

## Article 2.

### Condemnation Proceedings by Private Condemnors.

#### **§ 40A-19. Proceedings by private condemnors.**

Any private condemnor enumerated in G.S. 40A-3(a), possessing by law the right of eminent domain in this State shall have the right to acquire property required for the purposes of its incorporation or for the purposes specified in this Chapter in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s. 13; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1899, c. 64; 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C.S., s. 1715; 1951, c. 59, s. 1; 1981, c. 919, s. 1.)

#### **§ 40A-20. Petition filed; contents.**

For the purpose of acquiring property a condemnor listed in G.S. 40A-3(a), or the owner of the property sought to be condemned, may present a petition to the clerk of the superior court of any county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. The petition shall be signed and verified. If filed by the condemnor, it must contain a description of the property which the condemnor seeks to acquire; and it must state that the condemnor is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of its public business, and the specific use of the property; and that the property described in the petition is required for the purpose of conducting the proposed business. The petition, if filed by the condemnor, must also contain a statement as to whether the owner will be permitted to remove all or a specified portion of any buildings, structures, permanent improvements, or fixtures situated on or affixed to the land. The petition, whether filed by the condemnor or the owner, must also state the names and places of residence of all other owners, so far as the same can by reasonable diligence be ascertained, or those who claim to be owners of the property. If any such persons are infants, their ages, as near as may be known, must be stated; and if any such persons are incompetents, inebriates or are unknown, that fact must be stated, together with any other allegations and statements of liens or encumbrances on the property which the condemnor or the owner may see fit to make.

Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property. (1871-2, c. 138, s. 14; Code, s. 1944; 1893, c. 396; Rev., s. 2580; 1907, c. 783, s. 3; C.S., s. 1716; 1981, c. 919, s. 1.)

#### **§ 40A-21. Notice of proceedings.**

Notice of all proceedings brought hereunder shall be filed with the clerk of superior court of each county in which any part of the land is located in the form and manner provided by G.S. 1-116, and the clerk shall index and cross-index this notice as required by G.S. 1-117. In the record of lis pendens and in the judgment docket required by G.S. 7A-109 the clerk shall always index the name of the condemnor as the plaintiff and the name of the property owner as the defendant irrespective of whether the condemning party is the plaintiff or defendant. The filing of such notice shall be constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the condemnor shall take all property condemned under this Article free of the claims of any such person. (1969, c. 864; 1981, c. 919, s. 1.)

#### **§ 40A-22. Service.**

A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose estates or interests are to be affected by the proceedings, at least 10 days prior to the hearing of the same by the court. (1871-2, c. 138, s. 14; Code, s. 1944; Rev., s. 2581; C.S., s. 1717; 1981, c. 919, s. 1.)

**§ 40A-23. Service where parties unknown.**

If the person on whom service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then service may be made by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in accordance with the provisions of G.S. 1A-1, Rule 4(j)(9)c. In such cases the State Treasurer shall be served as custodian of the Escheat Fund and may become a party to the action. (Code, s. 1944, subsec. 5; Rev., s. 2582; C.S., s. 1718; 1971, c. 1093, s. 18; 1981, c. 919, s. 1.)

**§ 40A-24. Orders served as in special proceedings in absence of other provisions.**

In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this Chapter may be made as in other special proceedings. (Code, s. 1944, subsec. 7; Rev., s. 2583; C.S., s. 1719; 1981, c. 919, s. 1.)

**§ 40A-25. Answer to petition; hearing; commissioners appointed.**

On presenting such petition to the clerk of superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same. The clerk shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of three commissioners and shall fix the time and place for the first meeting of the commissioners. Each commissioner shall be a resident of the county wherein the property being condemned lies who has no right, title, or interest in or to the property condemned, is not related within the third degree to the owner or to the spouse of the owner, is not an officer, employee or agent of the condemnor, and is disinterested in the rights of the parties in every way. (1871-2, c. 138, s. 15; Code, s. 1945; Rev., s. 2584; C.S., s. 1720; 1981, c. 919, s. 1.)

**§ 40A-26. Powers and duties of commissioners.**

The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the property in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the clerk or pursuant to adjournment, they shall cause 10 days' notice of such meeting to be given to the parties who are affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing. After the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of the commissioners being present and acting, shall ascertain and determine the compensation which ought justly to be made by the condemnor to the owners of the property appraised by them. The commissioners shall determine the compensation to be awarded in accordance with the principles established by Article 4 of this Chapter. They shall report the

same to the clerk within 10 days. (1871-2, c. 138, ss. 16-18; Code, s. 1946; 1891, c. 160; Rev., s. 2585; C.S., s. 1721; 1981, c. 919, s. 1.)

**§ 40A-27. Form of commissioners' report.**

When the commissioners shall have assessed the compensation, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of \_\_\_\_ :

We, \_\_\_\_, commissioners appointed by the court to assess the damages that have been and will be sustained by \_\_\_\_, the owner of certain property lying in the county of \_\_\_\_, which \_\_\_\_ the condemnor proposes to condemn for its use, do hereby certify that we met on \_\_\_\_ (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the property aforesaid, and all other inconveniences likely to result to the owner, we have estimated and do assess the compensation aforesaid at the sum of \$ \_\_\_\_ .

Given under our hands, the \_\_\_\_ day of \_\_\_\_, A.D. \_\_\_\_\_. (R.C., c. 61, s. 17; 1874-5, c. 83; Code, s. 1700; Rev., s. 2586; C.S., s. 1722; 1981, c. 919, s. 1; 1999-456, s. 59.)

**§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.**

(a) Upon the filing of the report, the clerk shall forthwith mail copies to the parties. Within 20 days after the filing of the report any party to the proceedings may file exceptions thereto. The clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as the clerk may deem right and proper.

(b) If no exceptions are filed to the report, and if the clerk's final judgment rendered upon the petition and proceedings shall be in favor of the condemnor, and upon the deposit by the condemnor of the sum adjudged, together with all costs allowed, into the office of the clerk of superior court, then, in that event, all owners who have been made parties to the proceedings shall be divested of the property or interest therein to the extent set forth in the proceedings. A copy of the judgment, certified under the seal of the court, shall be registered in the county or counties where the land is situated, and the original judgment, or a certified copy thereof, or a certified copy of the registered judgment, may be given in evidence in all actions and proceedings as deeds for property are now allowed in evidence.

(c) Any party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report and may appeal to the judge of superior court having jurisdiction. Notice of appeal shall be filed within 10 days of the clerk's final determination. Upon appeal the clerk shall transfer the proceedings to the civil issue docket of the superior court. A judge in session shall hear and determine all matters in controversy and, subject to G.S. 40A-29 regarding trial by jury, shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 of this Chapter.

(d) Notwithstanding the filing of exceptions by any party to any orders or final determination of the clerk or the filing of a notice of appeal to the superior court, the condemnor may, at the time of the filing of the report of commissioners, deposit with the clerk of superior court in the proceedings the sum appraised by the commissioners and, in that event, the condemnor may enter, take possession of, and hold said property in the manner and to the extent sought to be acquired by the proceedings until final judgment is rendered on any appeal.

(e) If, on appeal, the judge shall refuse to condemn the property, then the money deposited with the clerk of court in the proceedings, or so much thereof as shall be adjudged, shall be refunded to the condemnor and the condemnor shall have no right to the property and shall surrender possession of the same, on demand, to the owner. The judge shall have full power and authority to make such orders, judgments and decrees as may be necessary to carry into effect the final judgment rendered in such proceedings, including compensation in accordance with the provisions of G.S. 40A-8.

(f) If the amount adjudged to be paid the owner of any property condemned under this Article shall not be paid within 60 days after final judgment in the proceedings, the right under the judgment to take the property shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against said claimant except the compensation awarded for the taking of the property.

(g) The provisions of this section shall not preclude any injunctive relief otherwise available to the owner or the condemnor. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C.S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1; 1969, c. 44, s. 47; 1971, c. 528, s. 37; 1981, c. 919, s. 1.)

#### **§ 40A-29. Provision for jury trial on appeal.**

In any proceedings under this Article by a condemnor to acquire property, any party to the proceedings shall be entitled on appeal to superior court to have the amount of compensation determined by a jury unless trial by jury has been waived by all parties. A jury shall determine the compensation to be awarded in accordance with the provisions of Article 4 of this Chapter. (1893, c. 148; Rev., s. 2588; C.S., s. 1724; 1957, c. 582; 1971, c. 528, s. 38; 1981, c. 919, s. 1.)

#### **§ 40A-30. Title of infants, incompetents, inebriates, and trustees without power of sale, acquired.**

In case any property required by a condemnor shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, incompetent, or inebriate, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, incompetent or inebriate, to sell and convey the same to such condemnor, on such terms as may be just. In case any infant, incompetent or inebriate has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making a sale, release or conveyance, and may require security from the general or special guardian or committee as the court may deem proper. Before any conveyance or release authorized by this section shall be executed, the terms on which it is to be executed shall be reported to the court on oath. If the court is satisfied that the terms are just to the owner of the property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of the property having legal power to sell and convey the same. (1871-2, c. 138, s. 28; Code, s. 1956; Rev., s. 2590; C.S., s. 1726; 1981, c. 919, s. 1.)

#### **§ 40A-31. Rights of claimants of fund determined.**

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the clerk or the judge on appeal may direct the money to be paid into the court by the condemnor, and may determine who is entitled to the same and direct to whom the same shall be paid, and may order a reference to ascertain the facts on which such

determination and order are to be made. (1871-2, c. 138, s. 19; Code, s. 1947; Rev., s. 2591; C.S., s. 1727; 1981, c. 919, s. 1.)

**§ 40A-32. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.**

(a) The clerk or the judge on appeal shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services which shall be taxed in the bill of costs. In such cases the State Treasurer as custodian of the Escheat Fund shall be notified of the appointment of such an attorney.

(b) The clerk or the judge on appeal shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this Chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (1871-2, c. 138, s. 20; Code, s. 1948; Rev., s. 2592; C.S., s. 1728; 1981, c. 919, s. 1.)

**§ 40A-33. Change of ownership pending proceedings.**

When any proceedings under this Article shall have been commenced, no change of ownership by voluntary conveyance or transfer of the property shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C.S., s. 1730; 1981, c. 919, s. 1.)

**§ 40A-34. Defective title; how cured.**

If at any time after an attempt to acquire title under this Article has commenced it shall be found that the title thereby attempted to be acquired is defective, the condemnor may commence new proceedings to acquire or perfect such title in the same manner as if no previous attempt had been commenced. At any stage in the new proceedings the court may authorize the condemnor, if in possession, to continue in possession, and if not in possession, to take possession and use the property during the pendency and until the final conclusion of the new proceedings. If the condemnor pays into court a sum determined by the court to be adequate compensation for the property, the court, in its discretion, may stay all actions or proceedings against the condemnor for its possession. In every such case the party interested in the property may conduct the proceedings to a conclusion if the condemnor delays or omits to prosecute the same. (1871-2, c. 138, s. 23; Code, s. 1951; Rev., s. 2595; C.S., s. 1731; 1981, c. 919, s. 1.)

**§§ 40A-35 through 40A-39. Reserved for future codification purposes.**