

# What We Know

## ARTICLES & INSIGHTS

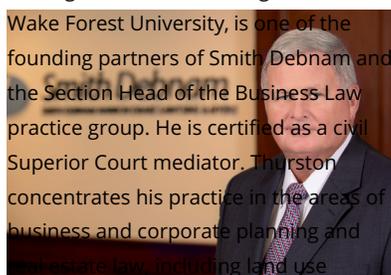
### ABOUT THE AUTHORS

[John Sperati](#) is a partner in the firm and member of the firm's Creditors' Rights



practice group. He concentrates his practice in commercial creditor bankruptcy, foreclosure and real estate litigation, structured settlement transfer, judgment domestication and enforcement, construction litigation, commercial litigation, equipment leasing and finance and creditors' rights. John is listed as a Rising Star in North Carolina Super Lawyers® that recognizes accomplished, young attorneys.

[Thurston Debnam](#), who received his undergraduate and law degrees from Wake Forest University, is one of the



founding partners of Smith Debnam and the Section Head of the Business Law practice group. He is certified as a civil Superior Court mediator. Thurston concentrates his practice in the areas of business and corporate planning and real estate law, including land use planning and zoning. For more than thirty years, Thurston has maintained a

## Holy Cow! They Can Take My Land?

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Eminent Domain is when the government, or in some instances a private entity, takes private property for public purposes. For centuries all levels of government in the United States have enjoyed the right of eminent domain as an incident to their sovereignty. Public policy requires that the various levels of government be allowed to take private property for public purposes. However, the United States Constitution and the North Carolina Constitution provide that "just compensation" be paid by the government to the owner.

In North Carolina, the legislature has delegated the power of eminent domain to certain private entities. For example, electric utility companies and railroads may exercise the power of eminent domain. Chapter 136 of the General Statutes governs condemnation cases instituted by the Department of Transportation for highway purposes. Chapter 40A governs eminent domain proceedings instituted by private condemners and all other public condemners, such as municipalities and counties.

### Early Negotiations

Most often the landowner's first communication with the condemner in an eminent domain situation is a letter of inquiry from the right of way agent or procurement agent. Since most eminent domain cases involve a "partial taking," in which less than all of a property owner's land is being acquired, there is a need for some initial surveying in order to determine the exact property that will be the subject of the condemnation. In the event that the landowner does not wish to grant survey access to the condemner, the condemning authority can seek a court order authorizing entry for the limited purpose of conducting a survey. Once the necessary surveying has been completed, the condemner generally obtains a fair market value appraisal from a state certified real estate appraiser. Typically, this appraisal is the basis upon which the condemning authority makes its initial offer to purchase. Since litigation can be expensive for all parties, most condemning authorities will seek a personal conference with the landowner in an attempt to reach an amicable settlement. The overwhelming majority of eminent domain cases are resolved during these private negotiations.

### When Negotiations Have Failed, Suit Will Be Filed

broad-based business practice, assisting clients with business and corporate planning and handling land development and real property issues and transactions.

In the event that the landowner and the condemning authority are unable to reach a settlement, the condemning authority will file a civil action in Superior Court. The civil action will set forth the purposes for which the subject property is being acquired, the nature and extent of the property interest being acquired by the condemnor, and the condemnor's estimate of fair market value. Under both Chapter 136 and Chapter 40A of the General Statutes, the condemnor acquires title to the subject property immediately upon the commencement of the civil action, the filing of a Notice of Taking in the office of the Register of Deeds, and the payment of the condemnor's estimate of just compensation into the office of the Clerk of Superior Court. The condemnor is required to serve a copy of the pleading along with a civil summons on the landowner and all other parties having an interest in the subject real estate. The civil summons will set forth the deadline within which the landowner must respond if the owner wishes to challenge the condemnor's estimate of fair market value. The summons must be reviewed carefully as the time deadlines for the filing of a responsive pleading pursuant to Chapter 136 (one year from the date of service) and Chapter 40A (120 days from the date of service) are not identical. If a responsive pleading is not filed by the deadline, it is deemed that the landowner agreed with the condemnor's estimate of fair market value and the landowner is barred from seeking additional compensation for the property being taken.

### **Estimate of Just Compensation**

Once the condemnation action has been commenced by the filing of the complaint and notice of taking, the landowner will have an opportunity to withdraw the initial deposit (estimated to be "just compensation") made by the condemnor with the Clerk of Superior Court. The general statutes allow the landowner to receive this deposit without prejudice to the landowner's right to contest the condemnor's estimate of just compensation. Since the portion of any future settlement or jury verdict will not include interest on the amount of money initially deposited with the Clerk of Superior Court, the initial deposit should be withdrawn as soon as possible.

In condemnation cases, the only issue submitted to the jury is the amount of just compensation to which the landowner is entitled. The term "just compensation" generally refers to the fair market value of the land being acquired plus an amount of money for the damage, if any, to the owner's remaining parcel of land. Despite the opportunity in North Carolina for the landowner to testify on the issue of value, the better practice is to employ one or more state certified real estate appraisers to render opinions as to just compensation. As the real estate appraiser will often testify at trial, it is important to select an appraiser who is both knowledgeable and articulate. State certified real estate appraisers usually qualify as expert witnesses, which gives their testimony more credibility.

The first step in the appraisal process is the determination of the "highest and best use" of the subject property. Highest and best use is that use which is the most profitable and likely use to which the property can be put. It may also be defined as that available use which produces the highest present land value. The highest and best use selected by the appraiser must be: 1) physically possible, 2) legally permissible, 3) financially feasible,

and 4) maximally productive. The highest and best use is quite often not the current use as of the date of taking. For example, farmland and timber land in active cultivation may be best utilized as either a residential community or a commercial project. The determination of highest and best use by the appraiser is critical to a determination of fair market value.

### **Fair Market Value**

Once the real estate appraiser has determined the highest and best use, a determination can be made as to fair market value. Certified real estate appraisers utilize three basic appraisal methods and exercise their own independent judgment when determining fair market value. Consequently, the landowner has no control over the appraisal process. Therefore, for several strategic reasons, it is recommended that the landowner's attorney employ the appraiser.

### **The Discovery Process**

In almost every civil action in Superior Court, the parties participate in a process known as "discovery." Pursuant to the Rules of Civil Procedure, the condemnor and the landowner are allowed to ask each other certain questions about the property and its fair market value. Each party must identify his intended trial witnesses. Often, the depositions of the landowner and the real estate appraisers are taken. These depositions educate the parties about the testimony of the adverse witnesses in order to prepare for trial.

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