County and township roads may be vacated by order of the board of county commissioners under K.S.A. 68-102 through K.S.A. 68-107. See *Wagoner v City of Hutchinson*, 169 Kan. 44, 216 P.2d 808 (1950). See also K.S.A. 58-2613 through 58-2614. The process may be initiated by petition, or in some instances by the board of county commissioners itself. See K.S.A. 68-102 through 68-107. No more than two miles of road may be vacated at one time. K.S.A. 68-102. Damages may be awarded on account of the vacation if a written application is filed with the county clerk within 12 months of the vacation order. See K.S.A. 68-102a.

See Att'y Gen. 18 (2015), where the Attorney General opined that before vacating a county road on its own motion, the county must follow the statutory notice requirements in K.S.A. 68-102a. The viewing and report requirements contained in K.S.A. 68-104 and 68-106 only apply when the road is installed, altered or removed following a petition by any adjacent landowner.

As noted above, the county generally acquires only an easement upon opening a road. Vacation of the road removes the easement, leaving fee ownership intact. Vacation of a road to which the county had acquired fee title results in the land reverting to the adjacent landowners. See *Luttgen v Ergenbright*, 161 Kan. 183, 166 P.2d 712 (1946).

See Op. Att'y Gen. 15 (2006), which stated that the assistance of a surveyor is not needed in regard to vacating a road unless the location of the public road being vacated is not known or is at issue.

The Court in *Davenport Pastures, L.P. v Morris County Board of Commissioners*, 291 Kan. 132, 238 P.3d 731 (2010), said multiple roles played by the county counselor in a vacation of roads proceeding before the county resulted in a violation of the due process rights of the ranch lessee. The county counselor had acted as the board's legal advisor, advised the board on legal procedures, recommended an appraiser for the board as an expert witness and advised the board on the damages figure to adopt. He also represented the board in the legal proceedings that covered nearly 10 years and resulted in three appellate court decisions. The case was remanded to the county board for further damages proceedings. The ranch lessee's appraisers had estimated a loss in property value of vacating two county roads providing access to the property of nearly $400,000. The county's appraiser estimated just over $4,000.

II. Acquisition of Property by Eminent Domain

§10.67 A. Federal Constitutional Limits

Eminent domain is the power of government to take private property for public use without the owner's consent. The right to take property by eminent domain is thought to be an inherent power of the sovereign, necessary to the function of government. As such, it exists in the absence of a specific grant of authority in a constitution or statute, although it can be limited by constitutional provision.

Thus, the federal government has the power of eminent domain although no clause in the *United States Constitution* expressly grants such power. The federal power of eminent domain is limited by the "takings clause" of the Fifth Amendment of the *United States Constitution* which guarantees the payment of compensation: "nor shall private property be taken for public use, without just compensation."

Similarly, the State of Kansas, as a sovereign, has the power of eminent domain, subject to constitutional limitations. See *Sutton v Frazier*, 183 Kan. 33, 40, 325 P.2d 338 (1958). The Fifth Amendment's guarantee of compensation for taking of property is made applicable to exercise of

eminent domain by the state through the due process clause of the Fourteenth Amendment. See *Lone Star Industries v Department of Transportation*, 234 Kan. 121, 671 P.2d 511 (1983).

§10.68 B. State Constitution and State Law

Kansas, unlike other states, does not have a general provision in its constitution requiring compensation for taking of private property by the state. Nichols, *Eminent Domain* § 1.3 (3rd Ed. 1988). The only reference to taking of property in the *Kansas Constitution* is found in Article 12 § 4 dealing with corporations:

> "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."

This provision differs from the Fifth Amendment takings clause in two ways; first it applies only to takings by corporations, and second it requires that payment be made prior to a taking.

On at least one occasion, the Kansas Supreme Court has interpreted Article 12, § 4 as simply a restatement of the takings clause in the Fifth Amendment. See *City of Wichita v Chapman*, 214 Kan. 575, 585, 521 P.2d 589 (1974). This is inconsistent with the history of the section. Early opinions viewed the provision as a restriction only on private corporations "upon whose private responsibility the making of compensation depends." See *St. Joseph & Grand Railway v City of Hiawatha*, 95 Kan. 471, 472, 148 P. 744 (1915), where the Court said a city's exercise of eminent domain for construction of a sewer was not subject to Article 12, § 4; and that the section was not intended to apply to municipal corporations. See *Sullivan v Goodland*, 110 Kan. 359, 203 P. 732 (1922), where the Court said Article 12, § 4 was not applicable to cities or school districts. Although Article 12, § 4 is rarely cited, this appears to be the logical interpretation. See *Lone Star Industries v Department of Transportation*, 234 Kan. 121, 671 P.2d 511 (1983), where the Court said Article 12, § 4 was applicable only to corporations.

The absence of a general provision in the *Kansas Constitution* does not affect the application of the *U.S. Constitution* to eminent domain in Kansas. In fact, it means that the Fifth Amendment's takings clause is the only significant constitutional limit on eminent domain in Kansas. See *Miller* v *Bartle*, 283 Kan. 108, 150P.3d 1282 (2007), which said the Fifth Amendment guarantee, was codified in Eminent Domain Procedure Act, which that private property shall not be taken *or* damaged for public use without compensation.

§10.69 C. Overview of Local Government Eminent Domain Power

Local units of government in Kansas may exercise the power of eminent domain where the Legislature has delegated this authority to such unit or where the local government has home rule power. See *General Building Constructors L.L.C. v Board of Shawnee County Commissioners*, 275 Kan. 525, 66 p.3d 873 (2003). The rule often stated by Kansas courts is that "the power of eminent domain can only be exercised by virtue of a legislative enactment. The right to appropriate private property to public use lies dormant in the state until legislative action is had pointing out the occasions, modes, conditions and agencies for its appropriation." See *Strain v Cities Service Gas Co.*, 148 Kan. 393, 83 P.2d 124 (1938). Thus, the Kansas statutes contain literally hundreds of

specific sections authorizing the use of eminent domain by a specific unit of government for a specific purpose. See, *e.g.*, K.S.A. 12-1736 (city may use eminent domain to acquire land for public buildings); K.S.A. 19-1561 (county may use eminent domain to acquire land for county fair buildings); and K.S.A. 73-411 (townships may use eminent domain to acquire land for a veterans monument). See K.S.A. 26-201 *et seq.* for a broad statutory grant of eminent domain powers to cities. Note: cities may not acquire fee simple title to land acquired for street purposes.

The power of eminent domain is not identical to the power to construct public improvements, although it is often used for that purpose.

A local unit may exercise the power of eminent domain to acquire land already dedicated to public use if the two public uses are compatible. See *Mid-America Pipeline Co. v Lario Enterprises*, 716 F.Supp. 511 (D. Kan. 1989), which suggested an inverse condemnation action might lie where a racetrack was installed over utility pipelines. If the proposed use would destroy or materially interfere with an existing public use, acquisition of the property must be specifically authorized. See Op. Att'y Gen. 51 (1991), which said that the City of Derby could not use a general grant of eminent domain power in K.S.A. 26-201 to install a sewer along a creek protected by an existing wildlife easement.

The Court in *Sullivan v City of Ulysses*, 23 K.A. 2d 502, 932 P.2d 456 (1997), upheld the right of a city to condemn surface and water rights outside the city limits under K.S.A. 12-694. The Court said that the city could apply for a change in use as an "owner" of the water rights under K.S.A. 82a-708b after complying with the Eminent Domain Procedure Act, but before the city actually acquired the water rights. See also *Young Partners LLC v USD 214*, 284 Kan. 397, 160 P.3d 830 (2007), where the Court upheld the school district in its condemnation of a reversionary interest in property the school had held for over 60 years and to which they had made substantial improvements.

See *Shipe v Public Wholesale Water Supply District, No. 25*, 289 Kan. 160, 210 P.3d 105 (2009), where the Court said the issue was not ripe to decide whether a public wholesale water district had the power to acquire water rights by eminent domain. The water district had brought as eminent domain action to obtain a temporary easement to drill test wells. The Shipes had objected to condemnation of water rights. The district court had held the water district had the power to condemn water rights.

See "The Eminent Domain Process." A paper presented by Joseph J. Erskine at the June 4, 2021, City Attorneys Association of Kansas. See also Chris Burger, "Sanguine Doves in the Hands of the State or How the Power of Eminent Domain Has Few Practical Restraints," 88 J.K.A.B. No. 1 28-34.

§10.70 D. Home Rule and Eminent Domain

Home rule makes it possible for cities and counties to engage in a broad spectrum of actions without seeking specific approval from the Legislature. The legislative authorization that would have come from the Legislature can come from the city or county itself, through an exercise of home rule powers. "Cities have power granted directly from the people through the constitution." See *City of Junction City v Griffin*, 227 Kan. 332, 334, 607 P.2d 459 (1980).

The Court in *General Building Contractors, L.L.C. v Board of Shawnee County Commissioners*, 275 Kan. 525, 66 P.3d 873 (2003), held that counties have the power of eminent domain under the home rule and related economic development statutes to condemn real property

for purposes of industrial and economic development. The Court held the home rule power must be exercised by resolution, not by motion, and that the taking of private property for industrial and economic development was a valid public purpose.

§10.71 E. Economic Development, Eminent Domain and a New Kansas Law

The Kansas Supreme Court in two cases has upheld the use of eminent domain to take private property for economic development purposes.

In the first case, *State ex rel. Tomasic v Unified Government of Wyandotte County/Kansas City*, 265 Kan. 779, 790 (1998), the Court upheld provisions of the tax increment financing (TIF) law which authorized special obligation (STAR) bonds, and the use of eminent domain to build an auto race track in Wyandotte County. The Court held that the development of the auto race track facility and related projects were valid public purposes for which TIF and STAR bonds could be issued and eminent domain authority could be exercised.

As noted above, in *General Building Contractors, LLC v Board of Shawnee County Commissioners*, 275 Kan. 525 (2003), the Court held that counties have the power of eminent domain under home rule and related economic related statutes and have the power to condemn real property for purposes of industrial or economic development. The case involved the condemnation of a private business owner's property for a Target Distribution Center facility.

The United States Supreme Court in the landmark case of *Kelo v City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed. 2d 439 (2005), held that the "public use" provision of the "takings clause" of the 5th Amendment of the *U.S. Constitution* permits the use of eminent domain for economic development purposes. The Court, in a 5-4 decision, said that the *U.S. Constitution* prohibits a "taking" whose "sole purpose" is to transfer one person's private property to another private person, even if just compensation is paid. The Court said: "The disposition of this case therefore turns on the question whether the city's development plan serves a 'public purpose'." The decision went on to stipulate that "without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." In writing for the majority, Justice Stevens noted, in fact, that "to effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development."

The Court determined that New London's economic development plan served a "public purpose" under the "public use" provision of the *U.S. Constitution*. Justice Stevens noted that:

> "Those who govern the city were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including–but by no means limited to–new jobs and increased tax revenue." (Id. At 483)

The Court did not preempt additional state action, and the Kansas Legislature in 2006 enacted a number of restrictions on the use of eminent domain for economic development purposes.

The 2006 changes prohibit the use of eminent domain for economic development purposes unless the Legislature approves the taking; changes certain eminent domain procedures; and

requires surveys for lands to be taken through the exercise of eminent domain be performed by a licensed land surveyor or an engineer competent to conduct land surveys.

K.S.A. 26-501b prohibits the taking of private property by eminent domain for the purpose of selling, leasing, or otherwise transferring such property to any private entity unless the taking meets one of the following.

The property is taken:

1. By the Kansas Department of Transportation or a municipality, city, county or unified government and the property is deemed excess real property that was taken lawfully and incidental to the acquisition of right-of-way for a public road, bridge, or public improvement project including, but not limited, to a public building, park, recreation facility, water supply project, wastewater and waste disposal project, storm water project and flood control and drainage project;

2. by any public utility, as defined in K.S.A. 66-104, gas gathering services, as defined in K.S.A. 55-1,101, pipeline companies, railroads and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state, but only to the extent such property is used for the operation of facilities necessary for the provision of services;

3. by any municipality when the private property owner has acquiesced in writing to the taking;

4. by any municipality for the purpose of acquiring property which has defective or unusual conditions of title including, but not limited to, clouded or defective title or unknown ownership interests in the property;

5. by any municipality for the purpose of acquiring property which is unsafe for occupation by humans under the building codes of the jurisdiction where the structure is situated; or

6. by express authorization of the Legislature on or before July 1, 2007, by enactment of law that identifies the specific tract or tracts to be taken. If the Legislature authorizes eminent domain for private economic development purposes, the Legislature shall consider requiring compensation of at least 200% of the fair market value to property owners.

§10.72 F. Requirement That There Be a Taking — Inverse Condemnation

Eminent domain is defined as the power of government to take private property for public use without the owner's consent. The requirement that there be a "taking" of property presents two sets of issues: first, whether or not there has been a taking, and second, the extent of the taking. These issues are raised in different procedural contexts.

The issue of whether or not there has been a taking is typically raised by the landowner in a suit

for damages alleging the taking of land without payment of compensation. Such lawsuits are referred to as "inverse condemnation," brought by the landowner instead of the condemning agency. See, *e.g.*, *Wittke v Kusel*, 215 Kan. 403, 524 P.2d 774 (1974), and Chapter 4 of this book for a discussion of inverse condemnation and takings.

See Feighny, "*Stealth Takings: Inverse Condemnation*", 84 J.B.A.K. 32 (2015) for an excellent review of inverse condemnation actions and takings jurisprudence.

§10.73 G. Extent of the Taking

The right of eminent domain extends only to real property. Personal property is not subject to condemnation. See *Urban Renewal Agency v Naegele Outdoor Advertising Co.*, 208 Kan. 210, 491 P.2d 886 (1971), (billboard on land taken by urban renewal agency not included in appraiser's award). The compensation paid to the owner takes into account only the real property taken. See *USD 464 v Porter*, 234 Kan. 690, 676 P.2d 84 (1984), where the Court held that a building and storage tank constructed solely to increase the value of condemnation award did not become part of real property but remained personal property and was not included in the condemnation award.

In the absence of specific statutory direction, the selection of which property and how much should be taken is left to the discretion of the condemning agency or governmental unit. The agency's determination will only be overturned upon a showing of "fraud, bad faith, or abuse of discretion." See *Urban Renewal Agency v Decker*, 197 Kan. 157, 162, 415 P.2d 373 (1966), where the landowners challenged taking of land for an urban renewal project. Public officers are presumed to have performed their public functions properly and in good conscience according to the Court in *Bowers v City of Kansas City, Kansas*, 202 Kan. 268, 271, 448 P.2d 6 (1968), and the burden of proving bad faith is on the party alleging it.

The agency's designation of the size of the tract of land is governed by the public purpose underlying eminent domain, and the statute authorizing the taking. The condemning agency can consider reasonably anticipated future demands as well as present needs. See *Shelor v Western Power & Gas Co.*, 202 Kan. 428, 449 P.2d 591 (1964), (upholding a utility's condemnation of site a large enough to accommodate an additional generating station anticipated to be necessary within five years); and *Reinecker v Trustees of Fort Scott Community College*, 198 Kan. 715, 426 P.2d 44 (1967), (future needs of a community college might include additional buildings, sidewalks, tennis courts).

The condemning agency in an eminent domain proceeding acquires only the interest needed for the public purpose specified in the statute authorizing the taking. *Kansas Gas and Electric Co. v Winn*, 227 Kan. 101, 605 P.2d 125 (1980). "As a general rule, where land is taken for construction of a public building, the fee is taken, but for other public uses only an easement is deemed to have been acquired." See *USD 512 v Vic Regnier Builders*, 231 Kan. 731 at 735, 648 P.2d 1143, 1147 (1982), where the Court said that a school district acquired title in fee simple absolute and that former owners had no interest when school use ceased. When the condemning authority acquires less than the full fee title, the "former proprietor of the soil retains fee title to the land and his rights extend to all purposes not incompatible with the rights of possession and use of the condemner." See *Kansas Power and Light v Ritchie*, 11 K.A. 2d 237, 722 P.2d 1120 (1986), where the Court held that a utility company acquired only a permanent easement.

III. Eminent Domain Procedure Act

§10.74 A. Overview of Procedure: Administrative Phase and Judicial Phase

Although there are many separate statutes that authorize the use of eminent domain, all eminent domain actions are governed by a single, uniform procedure, the Eminent Domain Procedure Act. K.S.A. 26-501 through 26-517. This act was adopted by the Legislature in 1963, replacing a number of separate procedures. For a general discussion and history of the Act, see Spring, *Comments on Practice and Procedure in Eminent Domain*, 35 J.B.A.K. 7 (1966).

The action proceeds in two stages. The first stage is a special statutory proceeding that involves filing a petition, appointment of appraisers, and the receipt of the appraisers' report setting the condemnation award. Although handled by judges of the district court, the proceeding is administrative rather than judicial.

The statutory proceeding may be followed by a second, judicial phase. Either party may appeal to the district court from the amount of the appraisers' award. This appeal takes the form of a trial de novo on the issue of damages.

§10.75 B. Petition and Notice

The condemning authority commences an eminent domain action by filing a petition in the district court of the county where the real estate is located. See K.S.A. 26-501. The petition must be verified, and must state:

1. The authority for and purpose for the taking;

2. a description of the real estate and the nature of the interest to be taken; and

3. the names of all owners and lienholders of record and any parties in possession. See K.S.A. 26-502.

Where notice is required in the eminent domain proceeding, all parties named in the petition are entitled to notice. Holders of unrecorded interests in land do not need to be made parties to an eminent domain action. See *Dotson v State Highway Commission*, 198 Kan. 671, 426 P.2d 138 (1967), where the Court held that the purchaser of land was not entitled to notice in an eminent domain proceeding where the purchaser was not in possession and the purchase contract was unrecorded.

See *Water District No. 1 of Johnson County v Prairie Center Development L.L.C.*, 304 Kan. 603, 375 P.3d 304 (2016) where a holder of a road easement argued the water district failed to list Prairie Center Development in the eminent domain petition to obtain permanent water main easements. The water district argued that Prairie Center did not require notice since its petition excluded existing easements from the taking. The Court agreed with the water district.

Upon filing the petition, the court will set a date for hearing, allowing time for notice. Notice must be published at least 14 days prior to the hearing date, and must also be mailed to all parties named in the petition at least 14 days prior to the hearing. See K.S.A. 26-503. The same statute provides that no defect in any notice or in the service thereof shall invalidate any proceedings.

See *Unified School District 500 v Turk*, 219 Kan. 655, 549 P.2d 882 (1976), where the Court

said the constructive notice provided by publication and mailing was sufficient even if the party to be charged did not receive the information. The purpose of the notice requirement is to allow the landowner time to challenge the taking through a separate civil action. See *Urban Renewal Agency v Decker*, 197 Kan. 157, 415 P.2d 373 (1966), where the history and nature of the Eminent Domain Procedure Act is explained.

The Court in *Landau Investment Company v City of Overland Park*, 261 Kan. 394, 930 P.2d 1065 (1997), allowed the amendment of the condemnation petition upon appeal of the condemnation award to correct a faulty legal description of the drainage easement. The Court allowed the amendment due to the unique circumstances of the case and upon consideration of K.S.A. 26-502 which provides that a defect in the form of the petition which does not impair substantial rights of the parties shall not invalidate any proceeding.

See also *City of Wichita v Meyer*, 262 Kan. 534, 939 P.2d 926 (1997), where the Court said a landowner has a right of action for inverse condemnation against a city which failed to list the landowner's property and the record owners in its initial petition. The property was included as part of the appraisers' report and the city deposited the total award with the Court. A motion was filed by the owners of the unlisted property for a new appraiser's report on the property. The second report awarded a considerably larger amount for the property in question. The city failed to deposit the larger amount with the Court and the Court ruled the city had abandoned the condemnation proceeding as to the property and therefore an inverse condemnation action could be brought.

§10.76 C. Hearing

At the hearing on the petition, the judge makes a determination as to the propriety of the taking. This requires a finding that the condemning authority has the power of eminent domain and that the taking is necessary for some lawful purpose of the condemner. See K.S.A. 26-504. The determination is based solely on the allegations in the petition. *Kansas Gas and Electric v Winn*, 227 Kan. 101, 605 P.2d 125 (1980). The judge's function at the hearing is administrative, not judicial. See *Urban Renewal Agency v Decker*, 197 Kan. 157, 415 P.2d 373 (1966).

If the trial judge makes the required finding as to the propriety of the taking (*i.e.* grants the petition), the proceeding continues with the appointment of appraisers. While denial of the eminent domain petition is a final order, subject to appeal, an order granting the petition is not considered final, and may not be appealed. See K.S.A. 26-504. The landowner who wishes to challenge the proceeding must do so in a separate civil action. See *Concerned Citizens, United v Kansas Power and Light*, 215 Kan. 218, 523 P.2d 755 (1974), which held that a landowner has no power to stop the progress of the eminent domain proceeding once the trial court grants the order under K.S.A. 26-504; and *State Highway Comm'n v Bullard*, 208 Kan. 558, 493 P.2d 196 (1972), which said that a landowner has no right to be heard on motion to dismiss a tract of land listed in petition.

§10.77 D. Challenge to Proceeding and Injunction

If the landowner wishes to challenge the rights of the condemning authority to exercise eminent domain, or the necessity of the taking, this must be done in a separate civil action, typically a suit for injunction. These issues cannot be raised at the hearing on the condemnation petition, which is an administrative, not a judicial, hearing. See *Kansas Gas and Electric Co. v Winn.*, 227 Kan. 101, 605 P.2d 125 (1980).

The determination that the condemner has the power of eminent domain, and that the particular

taking is necessary to a lawful corporate purpose of the condemner is made initially by the condemning authority. When challenged by a landowner, it is subject to review only for fraud, bad faith, or abuse of discretion. The burden of proof in such instance is on the party attacking the decision. *Concerned Citizens, United v Kansas Power and Light*, 215 Kan. 218, 523 P.2d 755 (1974).

See *Harsh v Miller*, 288 Kan. 280, 200 P.3d 467 (2009), involving a challenge to the constitutionality of K.S.A. 26-513(c) dealing with partial takings. An action was first filed by Harsh in state district court after the eminent domain proceeding had been filed by the Kansas Department of Transportation. An action was also filed in federal district court challenging the constitutionality of K.S.A. 26-513(c). A decision by the state district court to deny a stay of the proceeding and to order the jury trial to proceed on damages was upheld.

See also *Miller v Preissor*, 295 Kan. 356, 284 P.3d 290 (2012), where the Court said a challenge to the reasonableness of a Department of Transportation decision regulating traffic flow could not be raised in an eminent domain proceeding.

§10.78 E. Appointment of Appraisers

At the hearing on the petition, after granting the petition, the judge appoints three appraisers at least two of whom shall have experience in valuation of real estate. The judge is required to entertain suggestions from any party in interest relating to the appointment of the appraisers. The judge then sets a date for the appraisers to provide a written report on the damages and compensation resulting from the taking. Although the statute requires the written report to be filed within 45 days of appointment of the appraisers, the time can be extended. See K.S.A. 26-504.

The Court has broad discretion in appointing the appraisers, who act as officers of the court. See *Schwartz v Western Power and Gas Co.*, 208 Kan. 844, 850, 494 P.2d 1113 (1972), where the Court said that the hearing affords the landowner an opportunity to participate in the selection of the appraisers. One problem that existed prior to the adoption of the eminent domain procedure act was the routine appointment of appraisers suggested by the condemner only.

The appraisers are placed under oath and receive written instructions from the judge concerning their duties, which include, among others, to refrain from ex parte meetings or discussions. Incidental contact to verify factual information is allowed if the other party is notified and allowed to attend and provided all written material provided to an appraiser to the adverse party. See K.S.A. 26-505. The appraisers must actually view the property, and must hold a public hearing at which the condemner and interested parties give testimony. See K.S.A. 26-506. Under K.S.A. 26-512, the condemner or its agents are authorized to enter upon the land and make examinations, surveys, and maps.

Professor Spring describes the hearing as a conference between the owner, appraiser and condemner. Spring, *Comments on Practice and Procedure in Eminent Domain*, 35 J.B.A.K. 7 (1966). The hearing requires 14 days' notice by publication and mailing under K.S.A. 26-506. The form of notice is prescribed in K.S.A. 26-506(b).

In *National Compressed Steel Corporation v Unified Government of Wyandotte County/Kansas City, Kansas*, 272 Kan. 1239, 38 P.3d 723 (2002), the Court held that subsoil testing was beyond the scope of the examination of making surveys, maps, and examinations for the property authorized by K.S.A. 26-512. The unified government had filed an eminent domain proceeding and then filed a motion to do extensive environmental testing. The Supreme Court said environmental

contamination is relevant to appraising the value of property but subsoil testing was beyond the scope of K.S.A. 26-512.

§10.79 F. Appraisers' Report — Personal Property Removal

When the written report is complete, it is filed with the court under K.S.A. 26-505. The appraisers give notice to the condemner, who in turn is required to notify interested parties. After the appraisers' report is filed, the condemning authority has 30 days in which to proceed with the action by paying into court the amount of the appraisers' award plus costs, including appraiser's fees. K.S.A. 26-507(a). Note: If the property contains a defendant's personal property, a defendant shall have 14 days from the date of such payment to the clerk of the district court to remove the personal property. The clerk of the district court is required to notify interested parties that the appraisers' award has been paid and that the defendant has 14-days from the payment date to remove personal property. Appraisers' fees and expenses are determined by the court under K.S.A. 26-505.

Payment of the award vests the condemning authority with title to the property taken, including the immediate right to possession subject to the 14-day window to remove personal property. See K.S.A. 26-507(a). See also *Kansas Gas and Electric Co. v Winn*, 227 Kan. 101, 605 P.2d 125 (1980).

The appraisers' report must show "what the condemner takes and what the landowner parts with." See *Kansas Power and Light v Ritchie*, 11 Kan. App. 2d. 237, 239, 722 P.2d 1120 at 1123 (1986). When issues arise as to what interest was condemned, the appraisers' report is controlling. See *Spears v Kansas City Power and Light*, 203 Kan. 520, 455 P.2d 496 (1969), where the landowner claimed the utility company had acquired only an easement for overhead transmission lines in an eminent domain proceeding and filed an inverse condemnation action to recover additional damages for construction of underground lines.

The court clerk is required to notify the landowners within 14 days of payment under K.S.A. 26-510(a). The award is payable to the clerk of the district court, not to the landowners themselves. See *Osborne County v Kulich*, 245 Kan. 107, 774 P.2d 980 (1989). Upon order of the judge, an owner may withdraw the award without prejudice to his right to appeal the amount of the award under K.S.A. 26-510(b).

§10.80 G. Abandonment of Eminent Domain Proceeding

A condemnation action is considered to be abandoned as to any tracts for which payment of the appraisers' award is not made within 30 days of filing of the report. Judgment can be entered against the condemner for costs, appraiser's fees, and the owner's expenses with respect to abandoned proceedings under K.S.A. 26-507(b). In deciding whether an action has been abandoned, so as to justify awarding costs to the landowner, courts have been guided by the theory that this provision was intended to prevent harassment of landowners through the means of filing and dismissing eminent domain actions. See *City of Westwood v M & M Oil Co.*, 6 K.A.2d 48, 626 P.2d 817 (1981), where the Court said that the purchase of land listed in an eminent domain petition by a condemner did not constitute abandonment of the action within the meaning of K.S.A. 26-507(b); and that this section should apply only where harassment is possible. See also *Osborne County Comm'n. v Kulich*, 245 Kan. 107, 774 P.2d 980 (1989), where the fact that the condemner immediately filed another successful proceeding following involuntary dismissal due to a procedural flaw indicated the action was not abandoned. Where an action is abandoned, costs may be awarded only if the

abandonment occurs after the filing of the appraisers' report. In *In re Condemnation by City of Mission v Bennett*, 7 K.A.2d 621, 649 P.2d 406 (1982), costs were not awarded to the landowner where the condemnation was dismissed prior to filing of the appraisers' report, even though harassment was possible.

Costs recoverable by landowner under K.S.A. 26-507(b) include reasonable attorney's fees. See *City of Wichita v B G Products, Inc.*, 252 Kan. 367, 845 P.2d 649 (1992), where an attorney was representing a landowner on a contingent fee basis, and the Court determined a reasonable fee based on quantum meruit was due where the plaintiff had abandoned the condemnation.

§10.81 H. Appeal from the Condemnation Award — Judicial Stage

Either party has 30-days from the filing of the appraisers' report to appeal under K.S.A. 26-508. The 30-day period for appeal begins to run on the date the appraisers' report is due (K.S.A. 26-504) or the date the report is actually filed, whichever is later. See *City of Shawnee v Webb*, 236 Kan. 504, 694 P.2d 896 (1985). The 30-day period is jurisdictional.

The Court in *In re Condemnation of Land v Stranger*, 280 Kan. 576, 123 P.3d 731 (2005), held that K.S.A. 26-508 required both the filing of a written notice of appeal and the payment of the docket fee.

An amendment to K.S.A. 26-508 in 2006 clarified that the appeal is perfected solely by filing the notice of appeal. See also *Miller v Bartle*, 283 Kan. 108, 150 P.3d 1282 (2007), where the Court said a separate appeal was necessary to litigate a Fifth Amendment claim regarding just compensation.

The Court has no authority to extend the time period or to permit late filing. See *City of Kansas City v Crestmoore Downs*, 7 K.A.2d 515, 644 P.2d 494 (1982), where the Court held that K.S.A. 60-206(b) allowing enlargement of time and K.S.A. 60-260(b) allowing late filing in instances of excusable neglect do not apply to eminent domain actions.

Within seven days of perfecting the appeal, copies of the notice of appeal must be mailed to all parties affected by the appeal. See K.S.A. 26-508. An appeal by any interested party brings the issue of damages to all interests before the Court for a trial de novo. The statute, in effect, serves as a cross-appeal for other interested parties. See *City of Wellington v Miller*, 200 Kan. 651, 438 P.2d 53 (1968), where the Court said a city could not voluntarily dismiss its appeal over the objection of landowners and, *Dotson v State Highway Comm'n*, 198 Kan. 671, 426 P.2d 138 (1967), where the holder of the unrecorded interest in land being condemned was said to be also bound by appeal.

As noted earlier, the first stage of the eminent domain proceeding is administrative rather than judicial. Filing an appeal under K.S.A. 26-508 commences the judicial stage of the process. *Urban Renewal Agency v Decker*, 197 Kan. 157, 415 P.2d 373 (1966). The terminology used with regard to damages is symbolic of the difference. The first stage of the process results in an *award* of damages by the court appointed appraisers. If the damages determined on appeal are an amount different from the appraisers' award, a *judgment* is entered. See K.S.A. 26-511.

The issue on appeal under K.S.A. 26-508 is the sufficiency of the damages for the entire tract. See *Manhattan v Kent*, 228 Kan. 513, 618 P.2d 1180 (1980). Division of the damages among interested landowners is handled in a separate judicial proceeding under K.S.A. 26-517. The appeal results in a trial de novo on the question of damages. See *USD No. 464 v Porter*, 234 Kan. 690, 676 P.2d 84 (1984), where it was held that court rulings prior to appeal are not *res judicata* as to

reconsideration of issues at the de novo trial.

Mailing copies of the notice of appeal under K.S.A. 26-508 is not needed to perfect an appeal from an appraiser's award and therefore is not jurisdictional to an appeal. Notice of appeal which was served upon the condemner but not on other interested parties did not defeat the appeal. Although the obligation for mailing of the notice of appeal to other parties is upon the appealing party. See *City of Wichita v 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 (1993).

The Court in *Landau Investment Company v City of Overland Park*, 261 Kan. 394, 930 P.2d 1065 (1997), allowed the amendment of the condemnation petition to correct a faulty legal description of the drainage easement to be taken upon the appeal of the condemnation award. The Court allowed the amendment due to the unique circumstances of the case and upon consideration of K.S.A. 26-502 which provides that a defect in form in the petition which does not impair substantial rights of the parties shall not invalidate any proceeding.

See *Neighbor v Weston*, 301 Kan. 916, 349 P.3d 469 (2015), where the Court ruled the saving statute (K.S.A. 60-518) applied in appeals from condemnation awards.

§10.82 I. Measure of Damages: Unit Rule

The right to damages in an eminent domain proceeding stems from the *United States Constitution's* guarantee of compensation for the taking of property. Thus, the goal of both the appraisers and the appeal under K.S.A. 26-508 is to determine the value of the property or interest taken. In a condemnation where the taking involves an entire interest or tract, the task of the court on appeal is to determine a single figure: The value of the property as of the date of taking. See K.S.A. 26-513(b) and (c). Where only a portion of a tract or interest is taken, two figures must be determined: the value of the entire tract or interest immediately before the taking and the value of the remaining portion immediately after the taking. The measure of what is taken is the difference between these two figures. See K.S.A. 26-513(c).

The Court in *Miller v Gacier Development Co.*, 284 Kan. 477, 161 P.3d 730 (2007), upheld an award of $800,000 for a 33-acre plus tract in Kansas City taken as part of a highway improvement project. The landowner's appraiser estimated the value of the tract to be between $4 million and $4.6 million. The Court rejected the landowner's arguments, among other things, that the admission of the purchase price for the land was in error and the refusal to admit a study done for the Kansas Department of Transportation a year earlier which estimated the cost of the landowner's property at $2.5 million.

See also *Mooney v City of Overland Park*, 283 Kan. 617, 153 P.3d 1252 (2007), where the Court upheld an award of $620,000. The landowner claimed the Court abused its discretion by not admitting testimony about a prior sale of the landowner's property.

In *City of Mission Hills v Sexton*, 284 Kan. 414, 160 P.3d 812 (2007), the Court upheld an award of $10,900 for a partial taking of the landowner's property for two temporary easements for a sewer rehabilitation project. The landowners argued the damage was nearly $500,000. The landowners argued that the rental value methodology was contrary to law and argued various evidentiary flaws including the denial of a new trial because of testimony of the city administrator which stated the actual possession of the easement areas was significantly less than what was stated in the petition.

In *Butler County Rural Water District No. 8 v Yates*, 275 Kan. 291, 64 P.3d 357 (2003), the Court upheld a jury award of $5,000 for a partial taking of a property owner's right to enforce a

restrictive covenant prohibiting the location of the water district water tower to be located on property just west of that of the landowners. The Court held that the condemner's expert testimony opining a difference of zero dollars in the before and after value of the partially taken property was properly admitted to the jury. The landowners had asked for an award of $119,000 in damages.

The Court in *Carlson v Westoff*, 269 Kan. 128, 3 P.3d 1268 (2000), involving a partial taking and a highway easement, said that neither additur nor remitter was allowed. The property owner's compensation is the difference between the value of the entire tract immediately before the taking and the value of the remaining property immediately after the taking. For a verdict to be upheld, the jury's findings must be within the range of the opinion testimony. The Court said that when the jury award is not within these parameters, the district court must order a new trial—it cannot use additur to bring the jury award within the range of opinion testimony.

K.S.A. 26-513(d) lists 15 factors that may be considered in arriving at the proper amount of compensation. These factors apply to the property taken and/or to the property remaining as fits the situation. The ultimate goal of the court is to arrive at the "fair and reasonable market value for the best and most advantageous use to which the property may be put as of the date of the taking." See *Urban Renewal Agency v Spines*, 202 Kan. 262, 264, 447 P.2d 829 (1968).

A definition of "fair market value" appears in K.S.A. 26-513 as follows:

> . . . 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. 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."

In *Garrett v City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996), an inverse condemnation case, the Court noted that the calculation of damages under K.S.A. 26-513 applied to calculating damages in inverse condemnation proceedings as well.

Courts have stressed that the 15 items in K.S.A. 26-513 are only factors to be considered in arriving at a single, or unit, value for the property taken. Under the unit rule "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." See *Rostine v City of Hutchinson*, 219 Kan. 320, 323, 548 P.2d 756, 760 (1976). This unit approach is preferred to a "summation approach" where items contributing to the value of property are valued separately and then totaled. See *City of Manhattan v Kent*, 228 Kan. 513, 618 P.2d 1180 (1980).

In *Creason v Unified Government of Wyandotte County*, 272 Kan. 482, 33 P.3d 850 (2001), the Court found a trial judge had committed an error by informing a jury to disregard testimony about the value of a gas well on the property. The Court noted that separate values cannot be assigned to the value of mineral rights but evidence of how the value of property as a whole is enhanced by a natural asset such as a gas well may be introduced.

The takings clause of the Fifth Amendment does not prohibit paying more than just compensation. See *State ex rel. Tomasic v Unified Government of Wyandotte County/Kansas City*, 265 Kan. 779, 955 P.2d 1136 (1998), where the Court held that a state law providing a 25% premium in addition to and independent of just compensation for property owners who were

displaced by the Wyandotte County auto speedway project was proper. The Court dismissed arguments the premium was not permitted under the Fifth Amendment or that it violated equal protection guarantees. The Court noted that Kansas law provided added compensation in other instances, such as relocation assistance discussed later.

In *Board of County Commissioners of Johnson County v Smith*, 280 Kan. 588, 123 P.3d 1271 (2005), the Court said the questions of whether to determine the zoning classification of property and the actual determination for the zoning classifications itself were for the jury.

§10.83 J. Methods of Valuation — No Preferred Method Any Longer

Application of the unit rule must be coordinated with the method used to value the property. There are three generally accepted methods of valuation: The market data (or comparable sales) method, the replacement cost method, and the capitalization of income method. These methods are also used to value property for ad valorem tax purposes. See Chapter 9 also regarding valuation of property.

The preferred method of valuation is no longer the market data approach, which relies on the use of comparable sales to establish value.

The Court in *City of Wichita v Eisenring*, 269 Kan. 767, 7 P.3d 1248 (2000), noted that the 1999 amendments to the definition of "fair market value" in K.S.A. 26-513(e) place all three methods of determining value on an equal footing, thus overruling a line of earlier cases recognizing the market data approach as the favored method of valuation. The city had challenged a jury verdict valuing the property at $767,250, arguing it was an error to admit evidence of the income method in determining the fair market value of the property. The property owner's expert valued the 75.9 acres of land used as a sand and gravel quarry and where a rock crushing operation also existed. The Court noted that once a witness has qualified as an expert land appraisal witness in a condemnation action, the court cannot regulate the factors he or she uses, or the mental process used at arriving at a conclusion. These matters can only be challenged on cross examination. The Court upheld the verdict.

Other valuation methods may be used for property that is not ordinarily traded on the open market, such as churches and schools. See *City of Wichita v USD No. 259*, 201 Kan. 110, 439 P.2d 162 (1968), where the Court held that market data valuation was not applicable to condemnation of a school. The measure of damages when property dedicated to public use is taken is the cost of substitute facilities, defined as equivalent, necessary replacements. See *Whitewater River Watershed v Butler Rural Electric Cooperative*, 6 K.A. 2d 8, 626 P.2d 228 (1981).

Property need not be devoted to a public use to qualify for an alternative valuation method. The test is whether "the property is so unique that there is no ascertainable market and there are no sales of reasonably similar or comparable property." See *Ellis v City of Kansas City*, 225 Kan. 168, 172, 589 P.2d 552, 556 (1979), involving the only horseradish plant between Denver and St. Louis was a unique facility where the Court said that replacement cost or capitalization of income method of valuation could be used. But see *In re Central Kansas Electric Cooperative, Inc.*, 224 Kan. 308, 582 P.2d 228 (1978), involving a swine production facility not considered unique where the market data method was preferred. The pattern jury instructions recognize the possibility of an alternative valuation method to take into account a special use of the property by the owner. See *Skelly Oil Co. v Urban Renewal Agency*, 211 Kan. 804, 508 P.2d 954 (1973), where a parking lot and filling station were said not to be a special use and, therefore, market valuation was appropriate.

The Court in *In re Application of City of Great Bend for Appointment of Appraisers*, 254 Kan. 699, 869 P.2d 587 (1994), upheld the admissibility of expert testimony based upon a cost approach rather than a market data approach due to the unique nature of the property taken, *i.e.* a hog farming operation also used as a farm residence, and as the headquarters for a large grain farming operation, a custom feed mixing business and a farm-spraying business.

See *Manhattan Ice and Cold Storage, Inc. v City of Manhattan*, 294 Kan. 60, 274 P.3d 609 (2012), where the Court rejected the corporate argument that the replacement cost method should have been used to determine the value of Manhattan Meats processing plant. The Court upheld a $3.2 million appraiser award for three tracts which included the meat processing plant. The landowner argued the total fair market value of the three tracts of land was $10 million. The trial Court would not allow the president to testify regarding various components of the replacement cost appraisal because the president was not qualified as an expert.

§10.84 K. Undivided Fee Rule

The most difficult issues in eminent domain appeals arise in instances where the property being taken is subject to some form of divided ownership; *e.g.*, all or part of the property has been leased. The Eminent Domain Procedure Act adopts a bifurcated procedure in which allocation of damages among the various owners is postponed until the second stage. At the first stage, the property is valued as though there were a single owner. This valuation is accomplished by the appraisers, or at the trial on damages if an appeal is taken under K.S.A. 26-508. Division of the damages among the owners takes place at the second stage.

Valuation without regard to divided ownership is called the undivided fee rule. This is analogous to the principle of unitary assessment followed in valuation of property for ad valorem tax purposes. A single value is figured for a piece of property, from which one tax bill is prepared. Allocation of the tax due among owners of interests in the land is left up to the owners.

The undivided fee rule has the effect of treating all interested parties as one owner for purposes of the trial on damages. This is based on the assumption that all of the interested landowners have a common goal in seeking the largest possible damage award. See *City of Manhattan v Kent*, 228 Kan. 513, 618 P.2d 1180 (1980). While this may be true, the owners may disagree about how evidence of value should be presented. Resolution of such issues is left to the discretion of the trial judge.

See *Miller v Preisser*, 295 Kan. 356, 284, P3d290 (2012), where the Court said that under the doctrine of assemblage, unity of ownership at the time of the taking was not required. Assemblage is a theory of valuation that allows consideration of the condemned property as an integrated economic unit with an adjacent property.

See also *Kansas City Mall Associates Inc. v Kansas*, 294 Kan. 1, 272 P.3d 600 (2012). The Court held that assessed valuation for tax purposes is not admissible as evidence in an eminent domain action, but statements made by the property owner about the value of the property in an appeal of a tax assessment that are inconsistent with the owner's position in an eminent domain trial are admissible as an admission against interest.

§10.85 L. Evidence of Value

As a general rule, the trial court has broad discretion as to the evidence allowed at the trial on damages. See *City of Shawnee v Webb*, 236 Kan. 504, 694 P.2d 896 (1985). Such issues as how many witnesses may testify, and whether the jury should view the property are within the discretion

of the trial court. See *Schwartz v Western Power & Gas Co.*, 208 Kan. 844, 494 P.2d 1113 (1972). Because the appeal functions as a trial de novo, the jury may not be told the amount of the award by the court appointed appraisers. See *Hudson v City of Shawnee*, 246 Kan. 395, 790 P.2d 933 (1990).

The landowner is allowed to present his opinion on the value of the property taken. In accordance with the principles described above, evidence relating to value of property taken, or in the case of a partial taking, values before and after taking, is appropriate. Evidence of factors affecting value is permissible as well. See, *e.g.*, *Mason v Kansas City Power and Light Co.*, 7 K.A.2d 344, 642 P.2d 113 (1982), where evidence of the general public's fear of high voltage transmission lines was deemed admissible.

See *City of Wichita v Denton*, 296 Kan. 244, 294 P.3d 207 (2013), an eminent domain case involving the city of Wichita's condemnation of a tract of land owned by Denton. A portion of the tract was leased by Clear Channel Outdoor, Inc. for the operation of an electronic billboard. During the condemnation proceedings, the value of the tract was determined to be $1,075,600 with no compensation given for the billboard or for the advertising income produced by Clear Channel's leasehold. The city and Denton accepted the appraisers' award and Clear Channel appealed to district court. The district court granted summary judgment in favor of the city, and the district court ruling was appealed by Clear Channel.

Clear Channel argued that the billboard structure was affixed to the property and was therefore a fixture and part of the realty and not personal property. They also argued that the advertising income was also a factor to be considered in valuing the tract. The Court rejected both arguments. Rental income from property, however, is a factor in valuing property for eminent domain.

The jury's finding on value must be within the range of the opinion testimony. Where there has been a partial taking, the jury's findings as to both before and after values must be within the range of the evidence. See *Mettee v Kemp*, 236 Kan. 781, 696 P.2d 947 (1985), where a jury award was overturned where the after value was outside range of evidence, even though the before value and differences were within the range of testimony. See *Small v Kemp*, 240 Kan. 113, 727 P.2d 904 (1986). See also *Carlson v Westaff*, 269 Kan. 128, 3 P.3d 1268 (2000), where the Court said neither additur nor remitter was permitted to bring a jury award within the range of testimony–only a new trial is permitted.

The general rule is that fair market value is determined without considering any increase or decrease in value due to the project for which condemnation is sought. See *Hudson v City of Shawnee*, 246 Kan. 395, 790 P.2d 933 (1990). This rule does not apply, however, to situations in which there is only a partial taking. In *Van Horn v City of Kansas City*, 249 Kan. 404, 819 P.2d 624 (1991), the city condemned a 10-foot permanent right-of-way for installation of a sewer along an existing two-lane road. On appeal from the condemnation award, the city relied on the *Hudson* rule in objecting to testimony concerning possible future expansion of the road to four lanes. The Court said that 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. 249 Kan. at 406. The Court upheld the award, noting that if "decreased market value because of overhead power lines is relevant, then certainly decreased market value because of increased traffic flow is relevant." 249 Kan. at 408. See *Ryan v Kansas Power & Light Co.*, 249 Kan. 1, 6, 815 P.2d 528 (1991), which said Kansas follows the minority rule that "any evidence of fear in the market place obviously affects value and is admissible regardless of its reasonableness so long as the fear is not the personal fear of the witness."

Evidence of underground petroleum contamination was said to be admissible in an eminent domain proceeding in determining the fair market value of property taken. See *City of Olathe v Stott*, 253 Kan. 687, 861 P.2d 1287 (1993).

The Court in *In re Application of City of Great Bend for Appointment of Appraisers*, 254 Kan. 699, 869 P.2d 587 (1994), upheld the admissibility of an expert's testimony which was based, in part, upon rainfall tables as to the value of a pending easement. The test for determining whether a trial Court abused its discretion is whether any reasonable person would agree with the decision.

The Court in *City of Overland Park v Dale F. Jenkins Revocable Trust*, 263 Kan. 470, 949 P.2d 1115 (1997), upheld a condemnation award between a lessor and lessee to compensate the lessee, a barber shop owner, for extra rent he was forced to pay due to the taking.

§10.86 M. Division of Condemnation Award

As noted earlier, the first stage of an eminent domain proceeding is the determination of the total compensation to be paid for the property or interest taken. This amount is set by the appraisers' report unless an appeal is taken under K.S.A. 26-508. An appeal from the appraisers' award results in a trial to determine the total compensation to be paid. Under the undivided fee rule, compensation is figured as though there were only one owner of the property. At the first stage of the proceeding, the various landowners are assumed to have a common interest in obtaining the largest possible damages from the condemner.

Division of the condemnation award among various interested landowners, *e.g.*, landlord and tenant, is accomplished in a second stage of the eminent domain proceeding. The condemning authority is no longer a party once the proceeding reaches the second stage. See *Urban Renewal Agency v Naegele Outdoor Advertising Co.*, 208 Kan. 210, 491 P.2d 886 (1971). As a practical matter, the appraisers' award or the final judgment may indicate a preliminary division of the award among interested landowners. See for example, K.S.A. 26-510(b), which allows landowners to withdraw the amount paid to the clerk of the court as their interests are determined by the appraisers' report without prejudice to the owners' right to appeal.

See *GFT Lenexa LLC v City of Lenexa, Kan.*, 310 Kan. 976, 453 P.3d 304 (2019), where the Court rejected an inverse condemnation claim by a sublessor of commercial property. The city of Lenexa filed a condemnation action but failed to list GFT Lenexa as a defendant. The sublessee and lessor failed to assert their rights in the eminent domain proceeding dealing with the division of the condemnation award. The Court said a party asserting a claim of inverse condemnation must assert not only that the party owns an interest in the real property but that the condemner has taken all or part of that interest. The Court noted the landowner was fully compensated.

When a dispute arises among the landowners, any party in interest may petition the district court to determine the final distribution of the appraisers' award or final judgment. See K.S.A. 26-517. K.S.A. 26-517 does not specify when a motion to determine the distribution of the award should be filed.

The Kansas Supreme Court in *Urban Renewal Agency v Lane*, 208 Kan. 210, 216, 491 P.2d 886 (1971) held:

> "A party named as a party in interest in the appraisers' award in an eminent domain proceeding has a reasonable time, after it has notice of dispute as to division of the award, within which to apply for an order of distribution under 26-517 and is entitled to reasonable

notice before being foreclosed by an order of distribution from participation in the award."

K.S.A. 26-517 requires an allocation of the final award in proportion to the value of the interests owned. See *City of Manhattan v Signor*, 244 Kan. 630, 772 P.2d 753 (1989), involving a pro rata allocation between landlord and tenant. The Court said that the tenant was not entitled to preference over the landlord. This necessitates separate valuation of the interests owned by interested parties. The undivided fee rule, which governs the appraisal and appeal stages, prohibits separate valuation. The Court may conduct an evidentiary hearing on the issue of the separate valuation of the interests. This is a judicial function; an interested party may appeal from a division order. See *City of Manhattan v Kent*, 228 Kan. 513, 618 P.2d 1180 (1980).

The standard of review is whether the trial courts findings "are supported by substantial competent evidence and whether the findings are sufficient to support the trial courts conclusions of law." See *City of Topeka v Estate of Mays*, 245 Kan. 546, 549, 781 P.2d 721 (1989), where the Court said that the trial judge did not err in allocating a major portion of a condemnation award to a tenant under a forty-four-year lease who was obligated to pay full rent for condemned land. The division ordered must conform to the evidence in the same manner as the final judgment. See *City of Manhattan v Signor*, 244 Kan. 630, 772 P.2d 753 (1989), where the Court said the lower court erred in allocating 84% of the award to the landlord where expert testimony supported valuation of the landlord's interest in range of 34% to 45.72% of the total award.

See *City of Overland Park v Dale F. Jenkins Revocable Trust*, 263 Kan. 470, 949 P.2d 1115 (1997), where the Court upheld an extra portion of the total award to the lessee for the extra rent he would be forced to pay due to the taking. See also *Kansas Gas and Electric Company v Will Investments Inc.*, 261 Kan. 125, 928 P.2d 73 (1996), where the Court said that the owner of a retained easement taken by the electric utility was entitled to the entire appraiser's award. The owner of the retained easement had sold the property less the retained easement to another party who sought a portion of the award.

In *City of Manhattan v Galbraith*, 24 K.A. 2d 327, 945 P.2d 10 (1997), the Court awarded the entire condemnation amount to the property owners and none to the property lessee, Taco Tico and the sublessee. The lease agreement contained a provision that the tenants' interest terminated when title vested in the condemner. See *City of Roeland Park v Jason Trust*, 281 Kan. 668, 132 P.3d 943 (2006), where the Court said a lease agreement was controlling in terms of apportionment of a condemnation award between a lessee and its sublessee.

§10.87 N. Attorney Fees and Costs

Eminent domain actions follow the general rule that costs and attorney's fees may not be recovered unless specifically authorized by statute. The concept of just compensation for a taking under eminent domain does not require a contrary result. See *Schwartz v Western Power & Gas Co.*, 208 Kan. 844, 494 P.2d 1113 (1972). The Eminent Domain Procedure Act contains two sections specifically authorizing recovery of attorney's fees: K.S.A. 26-507 and 26-509. K.S.A. 26-507(b) deals with abandonment of condemnation proceedings discussed earlier.

K.S.A. 26-509 provides for the recovery of attorney's fees when the condemner appeals from the appraisers' award, if the trial results in a final judgment greater than the appraisers' award. See, *e.g.*, *City of Wichita v Chapman*, 214 Kan. 575, 521 P.2d 589 (1974), (provision authorizing attorney fees added in 1972). Where both parties appeal, attorney's fees are not recoverable by the

prevailing party. See *In re Central Kansas Electric Cooperative, Inc.*, 224 Kan. 308, 582 P.2d 228 (1978), where the Court said the award of attorney's fees under K.S.A. 26-509 was improper where both landowner and condemner appealed and landowners attempted to drop the appeal five minutes before going to trial to make the section applicable. The amount of attorney's fees is largely within the discretion of the trial judge. See *City of Wichita v Chapman*, 214 Kan. 575, 521 P.2d 589 (1974).

Although K.S.A. 26-509 states that attorney fees may be awarded when the condemner appeals and "the jury" renders a verdict for the landowners greater than the appraisers' award, the statute applies to bench trials as well. See *Board of County Comm'rs of Sedgwick County v Miser Living Trust*, 250 Kan. 84, 107, 825 P.2d 130 (1992), where the Court said to differentiate between a jury trial and a trial to the Court, in the attorney fees context, does not have the support of policy or logic.

§10.88 O. Interest

If the final judgment for compensation to the landowners exceeds the amount of the appraisers' award, the judge enters judgment against the condemner in the amount of the difference. See K.S.A. 26-511. Conversely, if the final judgment is less than the appraisers' award, the judge enters judgment in favor of the condemner. In either situation, the judgment bears interest from the date the appraisers' award was paid into court until the date of judgment. K.S.A. 26-511(c) specifies that the interest rate is the general interest rate for judgments found in K.S.A. 16-204.

Interest after the date of judgment is not specifically provided for in K.S.A. 26-511, but is available under the general interest statute for judgments. See K.S.A. 16-204. See also *Herman v City of Wichita*, 228 Kan. 63, 612 P.2d 588 (1980), where the Court said K.S.A. 26-511 was not applicable to inverse condemnation action. The Court said the landowner was entitled to interest from the date of taking at the rate in K.S.A. 16-201. Attorney's fees and litigation expenses where held to be payable to landowners in an inverse condemnation proceeding in *Bonanza Inc. v Carlson*, 269 Kan. 705, 9 P.3d 541 (2000). Landowners filed an inverse condemnation action against the Kansas Department of Transportation (KDOT) after KDOT failed to pay an appraisers award into the court after an eminent domain proceeding had been filed. The Court held, that under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and federal administrative rules and under the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act, K.S.A. 58-3501 *et seq.*, and Kansas administrative rules, attorney's fees and costs were allowed in inverse condemnation proceedings regardless of whether the condemnee is displaced.

§10.89 P. Relocation Assistance — When

K.S.A. 26-518 provides that whenever federal funding is not involved and real property is acquired by a condemning authority through negotiation in advance of a condemnation action and which acquisition will result in the displacement of any person, the condemning authority shall pay relocation assistance.

See *Nauheim v City of Topeka*, 309 Kan. 145, 432 P.3d 647 (2019), where the Court said that whether negotiation for acquisition of property is in advance of condemnation is a question of fact that must be shown by a preponderance of evidence.

K.S.A. 58-3501 *et seq.* requires relocation assistance to be paid for any program or project undertaken by the state of Kansas, any agency, or political subdivision when federal financial assistance is a part of the project. Relocation assistance must be paid when there is a displacement of

any person by acquisition of real property, or by the direct result of building code enforcement activities, rehabilitation or demolition programs. Under K.S.A. 58-3508, assistance must be paid when any condemning authority through negotiation in advance of condemnation or through a condemnation action will displace a person when no federal aid is involved. Relocation payment as provided under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act will be deemed fair and reasonable.

K.S.A. 58-3508(a)(4) provides a mechanism for paying 75% of the relocation assistance for displaced persons in advance of actual relocation after title vests in the condemning authority. An appeal process is also established by K.S.A. 58-3509 for persons entitled to relocation benefits before an independent hearing examiner with a de novo appeal to the district court.

See *Estate of Kirkpatrick v City of Olathe*, 289 Kan. 554, 215 P.3d 561 (2009), an inverse condemnation case involving damages to a landowner's property due to the construction of a street roundabout which altered the flow of groundwater. The Court upheld an award of attorney's fees ($37,375) and litigation expenses ($13,291.75). The Court noted that when public improvements are funded in part by the federal government, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.* requires reimbursement of attorney's fees and other litigation expenses.

In *Frick v City of Salina*, 289 Kan. 1, 208 P.3d 739 (2009), the Court said K.S.A. 58-3509(a) requires a *trial de novo*, of an administrative decision regarding relocation benefits. The standard of review is one requiring the district court to make independent findings of fact and conclusions of law based on the record of proceedings before the administrative hearing officer.

K.S.A. 26-518 provides that whenever federal funding is not involved, and real property is acquired by any condemning authority through negotiation in advance of a condemnation action or through a condemnation action, and which acquisition will result in the displacement of any person, the condemning authority shall provide the displaced person, as defined in the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, fair and reasonable relocation payments and assistance to displaced persons.