or trial court's ability to control its own proceedings, including the application of the rules of evidence. The EDPA is silent as to the applicability of any rules of evidence at the appraisal hearing, and the informal nature of such hearings strongly suggests none would apply, subject only to the panel's general power to control its proceedings. The rules of evidence apply on appeal to the trial court.

"Generally speaking, '[t]he district court has broad discretion in determining what evidence will be allowed in an eminent domain proceeding.'<sup>21</sup> The appellate courts "will not second-guess the specific evidentiary decisions of the trial court absent an abuse of discretion. Considerable discretion is vested in the trial court in admitting or rejecting evidence of value, and the latitude accorded to the parties in bringing out collateral and cumulative facts to support value estimates is left largely to the discretion of the trial court."<sup>22</sup> Cases are won

and lost within this discretion, which could be viewed as an equitable tool to better promote justice or a source of greater unpredictability and uncertainty. For example, in *Strong*, witnesses were given great leeway in their opinions about value and compensation.<sup>23</sup> A few years later in *Doug Garber Construction*,<sup>24</sup> the same Kansas Supreme Court upheld the trial court's exclusion of testimony because of its apparent incredibility.

Essentially, when the entirety of a property is being taken, the compensation is for its full value, and the valuation of partial takings requires consideration of a "nonexclusive list of factors [in K.S.A. § 26-513 that] shall be considered if such factors are shown to exist."<sup>25</sup> This list is not exhaustive but gives guidance on what can and should be valued. The factors give insight to an attentive condemning authority as to how to describe the taking and potentially to exclude some factors from the taking description.

There may also be factors that are not identified in the EDPA, yet would affect the particular property's value. For example, valuation is determined according to the property's highest and best use<sup>26</sup> rather than how it is used at the time of the taking. Another example is where the described property should be joined for valuation purposes to other property or otherwise considered as part of a larger parcel than what has been described. These are matters that may not be known to a condemning authority that is not familiar with local conditions but are known by affected parties who have personal and local knowledge.

There are events that may affect value but cannot be used in determining just compensation. The amount of compensation is limited to the reduction in value of *the real estate as a whole* rather than a sum of various separate items of damage.<sup>27</sup> Just compensation therefore must not be calculated by adding the values of individual items taken, such as a fence. This rule, referred to as the Unit Rule, rejects the Summation Method:

The "summation method" denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof. Use of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property. ... In contrast, the 'unit rule,' which is the generally accepted method of valuation, denotes a process of appraisal whereby the total value of real estate is first determined without placing a value on each of the separate contributing items. Consideration of the value of buildings and improvements is limited to the extent they enhance the value of the land taken. The same rule applies to machinery or other articles of personal property which have become affixed to the real estate."<sup>28</sup>

In *Pener v. King*,<sup>29</sup> the property owner presented evidence of the cost to replace a fence lost to condemnation. Although apparently agreeing as to the cost of the fence, the condemning authority presented expert testimony that the loss of the fence diminished *the parcel's* post-taking value by approximately one-fifth of the fence's cost. The award was based on the change to the value of the real estate as a whole, not on the cost to replace the fence. The Kansas Supreme Court affirmed. "When the district court adopted [the condemning authority's] view, it acted consistent with K.S.A. 26-513(d)'s admonition that replacement cost be considered to the extent it affected value rather than as a separate item of damages."<sup>30</sup>

Another category of financial loss potentially incurred by an affected party but excluded from the compensation award is the revenue generated from a business located on real estate that is taken. Such revenue is not to be considered in the determination of value.

If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property. It is, accordingly, well settled that evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive.<sup>31</sup>

For example, the revenue and profits of a shop located on taken real estate are not recoverable as compensation to the landlord or tenant. But the amount of any rent paid to the owner likely is to be considered in determining the value of condemned property.

Also excluded from consideration in the compensation award are any anticipated value increases that would result from the project for which the property is being taken. Under this "Project Influence Rule," the "enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value."<sup>32</sup> The rule found in the EDPA requires value to be measured "at the time of the taking."<sup>33</sup>

### Compensation is for what is described as being taken

The description of the taking in the petition determines the scope of the taking, and hence the just compensation and damages paid. This rule applies whether the description is too narrow (not fully describing the actual effect of the taking) or too broad (describing a greater taking than will actually occur).<sup>34</sup>

"The landowners and the condemner may, and must, rely on the language of the commissioners' report [rely-

ing in turn on the petition's description of the taking] as to the extent of the easement and the extent of the use. If the landowners are not compensated in full for the full use, as set out in the report [relying on the petition], the condemner can take the full use in the future without further compensation to the landowners."<sup>35</sup>

Compensation is not to be limited by oral or (non-petition) written promises of limited use or other promises that acquired written rights will not be used.<sup>36</sup> However, even if not expressly stated, good faith and fair dealing are implied into the exercise of the rights, along with obligations for mutual accommodation of economically beneficial uses.<sup>37</sup>

### The description of the taking is under the sole control of the condemning authority

The description of the taking is found in the language used in the petition that is unilaterally drafted by the condemning authority. It cannot be challenged in the EDPA proceedings.<sup>38</sup> (The Appraisers' Report's description is to mirror the Petition.<sup>39</sup>) It is this language that determines the property rights being taken by the condemning authority.<sup>40</sup> The condemning authority has the burden, and power, of writing the description to show the limitations of its taking by making clear a) what is taken and b) what is not taken.<sup>41</sup> Incorporated exhibits are considered part of the description.<sup>42</sup>

### Doves in the Hands of Scrupulously Fair Coaches

In *Water Dist. No. 1*, a water district filed a condemnation petition. The petition stated that the taking was "subject to existing easements." It thereby defined the taking so as to expressly exclude any impact upon existing easements that were on the land. Accordingly, the petition failed to name the easement holders.

An easement holder learned of the condemnation action and asserted that its rights would certainly be affected, both physically and legally. However, because the petition and the Appraisers' Report expressly stated that there would be no impact on easements, the Kansas Supreme Court majority affirmed the trial court's and appraisal panel's acceptance of its accuracy.<sup>43</sup> The majority opinion upheld not only the denial of compensation to the easement holders but their exclusion from participating in the condemnation proceedings.<sup>44</sup> Specifically, K.S.A. § 26-513 says the (non-exhaustive) factors "shall" be considered but only if they are shown to exist. Accordingly, it appears permissible for a petition to allege that particular factors do not exist. The majority concluded that, if the representation proved to be incorrect, an affected easement holder would have to pursue its rights in a separate inverse condemnation proceeding.

One justice of the Kansas Supreme Court was concerned by the potential abuse of the condemnation power by "drafting gamesmanship:"

"However, the reality our decision today manifests without articulating—a state of affairs deserving explicit acknowledgment—is that the EDPA grants condemning authorities *carte blanche* to consciously limit the scope of the required notice [of the condemnation proceedings] through drafting gamesmanship."<sup>45</sup>

"Left unchecked by flood walls erected either by the people's representatives or by the people's constitution, the power of the state will flow like an encroaching ocean into and through every available chink and crevice. The statutory requirement of prior notice is one such flood wall against the "abuse of a private citizen" in eminent domain proceedings. But in its absence, as today's case aptly demonstrates, condemning authorities are more likely to take advantage of this crack in the law—the better to effect expansive exercise of power—than they are to be "scrupulously fair" and "cognizant of the responsibility that comes with a power so great."<sup>46</sup>

"In response to this failure of statutory language, my colleagues muster the hope that government actors will "be scrupulously fair in the exercise of eminent domain, always cognizant of the responsibility that comes with a power so great." Slip op. at 14. I am not so sanguine. Instead, I am mindful that in the past, when considering the potential for abusive practices in eminent domain proceedings, we have noted that it is difficult to "conceive of a policy of government afflicted with greater potentials for abuse of a private citizen."<sup>47</sup>

Though the concurrence was skeptical that condemning authorities would always exercise their power in good faith, the majority followed both its precedent and the language of the EDPA, which allow such "gamesmanship." An aggrieved condemnee would have to separately proceed with its own inverse condemnation lawsuit to seek redress. *Water Dist. No. 1* has affirmed the eminent domain Petition's description of the taking as the basis for compensation and blessed it as a tool for limiting the compensable property rights taken.<sup>48</sup>

### Petition Drafting and Interpretation

A condemning authority's attorney would be wise to follow the directions of the Kansas Supreme Court and carefully draft a petition for condemnation so as to satisfy the client's needs while minimizing the impact of the taking, thus preserving as much mutually beneficial use of the land as possible while protecting the purse. A property owner's counsel would equally be wise to know the landscape of not only the petition but also the literal landscape of the property being taken and whether it has been more affected than the petition indicates.

Through careful consideration and planning, along with a non-ham-handed taking of the necessary rights, condemning

authorities can embrace the Kansas Supreme Court's instruction "to be scrupulously fair in the exercise of eminent domain, always cognizant of the responsibility that comes with a power so great."<sup>49</sup> ■

### About the Author



**Chris Burger** is a partner with the law firm of Stevens & Brand LLP out of Lawrence and Topeka, specializing in real estate and design and construction issues. As a Kansas country Lawyer, Mr. Burger handles the complex and simple and has been on the forefront of Kansas construction and real property law, sharing his experience and knowledge as the University of Kansas School of Law's Adjunct Professor on the subject of Construction Law and Litigation. He is a trial attorney who brings those skills and experiences to prosecuting and defending claims, and counseling his clients to help keep them out of courtrooms, hearing rooms and losses. His practice is broadened through his involvement in the community, sharing projects such as these, and his family.

1. [http://www2.kusports.com/news/2003/apr/09/bohl\\_fired\\_as/](http://www2.kusports.com/news/2003/apr/09/bohl_fired_as/)
2. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.**" USCS U.S. Const. amend. V (emphasis added). See also Kan. Const. art. XII, § 4 ("No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation.")
3. K.S.A. § 26-513(a) ("Private property shall not be taken or damaged for public use without just compensation"); *Water Dist. No. 1 v. Prairie Cr. Dev., L.L.C.*, 304 Kan. 603, 606 (2016).
4. An excellent summary and overview of the eminent domain process is found in Mary Feighny's stimulating May 2013, *Journal of the Kansas Bar Association* article, "Coping with ED (Eminent Domain)." The Article you are presently reading will explore whether a property owner can remain master of its domain under recently affirmed Kansas Supreme Court opinions.
5. Please see Mary Feighny's May 2013, *Journal of the Kansas Bar Association Article*, "Coping with ED (Eminent Domain)" for a compilation of applicable cites and the overview of the EDPA.
6. 545 U.S. 469, 125 S. Ct. 2655 (2005).
7. See K.S.A. § 26-501a(a).
8. *State ex rel. Tomasic v. Unified Gov't*, 265 Kan. 779, 788-89, 962 P.2d 543 (1998) (citations omitted).
9. *Water Dist. No. 1*, 304 Kan. at 605; K.S.A. § 26-501(a).
10. See K.S.A. § 26-501a, authorizing takings for subsequent transfers to private entities for certain right-of-way acquisitions, utilities, and municipalities, with meaningful limits on the municipalities unless there

is acquiescence, title issues, or life-safety issues. Further exceptions require legislative action.

11. *E.g.*, K.S.A. § 26-502 (contents of Petition), 503 (notice of proceeding), 504 (suggesting valuation panelists), 505 (panel instructions and notice of award), 506 (notice of and participation in valuation hearing), 507 & 510 (notice of payment of award and duty to remove personal property), 508 (right to appeal valuation only). K.S.A. § 26-513 outlines a non-exclusive list of factors used in valuing a taking, including a requirement for damages. This is discussed in more depth later.

12. The meanings ascribed to these terms can affect the decision whether and how to exercise the power of eminent domain. For example, in *Creegan v. State*, 305 Kan. 1156, 391 P.3d 36 (2017), the Kansas Supreme Court held that all of the parties to a restrictive covenant are “owners” under the EDPA and must be named in eminent domain proceedings or otherwise have claims for inverse condemnation. Accordingly, as argued by parties in the appeal, because condemnation or voluntary acquisitions of property covered by a restrictive covenant would require the inclusion of every person within the restrictive covenant community, even if they have no physical taking upon them, the costs will dramatically increase.

13. K.S.A. § 26-502 (contents of Petition), 503 (notice of proceeding), 504 (suggesting valuation panelists), 505 (panel instructions and notice of award), 506 (notice of and participation in valuation hearing), 507 & 510 (notice of payment of award and duty to remove personal property), 508 (right to appeal valuation only).

14. *In re City of Great Bend*, 254 Kan. 699, 701, 869 P.2d 587 (1994); *see also Sutton v. Frazier*, 183 Kan. 33, 37, 325 P.2d 338 (1958) (“An eminent domain proceeding is a special statutory proceeding and is not a civil action covered by the code of civil procedure. The proceeding is administrative rather than judicial, and its nature is the same whether conducted by or before a district court, or any judge thereof, the probate court, or its judge, a board of county commissioners or any other official board or tribunal authorized by the legislature to act in that capacity. . . . The report of the amount found due is an award and is not a judgment. Prior to an appeal from the award the proceeding is in the nature of an inquest.”)

But the prohibition against Chapter 60 in initial proceedings may not be as absolute as suggested. Although the Kansas Supreme Court has made definitive statements about the inapplicability of Chapter 60, it also has recognized that “In Kansas, provisions of the EDPA control the proceedings to the extent the provisions address an issue.” *Water Dist. No. 1*, 304 Kan. at 606. The EDPA is silent on many things otherwise found in Chapter 60. For example, in *Water Dist. No. 1*, the intervention of a person was allowed after an award. “Despite their nonparty status, we agree with the district court that it could determine the narrow issue of whether WaterOne’s Petition contained a statutory defect. There is no provision in the [EDPA] precluding a landowner from raising statutory defect arguments in the condemnation proceeding. [citation omitted] The Bonhams relied exclusively on [*City of Wichita v. Meyer*, 262 Kan. 534, 542 (1997)] for the authority to file a motion to void the proceedings. And the case does support the Bonhams’ ability, as a procedural matter, to file their motion in this case.” *Water Dist. No. 1*, 304 Kan. at 609. Addressing *City of Wichita* further in which the court rejected “the city’s jurisdictional argument, this court concluded that although the EDPA limits an appeal to the issue of compensation, “raising statutory defects that render the condemnation proceeding void before trial of the appeal [or after the appeal] is not foreclosed.” [citation omitted]. This court in *City of Wichita* reasoned that even though REM was not initially a party to the proceedings, as a landowner with rights at stake, it should not have to risk foregoing an appeal of an award by filing a separate action to challenge the validity of the petition” *Id.* at 610. “Alternatively, the code of civil procedure gives the district court discretion to permit intervention if the Bonhams presented “a claim . . . that share[d] with the main action a common question of law or fact.” K.S.A. § 60-224(b)(1)(B). WaterOne notes that the Bonhams characterized their motion specifically as a motion to void under *City of Wichita*

rather than a motion to intervene. But implicit in the motion to void was an intervention question—whether the Bonhams had an ownership interest sufficient to give them a place in this action. And typically intervention is subject to liberal construction in favor of intervention. [Citation omitted]. In this procedurally unique case, we do not find that the district court wholly lacked jurisdiction to narrowly consider the Bonhams’ claims.” *Water Dist. No. 1*, 304 Kan. 603.

15. USCS U.S. Const. amend. V.

16. K.S.A. § 26-513.

17. *Id.*; *Kan. City Power & Light Co. v. Strong*, 302 Kan. 712, 728-29, 356 P.3d 1064 (2015); *Doug Garber Constr., Inc. v. King*, 305 Kan. 785 (2017).

18. K.S.A. § 26-513(e). “Well informed” was included as part of the definition of “fair market value” in the amendments of 1999. The use of “well informed” is different than the more common use of “willing” and was used to mirror K.S.A. § 79-503a, which is the statute applicable for taxation of real estate. The legislative comments note that the “committee is of the opinion that it is appropriate to define fair market value in the same manner in situations in which the government is taking a citizen’s property as it is defined in situations in which the government is taxing a citizen’s property.”

19. K.S.A. § 26-513(e); *City of Mission Hills v. Sexton*, 284 Kan. 414, 422-23, 160 P.3d 812 (2007).

20. *Kan. City Power & Light Co.*, 302 Kan. at 728-29, 356 P.3d 1064

21. *Id.*

22. *Id.* at 727, 356 P.3d 1064.

23. *Id.* at 713-22, 356 P.3d 1064; *Doug Garber Constr., Inc.*, 305 Kan. at 790 (“A district court’s exclusion of expert or lay opinion testimony is reviewed for abuse of discretion. [Citation omitted] A district court abuses its discretion if no reasonable person would adopt the district court’s view, the decision was based on an error of law, or the decision was based upon an error of fact. *Strong*, 302 Kan. at 729. Thus, “even under the deferential abuse of discretion standard of review, an appellate court has unlimited review of legal conclusions upon which a district court’s discretionary decision is based.” [Citation omitted])”

24. *Doug Garber Constr., Inc.*, 305 Kan. 785.

25. *Miller v. Preisser*, 295 Kan. 356, 368, 284 P.3d 290 (2012). “K.S.A. 26-513(d) provides a “nonexclusive list” of factors that “shall be considered” to determine the amount of compensation and damage where it is shown the factors apply. Some of the factors listed in the statute are: access, appearance, productivity and convenience, severance or division of the property, loss of trees or shrubs, cost of fencing, and proximity to improvements on land. The “factors are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damage.” *Id.* Because the list is nonexclusive, “any competent evidence bearing upon market value generally is admissible including those factors that a hypothetical buyer and seller would consider in setting a purchase price for the property.” *City of Wichita v. Eisenring*, 269 Kan. 767, 773 (2000) (citing 5 *Nichols on Eminent Domain* § 18.05[1] (3d ed. 1997)). *See also City of Mission Hills*, 284 Kan. at 423, 160 P.3d 812.

26. “Parties to an eminent domain proceeding are entitled to adopt their own theories as to the highest and best use of the condemned land. The fact that the land has been used for one purpose only does not prevent showing its availability and value for other uses provided the other uses are so reasonably probable as to have an effect on the present market value of the land.” *Miller*, 295 Kan. at 368, 284 P.3d 290 (citations omitted).

27. *Pener v. King*, 305 Kan. 1199 (2017).

28. *Id.*

29. *Id.*

30. *Id. See also Creason v. Unified Gov’t of Wyandotte County*, 272 Kan. 482, 485-86, 33 P.3d 850 (2001) (“In prior condemnation cases, the “unit rule” required that improvements, located upon land which is condemned, are not to be valued separately but are a part of the real estate and

must be considered in determining the value of the land taken. [Citation omitted] The "unit rule" denoted a process of appraisal whereby the total value of real estate is first determined without placing a value on each of the separate contributing items. Consideration of the value of buildings and improvements is limited to the extent they enhance the value of the land taken. [Citation omitted] In contrast, the "summation method" of appraisal denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof. Use of this method of appraisal has generally been rejected since it fails to relate the separate value of the improvements to the total market value of the property. [Citation omitted]"

31. *City of Wichita v. Denton*, 296 Kan. 244, 262, 294 P.3d 207 (2013).

32. *Doug Garber Constr., Inc.*, 305 Kan. 785; *Van Horn v. City of Kan. City*, 249 Kan. 404, 406, 819 P.2d 624 (1991) ("The City bases its argument on the following language from a recent case, *Hudson v. City of Shawnee*, 246 Kan. 395, 790 P.2d 933 (1990): "The general rule is that enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value." 246 Kan. at 406, citing 4 Nichols on Eminent Domain § 12.3151 (3d ed. rev. 1985).")

33. *Doug Garber Constr., Inc.*, 305 Kan. 785, 789.

34. There would appear to be room for disagreement about what must be paid for, but for the clear statements in *Water Dist. No. 1*, 304 Kan. at 607. When a condemning authority uses more than it took, those rights must be paid for, possibly through inverse condemnation proceedings. Under the guiding precept of ensuring compensation for the property owner, et al, even if the rights are not all used "[t]he law is clear that landowners are entitled to full compensation for the actual rights acquired by the condemnor, not the rights actually used. [Citations omitted]" *Hudson v. Shawnee*, 246 Kan. 395, 400, 790 P.2d 933 (1990). This can be true if collective and encompassing terms are permitted to gather together a wide range of rights. *Id.* at 402, 790 P.2d 933 ("The petition stated the easement was for "surveying, excavating, filling, grading and all other purposes incidental to the construction of a street or sidewalk on the permanent right of way adjacent thereto." *Sutton* does not stand for the proposition that every common-law right of property owners must be specifically listed in a condemnation petition in order to be taken.") Additionally, if there is a post-taking use beyond the described rights, that use must be paid for as well, typically through inverse condemnation initiated by the owner. "Nothing is taken by implication or intendment. The landowners may rely implicitly on the [appraisers'] report filed. This [appraisers'] report becomes the evidence and the only evidence of the commissioners doings." *In re Great Bend*, 254 Kan. at 703, 869 P.2d 587; *Sutton*, 183 Kan. at 45, 325 P.2d 338.

35. *In re Condemn. of Land*, 193 Kan. 151, 157-58, 392 P.2d 914 (1964).

36. *Id.* at 159, 392 P.2d 914 ("The measure of damages should have been based on the rights acquired by the condemnor and not upon testimony as to the intended use. The landowners were entitled to compensation based on the full use which the condemnor had the right to exercise over the easement condemned as described in the commissioners' report."); see also *In re Great Bend*, 254 Kan. at 701, 869 P.2d 587 ("The first question involves careful consideration of the nature of the interest taken by the City to secure a ponding easement on the 61.8 acres of the Essmiller property. The parties are in agreement with the law applicable to this case but are deeply divided on the question of whether the City was allowed to introduce evidence of a limited use of the ponding easement, thereby contradicting the description of the easement taken according to the Petition and appraisers' report. Kansas law is clear that regardless of the future intention of the condemnor, the rights actually acquired, and not the intended use of those rights, is the measure of the landowner's compensation.")

37. See Restatement Third, Property (Servitudes) secs. 4.10 Cmts. a, b

& g, 4.9 cmts. a & b, 4.1 Rptr. Notes; *City of Ark. City v. Bruton*, 284 Kan. 815, 166 P.3d 992 (2007); *Hudson*, 246 Kan. at 402, 790 P.2d 933 ("The landowner retains the right to use condemned property for any purpose not inconsistent with the public right. [Citations omitted]"); *Water Dist. No. 1*, 304 Kan. 603 ("Nevertheless, we are constrained in an eminent domain proceeding by the language the condemning authority uses, its condemnation plans, and the limits of the EDPA.")

38. The language of a taking cannot be challenged in an EDPA proceeding. A separate proceeding would be required. "This court has characterized these proceedings as an 'inquest'"—an investigation into exactly how much the government owes. Indeed, the proceedings are narrow and not "a forum for litigation of the right to exercise the power of eminent domain nor the extent thereof." *Id.* at 607 "In short, EDPA proceedings are intended to be quickly resolved, only concerning (1) the authority to take and (2) just compensation for the taking. Litigation of collateral issues is relegated to other civil actions." *Id.* at 608. Any challenge appears to bear a heavy burden. "In fact, WaterOne's discretionary decision to take an interest in Tract 16A and leave the Bonhams with their easement is only subject to judicial review upon a showing of fraud, bad faith, or abuse of discretion.[citations omitted]" *Water Dist. No. 1*, 304 Kan. 603, 614.

39. The "language of the petition" and "the language of the report" are often used interchangeably within the decades of decisions concerning the exercise of the power of eminent domain. Little discussion of any distinction exists in Kansas cases, possibly due to the practical reality that counsel for the condemning authority almost always prepare a draft report that mirrors the language in the Petition. However, some attention must be given to the fact that an appraisal panel would have the independence to physically draft its own report but would not be empowered to alter what is sought in the Petition, absent further agreement or revision – a fertile subject in and of itself. *In re Great Bend*, 254 Kan. at 702-03, 869 P.2d 587 (discussing two separate documents - "Of crucial importance is the description of the nature of the interest taken in the appraisers' report. In most cases, the interest set forth in the petition becomes the interest identified in the appraisers' report. If the two are different, then both descriptions must be read together to determine the nature of the interest to be taken. Any ambiguity must be resolved in favor of the landowner and ultimately determined by the description contained in the appraisers' report. [Citations omitted]") compared with *In re Condemn. of Land*, 193 Kan. at 157, 392 P.2d 914 (stating in a pre-EDPA environment that "[t]he commissioners' report, and only their report, is evidence of the land appropriated, the extent of the easement and its use.") and with *City of Wichita*, 262 Kan. at 544 ("Under the provisions of K.S.A. 26-502, the condemnor's only obligation in naming parties is to name in the petition the owners and all lienholders of record and any party in possession. [Citation omitted]. The property rights taken by a condemnor are to be determined by the language in the petition and in the appraisers' report. A condemnor bears the burden of drafting its petition to show the limitations in its taking. [Citation omitted].")

40. *Hudson*, 246 Kan. at 400, 790 P.2d 933.

41. *In re Great Bend*, 254 Kan. at 702, 869 P.2d 587; *Hudson*, 246 Kan. at 401, 790 P.2d 933; *City of Mission Hills*, 284 Kan. at 430-31, 160 P.3d 812.

42. See *Hudson*, 246 Kan. at 402, 790 P.2d 933.

43. Deference would be less likely if the representations included such things as, "nothing herein shall affect the after value of the property," or "this taking shall not affect the value of the property."

44. *Water Dist. No. 1*, 304 Kan. 603.

45. *Id.* at 619 (Stegall, J. concurring).

46. *Id.* at 620 (Stegall, J. concurring).

47. *Id.* at 619-20 (Stegall, J. concurring).

48. *Id.* at 603.

49. *Id.* at 613-614.