

**CHAPTER 101**  
**EMINENT DOMAIN**

Part I. Condemnation of Private Property

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## Rules of Court

Applicability of Hawaii Rules of Civil Procedure, see HRCPC rule 81(b)(2).

## Law Journals and Reviews

Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems. 17 UH L. Rev. 193.

## Case Notes

Chapter did not preempt ordinance relating to residential condominium leasehold conversion. 76 H. 46, 868 P.2d 1193.

### "PART I. CONDEMNATION OF PRIVATE PROPERTY

**§101-1 Definitions.** In this part, except where the context otherwise requires:

"County" means a county (except the county of Kalawao) and any agency of a county, including the board of water supply thereof, duly authorized to exercise the power of eminent domain.

"Plaintiff" means the State or any county or the public utility or other authority duly authorized to exercise the power of eminent domain.

"State" means the State or any agency of the State duly authorized to exercise the power of eminent domain. [L 1951, c 12, §1(a); RL 1955, §8-1; HRS §101-1]

### Revision Note

Numeric designations deleted.

" **§101-2 Taking private property for public use; disposal of excess property.** Private property may be taken for public use. Private property may also be taken by the State or any county in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates such taking to protect and preserve the contemplated improvement, or public policy demands such taking in connection with the improvement, in which case the condemning authority may sell or lease such excess property, with such restrictions as may be dictated by considerations of public policy in order to protect and preserve such improvements; provided that in the disposal of any such excess property, if such property is less than the minimum lot size requirements of

the applicable zoning regulations, is of a configuration or topography which in the judgment of the appropriate county zoning authority cannot be put to a reasonable use in accordance with the applicable zoning regulations, or lacks proper access to a street, it shall be offered to the owner or owners of the abutting land for a reasonable price based on an appraisal; provided further that if such excess property conforms to said minimum lot size requirements, is of a configuration and topography which in the judgment of the appropriate county zoning authority can be put to a reasonable use in accordance with the applicable zoning regulations and has proper access to a street, then the State or the county, as the case may be, may sell such property at public auction. If there is more than one abutting owner who is interested in purchasing any such excess property which is less than the minimum lot size requirements of the applicable zoning regulations, is of a configuration or topography which in the judgment of the appropriate county zoning authority cannot be put to a reasonable use in accordance with applicable zoning regulations, or lacks proper access to a street, it shall be sold by the condemning authority by sealed bid to the abutting owner submitting the highest offer above the appraised value; provided further that if any such excess property abuts more than one parcel, the condemning authority may make application for subdividing such property so that a portion thereof may be sold to each abutting owner at the appraised value if the public interest is best served by such subdivision and disposal. All moneys received from the sale or lease of such excess property shall be paid into the fund or appropriation from which money was taken for the original condemnation and shall be available for the purposes of such fund or appropriation. [L 1896, c 45, §1; am L 1909, c 10, §1; RL 1925, §808; am L 1925, c 59, §1; RL 1935, §50; am L 1941, c 149, §1; RL 1945, §301; am L 1945, c 185, §1; am L 1951, c 12, §1(b); RL 1955, §8-2; HRS §101-2; am L 1975, c 110, §1; am L 1976, c 7, §1]

### **Cross References**

County eminent domain provisions, see §§46-61 and 62, and county charters.

Sale of remnants of public lands, see §171-52.

Water for Hawaiian home lands, see HHCA §221.

### **Law Journals and Reviews**

Hawaii's Land Reform Act: Is It Constitutional? 6 HBJ 31.

The Amended Just Compensation Provision of the Hawaii Constitution: A New Basis for Indemnification of the Condemnee. 6 HBJ 55.

Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems. 17 UH L. Rev. 193.

### Case Notes

Proceedings under federal statute by United States to condemn land in Territory for public use. 1 U.S.D.C. Haw. 140, 179; 1 U.S.D.C. Haw. 222.

Supersedes the common law. 5 H. 57. Statutes of this character are to be strictly followed. 6 H. 638.

Water, riparian rights. 31 H. 376, aff'd. 52 F.2d 356.

Taxpayer whose interests are not affected may not assail statute. 39 H. 67.

Public school sites include private lands set aside for such purpose through an act. 8 H. 60. Exercise of power of eminent domain by State for purpose of taking land and then conveying it to the U.S. for a national park is for a public use. 44 H. 370, 355 P.2d 25.

Question of public use is ultimately judicial, public necessity is legislative, subject to judicial review. 43 H. 253. Legislative determination to acquire additional lands for Honolulu civic center was valid although specific use of lands was not specified. 46 H. 279, 378 P.2d 882.

Voluntary deed given by condemnee, effect of on claim based on change of public use. 49 H. 365, 373, 418 P.2d 482.

Ejectment is available remedy notwithstanding defendant has power of eminent domain to establish the use complained of. 50 H. 189, 436 P.2d 207.

Sections 46-61 and 46-62 and this section neither limit counties' general power of eminent domain as set out in §46-1.5(6), nor divest counties of authority to enact ordinances allowing for condemnation of land for any particular public purpose. 76 H. 46, 868 P.2d 1193.

### Due process.

Hawaii may not change its laws governing property rights of riparian landowners to use of water without compensating owners for lost rights. 441 F. Supp. 559.

Due process violated by court decree stating property seaward of vegetation line belonged to the public since the decree resulted in a taking of private property and no title hearing was held. 460 F. Supp. 473.

Enactment of 1977 General Plan during pendency of appeal made it necessary to review condemnation in light of 1977 plan rather than 1964 plan. 62 H. 411, 616 P.2d 213.

Cited: 20 H. 365, 366; 36 H. 348, 350.

" **§101-3 Entry upon private property by agreement.** In the event the State or a county thereof enters upon privately owned real property by authority of an agreement to acquire the real property either by voluntary action of the parties or by condemnation, the State or county is required to:

- (1) Reduce the agreement in writing;
- (2) File the executed written agreement promptly in the bureau of conveyances;
- (3) Complete its part of the agreement, including payment in full of any money, within the period of two years immediately succeeding the date upon which the agreement is filed.

If the State or county does not so complete its part of the agreement, the State or county shall pay to the property owner, in addition to the sum due, interest of six per cent a year on the sum due commencing with the end of the term of two years, and the property owner may bring suit against the State or any county to recover the sum together with interest. [L 1953, c 108, §1; RL 1955, §8-3; HRS §101-3]

" **[§101-3.5] Priority for lessees dislocated by condemnation proceedings.** Notwithstanding any law to the contrary, any lessee engaged in commercial or industrial uses who has been or will be displaced from private property which is acquired by the State or any county for public use by the power of eminent domain or threat thereof shall have the right of first refusal to enter into a lease in an industrial park created under chapter 171, or on other state land, which has been designated as an appropriate relocation site for the displaced lessee by law or by resolution adopted by the board of land and natural resources and approved by the legislature by concurrent resolution. [L 1990, c 274, §2]

" **§101-4 Right of eminent domain granted to public utilities and others.** The right and power of eminent domain is hereby granted to every person, operating a public utility, and engaged in the transportation of passengers or freight or any commodity by rail or bus, or by any other means, or the conveyance or transmission of telephone messages, or the production, conveyance, transmission, delivery, or furnishing of electricity, power, water, gas, or oil, within the State, as well as to corporations designated in section 101-41. The right

and power shall be exercised only in compliance with, and under, the conditions and procedures set forth in this part. [L 1896, c 45, §6; RL 1925, §809; RL 1935, §51; RL 1945, §302; am L 1951, c 12, §1(c); RL 1955, §8-4; HRS §101-4]

#### Case Notes

Cited: 20 H. 365, 367.

" **§101-5 Fee simple or lesser estate may be acquired.** In the taking of private property for a public use, a fee simple estate or any lesser estate may be acquired. [L 1896, c 45, §2; RL 1925, §810; RL 1935, §52; RL 1945, §303; am L 1951, c 12, §1(d); RL 1955, §8-5; HRS §101-5]

#### Case Notes

Condemning a fee simple estate subject to existing tenancy. 42 H. 415.

Undivided interests in parcels of land owned in fee simple are fee simple estates and may be taken in eminent domain proceedings. 50 H. 501, 443 P.2d 140.

" **§101-6 What property may be taken.** Property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature. [L 1896, c 45, §3; am L 1898, c 62, §1; RL 1925, §811; RL 1935, §53; RL 1945, §304; am L 1951, c 12, §1(e); RL 1955, §8-6; HRS §101-6]

#### Case Notes

Prior to statute change of grade of street not held to be taking of property without compensation. 7 H. 470.

Right of eminent domain does not extend to public property. 38 H. 329.

Access rights are property. 44 H. 343, 354 P.2d 981.

" **§101-7 Superior public use.** Property already appropriated to some public use may be taken by the State or a county in the manner and under the conditions provided by part III. An easement over, across or under property not owned by the State or a county and devoted to public use may be taken by any other person enjoying the right of eminent domain where such taking will not substantially impair the use for which the property has

previously been appropriated. [L 1951, c 12, §1(f); RL 1955, §8-7; HRS §101-7]

#### Case Notes

Not applicable unless state or county owns the land. 70 H. 18, 757 P.2d 647.

" **§101-8 Entering and surveying land.** Any agent or servant of a plaintiff may, for the purpose of locating or surveying land to be condemned in accordance with this part, enter upon the land and make examinations and surveys. The entry shall not constitute a cause of action in favor of the owner of the land, except for damages resulting from wilful acts or negligence on the part of the agent or servant. [L 1896, c 45, §7; am L 1917, c 108, §1; RL 1925, §812; RL 1935, §54; RL 1945, §305; am L 1951, c 12, §1(g); RL 1955, §8-8; HRS §101-8]

" **§101-9 Actions; priority.** In all actions brought under this chapter, to enforce the right of eminent domain, all courts shall give the actions preference over all other civil actions in the matter of setting the actions for hearing or trial, and in hearing them, to the end that all the actions shall be quickly heard and determined. [L 1959, c 18, §1; Supp, §8-8.5; HRS §101-9]

" **§101-10 Circuit courts have jurisdiction.** The circuit courts shall try and determine all actions arising under this part, subject only to an appeal in accordance with law. The court, on its own motion or on motion of any party, may try and determine any issue in the case in advance of other issues. [L 1896, c 45, §5; RL 1925, §813; RL 1935, §55; RL 1945, §306; am L 1947, c 200, §1(a); RL 1955, §8-9; HRS §101-10; am L 2004, c 202, §9; am L 2006, c 94, §1; am L 2010, c 109, §1]

#### Case Notes

Cited: 20 H. 365, 367; 30 H. 1, 5; 39 H. 53, 57.

" **§101-11 Procedure as in civil actions.** Except as otherwise expressly provided in this part, the procedure shall be the same as in other civil actions. [L 1896, c 45, §20; RL 1925, §814; RL 1935, §56; RL 1945, §307; RL 1955, §8-10; HRS §101-11]

#### Case Notes



Condemnor has duty to open and close in presentation of evidence. 48 H. 101, 395 P.2d 932.

Based on the established common law convention of this jurisdiction at the time of adoption of the state constitution, as a general matter, a right to jury trial exists in state eminent domain proceedings. 91 H. 81, 979 P.2d 1107.

Cited: 30 H. 1, 5.

" **§101-12 Evidence.** In addition to rules of evidence otherwise provided by law, in all proceedings brought under this part the valuation claimed by the taxpayer shall be taken into account. The valuation claimed by the taxpayer in any appeal regarding the assessment of real property tax shall be admissible in evidence as an admission of the fair market value of the real property as of the date of assessment irrespective of the fact that the assessed value from which the taxpayer appealed is adjusted to one hundred per cent fair market value; provided that the evidence shall not in any way affect the right of the taxpayer to severance damages, if any, to which the taxpayer may be entitled, and provided further that, if the taxpayer appealing the assessed value of the real property is a person under a contractual obligation to pay the tax assessed against the fee owner, whether such appeal is deemed consented to by the fee owner, the valuation claimed by such person shall not be admissible in evidence in any eminent domain proceeding against the fee owner. [L 1963, c 143, §4; Supp, §8-10.1; HRS §101-12; am L 1995, c 155, §1]

#### **Rules of Court**

Admission, see HRCF rule 36.

#### **Case Notes**

Recent sales of similar real estate is admissible as evidence of value in a condemnation case. 60 H. 393, 591 P.2d 1049.

" **§101-13 Exercise of power by county.** Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted as provided in section 101-14 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. The resolution, in the case of the city and county of Honolulu or an independent board thereof, shall, after its

introduction, be published in a daily newspaper with the ayes and noes, once (Sundays and legal holidays excepted) at least three days before final action upon it, and in the case of any other county or an independent board thereof, be published in a newspaper with the ayes and noes, at least one day (Sundays and legal holidays excepted), before final action upon it. [L 1919, c 63, §1; am L 1923, c 48, §1; RL 1925, §815; am imp L 1933, c 98, §2; RL 1935, §57; RL 1945, §308; am L 1951, c 12, §1(h); RL 1955, §8-11; HRS §101-13]

#### **Revision Note**

"County council" substituted for "board of supervisors".

#### **Case Notes**

Ordinance relating to residential condominium leasehold conversion did not entail the sort of impermissible delegation of the power of eminent domain from the city council to city's department of housing and community development that would violate this section. 76 H. 46, 868 P.2d 1193.

" **§101-14 Plaintiff.** The attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part. Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county for any of the purposes provided in this part which are within the powers granted to the county. [L 1896, c 45, §4; am L 1917, c 108, §2; RL 1925, §816; RL 1935, §58; RL 1945, §309; am L 1947, c 200, §1(b); am L 1951, c 12, §1(i); RL 1955, §8-12; HRS §101-14]

#### **Cross References**

Hawaiian homes commission may institute proceedings in own name, see HHCA §221.

#### **Case Notes**

Proceeding by Territory to be in name of Territory. 20 H. 365.

Legislative delegation of authority to determine necessity of taking implied. 43 H. 253.

" **§101-15 Complaint; defendants.** Actions under and by virtue of this part, shall be commenced by filing a complaint and issuing a summons thereon. All persons who are owners or claimants of the property sought to be condemned shall be joined as defendants. In case the owner or claimant is unknown to plaintiff, it shall be sufficient if the complaint includes a statement of that fact, and the defendant may be joined in the complaint under a fictitious name. In the event there is a class of persons owning or claiming some interest in the property sought to be condemned, who are too numerous to be served by personal service of the summons, or who would have to be ascertained by examination into the possible claims of a group of persons too numerous to permit identification of the defendants, the complaint may include a statement of that fact and the defendants may be joined in the complaint by describing them as a class, and in such case it shall be unnecessary to state in the complaint that the owners or claimants are unknown to the plaintiff. [L 1896, c 45, pt of §8; RL 1935, pt of §59; am L 1941, c 38, §1; RL 1945, pt of §310; RL 1955, §8-13; HRS §101-15]

#### Case Notes

Petition requirements. 3 U.S.D.C. Haw. 649.

An owner registered in bureau of conveyances is not unknown and must be personally served. 32 H. 745.

Variance of use and purpose between petition and final order, reversible error. 38 H. 592.

Cited: 20 H. 365, 369; 35 H. 608, 666.

" **§101-16 Complaint; additional contents; map.** The complaint shall also contain a statement of the use to which the land sought to be condemned is to be put, a description of each and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map shall accompany the complaint which shall correctly delineate the land sought to be condemned and its location. [L 1896, c 45, pt of §8; RL 1945, pt of §310; RL 1955, §8-14; HRS §101-16]

#### Case Notes

Cited: 35 H. 608, 666.

" **§101-17 Different properties in one action.** All property necessary for any public use may be united in one action. [L

1896, c 45, §10; RL 1945, pt of §310; RL 1955, §8-15; HRS §101-17]

" **§101-18 Joint or consolidated actions by governmental agencies.** Whenever two or more parcels of real property, or different interests in the same parcel of real property or improvements on real property or personal property in connection therewith, are to be acquired by eminent domain proceedings by two or more governmental agencies, and the properties to be so acquired are contiguous or are so interrelated that the taking of one of the properties or interests by one agency or the improvement contemplated in connection with the taking may affect the amount of the award which may be adjudged for the other of the properties, or vice versa, proceeding for the taking may be consolidated or the taking may be effected in one action brought in the name of one or more of the governmental agencies concerned in the taking pursuant to an agreement between the agencies. In such case the awards, when made, shall be apportioned in such manner as is agreed upon between the agencies, or, if not determined by agreement, then the apportionment shall be made by the court in such manner as it deems equitable, based upon the evidence given in the action or upon the same and such additional evidence as may be necessary or proper to determine the apportionment.

As used in this section, the term "governmental agency" includes the State, and any county, and any department, division, board, commission, public corporation, or other agency or instrumentality of the State or of any county.

Notwithstanding any other provision of law to the contrary, any governmental agency having by law the power to acquire any properties by the exercise of the power of eminent domain, may enter into agreements with any other governmental agency to effect the consolidation or to join in one action for the acquisition of the properties as provided in this section. [L 1953, c 147, §§1-3; RL 1955, §8-16; HRS §101-18]

" **§101-19 Amendments of complaints, citations.** In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendments in form or substance in any complaint, citation, summons, process, answer, motion, order, verdict, judgment, or other proceeding, including amendment in the description of the lands sought to be condemned, whenever the amendment will not impair the substantial rights of any party in interest. [L 1937, c 184, §1; RL 1945, pt of §310; RL 1955, §8-17; HRS §101-19]

Cited: 42 H. 415, 435.

" **§101-20 Notice.** When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to the owner or claimant, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case. [L 1896, c 45, §9; RL 1925, §818; RL 1935, §60; am L 1937, c 184, §2; am L 1941, c 38, §2; RL 1945, §311; RL 1955, §8-18; am L 1959, c 19, §1; HRS §101-20; am L 1973, c 30, §1; gen ch 1985]

#### Case Notes

Owner of a recorded title is known. 32 H. 745.  
Cited: 3 U.S.D.C. Haw. 649, 656.

" **§101-21 Intervenors.** Any person in occupation of or having any claim or interest in any property sought to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to the person's own property or interest, in like manner as if named in the complaint. [L 1896, c 45, §11; RL 1925, §819; RL 1935, §61; RL 1945, §312; RL 1955, §8-19; HRS §101-21; gen ch 1985]

#### Rules of Court

Intervention, see HRCP rule 24.

#### Case Notes

Grantee from owner takes land subject to proceedings in condemnation. 61 F.2d 896.

One who purchases during action and makes no claim to compensation awarded to owner is bound by result. 31 H. 781, aff'd 61 F.2d 896.

"Person in occupation" means an occupant whose right of occupancy is sought to be taken. 50 H. 501, 443 P.2d 140.

This section limits the right to intervene to a person in occupation or having a claim or interest in the property sought to be taken or in the damages for the taking. 50 H. 501, 443 P.2d 140.

"Claim or interest" means prima facie claim or interest under section and HRCF 24(a)(1). 54 H. 56, 502 P.2d 378.

Court has no discretion to deny intervention to applicant who meets all requirements. 54 H. 56, 502 P.2d 378.

Court had discretion to allow lessees of property to be condemned to appear as parties. 68 H. 55, 704 P.2d 888.

Cited: 30 H. 1, 5.

" **§101-22 Decision.** The court may determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the property. [L 1896, c 45, §12; RL 1925, §820; RL 1935, §62; RL 1945, §313; RL 1955, §8-20; HRS §101-22]

" **§101-23 Damages assessed, how.** In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed. If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, and also how much the portion not sought to be condemned will be specifically benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as compensation or damages. In case of the exercise of the power of eminent domain by the city and county of Honolulu in

furtherance of any governmental power under section 46-74.2 and the improvement ordinance of the city, the amount of damages or compensation assessed, or awarded, or agreed upon in any compromise approved by motion of the city council shall in no case be construed as limiting or affecting the power of the city council to distribute any portion of the cost upon any property found to be benefited thereby proportioned as provided by law in the exercise of their judgment whether under an improvement district or frontage improvement created before or after the acquisition of any such land. If condemnation is for the purpose of widening or realigning any existing highway or other public road, the owner of the property condemned shall be entitled to full compensation for the property actually taken and special benefits shall be considered only insofar as the value of the benefits shall not exceed the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff. That is, if the special benefits shall be equal to the severance damages, then the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the special benefits shall be less than the severance damages, then the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the land taken. [L 1896, c 45, §13; am L 1919, c 63, §2; RL 1925, §821; RL 1935, §63; RL 1945, §314; am L 1947, c 200, §1(c); am L 1953, c 269, §1; RL 1955, §8-21; HRS §101-23; am L 1990, c 34, §9]

#### **Case Notes**

Payment operates as consideration as well as damages. 126 F.2d 4.

Adequacy of expert witness' qualifications is matter of discretion of the trial court. 54 H. 385, 507 P.2d 1084.

Whether a taking is for a realignment is a matter of law. 55 H. 190, 516 P.2d 1250.

#### **Valuation.**

Rental value of lands in vicinity generally inadmissible. 74 F.2d 596. Cost of filling to level of highway irrelevant. 31 H. 184. No compensation for business losses, leases. 72 F. Supp. 903.

Capitalization of rental value is evidence of market value. 132 F.2d 699. Rental value is evidence of market value. 91 F.2d 85. Market value may include adaptability of land for subdivision purposes. 43 H. 195.

Landowner is generally held to be qualified to give landowner's opinion as to value of landowner's land. 45 H. 144, 363 P.2d 979.

Admissibility of comparable sales and leases. 48 H. 101, 395 P.2d 932; 48 H. 444, 404 P.2d 373. Other sales to condemnor. 49 H. 640, 426 P.2d 324.

Trial court's determination of admissibility of comparable sales will not be upset unless it is a clear abuse of discretion. 54 H. 167, 504 P.2d 1223.

Enhancement of value resulting from proposed public improvement project not allowed. 43 H. 167; 48 H. 101, 395 P.2d 932.

Evidence may show reasonable use land may be put to in the future. 298 U.S. 342.

Evidence as to valuation; expert testimony. 48 H. 444, 404 P.2d 373. Evidence of expenditures to prepare land for construction is admissible to show enhancement of value. 50 H. 195, 436 P.2d 3.

Partial taking for highway purposes; methods of valuation discussed. 45 H. 144, 363 P.2d 979; 48 H. 101, 395 P.2d 932.

In highway widening case, where there is no issue as to severance damages, evidence as to special benefits is inadmissible. 48 H. 101, 395 P.2d 932. Special benefits defined and distinguished from general benefits. 46 H. 83, 375 P.2d 6. Special benefits may be offset against total damages. Id.

Before and after rule. 34 H. 859, criticized 45 H. 144, 363 P.2d 979. Applicability of the "Unit Rule". 42 H. 547.

If taking does not affect value of remaining property, evidence as to its value is inadmissible. 122 F. 581. Just compensation equals value of part taken plus damages to remainder. 34 H. 859. Determination of just compensation discussed. 42 H. 199.

Land cannot be valued alone without buildings. 182 F.2d 172. Improvements have only such value as they add to land. 48 H. 444, 404 P.2d 373.

Evidence of cost of development of land for its best use is admissible to show diminution of market value. 53 H. 582, 499 P.2d 663.

Anticipated profits, when admissible to show enhancement of value of land. 54 H. 385, 507 P.2d 1084.

Development expenses, admissible to show enhancement of value of land. 54 H. 385, 507 P.2d 1084.

Opponent's expert appraisers, when use permitted. 54 H. 385, 507 P.2d 1084.

Test used in determining whether parcel to be condemned is part of a larger tract of land is that there must be unity of



title, physical unity, and unity of use. 54 H. 523, 511 P.2d 163.

Reasonable possibility of rezoning to higher use as result of partial taking may constitute special benefit. 55 H. 190, 516 P.2d 1250.

The "before and after" valuation is prejudicial when used as a format by jury to determine special benefits. 55 H. 190, 516 P.2d 1250. "Before and after" method admissible as supportive evidence of expert's valuation of special benefits. 55 H. 212, 517 P.2d 24.

Valuation of property subject to several, independently held interests; allocation of compensation among the various interests. 55 H. 226, 517 P.2d 7.

In absence of evidence, value of land encumbered with roadway easement is nominal. 55 H. 305, 517 P.2d 779.

Subdividability and potential use are factors to be considered in determining fair market value. 60 H. 393, 591 P.2d 1049.

Admissibility of evidence of probable future uses of land; evidence as to compensation; admissibility; discretion of trial court; while an individual owner is qualified to state opinion of the value of owner's land, an officer of a corporate owner is not qualified unless officer is an expert. 63 H. 322, 628 P.2d 192.

County general plan map indicating possible redesignation of subject land, even though not adopted, was a document likely to be considered by informed sellers and buyers and thus admissible; no error in admitting evidence of development concept and plan for property adjoining condemned land; where paucity of comparable sales, allowance of discussion of transaction occurring several years after subject property's condemnation not necessarily an abuse of discretion. 64 H. 168, 637 P.2d 1131.

### **Juries.**

Value of land sought to be taken by U.S. in the exercise of eminent domain is triable by jury. 122 F. 581. Verdict of jury--review, substantial evidence test. 45 H. 144, 363 P.2d 979. Damage verdict must stand unless so excessive as to have been brought about by passion or prejudice or is shocking to the conscience. 45 H. 144, 363 P.2d 979; 50 H. 195, 436 P.2d 3.

### **Damages.**

Generally, 1 U.S.D.C. Haw. 222. To adjacent land. 31 H. 787, aff'd. 61 F.2d 896. To crops. 33 H. 379. To lessee. 33 H. 647. For fishing rights. 91 F.2d 93. For easement. 39 H. 514.

### **Interest.**

30 H. 1; 40 H. 429.

**Lessees.**

Lessee of land partly condemned under eminent domain entitled to have rent reduced proportionately. 6 H. 653. On lessee's rights under a condemnation clause of a lease; access rights. 44 H. 343, 354 P.2d 981.

**Cited.**

38 H. 592, 596.

" **§101-24 Assessed as of day of summons.** For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of summons, and, except as provided in section 46-6, its actual value at that date shall be the measure of valuation of all property to be condemned, and the basis of damage to property by reason of its severance from the portion sought to be condemned, subject, however, to section 101-23.

No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages. [L 1896, c 45, §15, pt of §16; RL 1925, §822; RL 1935, §64; RL 1945, §315; RL 1955, §8-22; am L 1959, c 19, §2; HRS §101-24]

**Case Notes**

Basis of case. 36 H. 348.

Date of summons is determinative of "the right" to compensation. Applicable to amount and person. 61 F.2d 896. Damages prior to assessment may not be considered. 91 F.2d 85, 93. No claim can be made for improvements after date of summons. 34 H. 859. Appreciation in value of property after date of summons is not an element of just compensation. 45 H. 650, 372 P.2d 348.

Severance damages are computed as of date of summons, and no claim can be allowed for retaining wall built after notification of condemnation but before date of summons. 54 H. 287, 506 P.2d 770.

Blight of summons damages: payable in form of interest; determination of rate of interest; set-off against interest. 45 H. 650, 372 P.2d 348.

Blight of summons damages are computed at 5% interest rate (State v. Coney, 45 H. 650, overruled). 54 H. 385, 507 P.2d 1084.

Blight of summons damages. 54 H. 523, 511 P.2d 163; 55 H. 226, 517 P.2d 7.

Procedure for determining blight of summons damages in leasehold conversion cases. 69 H. 247, 739 P.2d 248.

Damages. 1 U.S.D.C. Haw. 179.

Cited: 3 U.S.D.C. Haw. 644, 656; 30 H. 1, 6; 46 H. 83, 102, 375 P.2d 6.

" **§101-25 Payment of judgment, penalties.** The plaintiff shall within two years after final judgment pay the amount assessed as compensation or damages and upon failure so to do all rights which may have been obtained by the judgment shall be lost to the plaintiff; and if such payment is delayed more than thirty days after final judgment, then interest shall be added at the rate of five per cent a year. The payment shall be made to the clerk of the court rendering the judgment. The plaintiff shall within thirty days after the payment deposit in the mails of the United States a written notice addressed to the defendants, who have filed answers or appeared in court in the proceedings, or to their attorneys of record in the proceedings, if so represented, at their last known address, that the payment has been made, and the clerk of the court shall distribute the payment to those entitled thereto in accordance with the order of the court. If the plaintiff fails to make the payment as aforesaid, the defendant shall be entitled to recover judgment as provided in section 101-27. If the plaintiff fails to give written notice of the payment as aforesaid, interest shall be added on the amount thereof at the rate of five per cent a year until the written notice is placed in the mails or until the defendant receives from the clerk of court the amount to which the defendant is entitled under the terms of the order of court, whichever event shall first occur. [L 1896, c 45, §17; RL 1925, §823; RL 1935, §65; am L 1937, c 184, §3; am L 1941, c 55, §1; RL 1945, §316; am L 1951, c 12, §1(j); RL 1955, §8-23; HRS §101-25; gen ch 1985]

### Case Notes

Section does not apply to proceeding by U.S. 244 F. 923. Statute is substance and not procedure, therefore not applicable. Id.

Interest. 4 U.S.D.C. Haw. 33. Interest relates back to date of judgment upon delay in payment of judgment. 45 H. 650, 372 P.2d 348.

Final judgment means the judgment entered after disposition of an appeal to the supreme court. 50 H. 237, 437 P.2d 321.

Payment of post-judgment interest on award of fair market value in leasehold condemnation. 72 H. 383, 819 P.2d 82.

Cited: 4 U.S.D.C. Haw. 748; 30 H. 1, 6; 31 H. 781, 784; 48 H. 349, 353, 402 P.2d 683.

" **§101-26 Final order of condemnation.** When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff. [L 1896, c 45, §18; RL 1925, §824; RL 1935, §66; RL 1945, §317; RL 1955, §8-24; HRS §101-26]

### Case Notes

"Certified" interpreted. 2 U.S.D.C. Haw. 428.

Registration of deed is condition precedent to vesting of title. 2 U.S.D.C. Haw. 423. Registration. 161 F. 303, reversing 2 U.S.D.C. Haw. 431.

Cited: 30 H. 1, 3; 31 H. 781, 784; 42 H. 415, 428; 48 H. 349, 353, 402 P.2d 683; 49 H. 494, 502, 421 P.2d 300.

" **§101-27 Defendant allowed damages upon abandonment or dismissal of proceedings.** Whenever any proceedings instituted under this part are abandoned or discontinued before reaching a final judgment, or if, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses; and the possession of the property concerned shall be restored to the defendant entitled thereto. Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury is demanded by either party, pursuant to the rules of court, within ten days from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use. In the event judgment is entered in favor of the defendant and against the plaintiff, any moneys which have been paid, and any additional security which has been furnished, by the plaintiff

to the clerk of the court under sections 101-28 and 101-29, shall be applied or enforced toward the satisfaction of the judgment. In the case of the State or a county, if the moneys so paid to the clerk of the court are insufficient, then the balance of such judgment shall be paid from any moneys available or appropriated for the acquisition of the property concerned, or if that is insufficient then the same shall be paid from the general fund of the State or county, as the case may be. [L 1929, c 230, §1; RL 1935, §67; am L 1937, c 184, §4; RL 1945, §318; am L 1951, c 12, §1(k); RL 1955, §8-25; HRS §101-27; am L 1973, c 30, §2; gen ch 1985]

### Case Notes

Section only applies to relief in eminent domain proceedings and does not authorize a collateral suit for damages or an independent suit for injunction and declaratory relief. 49 H. 365, 418 P.2d 482. Section does not apply when there is an abandonment of the original public use. Id.

Partial abandonment. 42 H. 415, 627. Abandonment by amendment. 44 H. 557, 356 P.2d 386. Abandonment may be any time before final judgment. 42 H. 415.

"Final judgment" means judgment entered after an appeal. 50 H. 237, 437 P.2d 321.

Manifests legislative intent to preclude recovery of attorney's fees and litigation costs where the property is condemned. 53 H. 582, 499 P.2d 663.

A landowner in a condemnation action is entitled to damages under this section where the property at issue is not finally taken in the context of a particular condemnation proceeding, irrespective of whether the government attempts to take the land through subsequent condemnation proceedings. 119 H. 352, 198 P.3d 615.

"All such damage" under this section provided adequate authority for appellant's request for attorneys' fees and costs on appeal of automatic denial of fees in condemnation proceedings; the "damage" sustained by appellant in seeking the fees and costs owed and in appealing the denial of such fees and costs was part of the damage resulting from the county having brought the unsuccessful proceedings; thus, the county should have been held liable for such damage. 120 H. 400, 208 P.3d 713.

Because this section is silent as to which court a request for damages should be directed, the procedure set forth in HRAP rule 39 applied to the case; that rule specifically required that requests for fees and costs on appeal should be applied for in the supreme court. 120 H. 400, 208 P.3d 713.

Messenger fees are properly seen as part of a law firm's overhead and therefore should be reflected in attorneys' fees, not as costs under this section. 120 H. 400, 208 P.3d 713.

Neither HRAP rule 39 nor this section specifically allows for costs associated with online legal research; if appellant collected an appropriate attorney's fee pursuant to this section, it would have already been made whole for its research costs, and any additional taxation of these costs to appellee would have provided appellant with a windfall; thus, any separate recovery for legal research costs as "other reasonable costs" under this section denied. 120 H. 400, 208 P.3d 713.

Where the record in the case was available in electronic format and appellant did not identify which costs were associated solely with "producing necessary copies of brief and appendices", nor did it make any argument as to why any additional photocopying costs requested were reasonable, appellant's photocopying costs denied. 120 H. 400, 208 P.3d 713.

Prejudgment interest can be recovered as an "other reasonable expense" under this section, but is limited to the specific circumstances of a failed condemnation contemplated by this section. 124 H. 281, 242 P.3d 1136.

Where defendant had not asserted any lengthy delay in the issuance of the judgment of the attorneys' fees or costs at the trial level, and there was no fault found on the part of either defendant or plaintiff for the delay, the trial court had discretion to deny defendant's prejudgment interest claim under the circumstances of the case and the court did not err in denying defendant's request for prejudgment interest under this section. 124 H. 281, 242 P.3d 1136.

Where defendant would not have had cause to move for fees or to litigate the amount of fees on remand had the county not brought the unsuccessful proceeding in the first condemnation, the county was liable for those damages under this section. 124 H. 281, 242 P.3d 1136.

Where there was no evidence that the county's actual purpose for the second condemnation was to avoid liability for attorneys' fees and costs under this section, and while the second condemnation provided an incidental benefit to the county, it was insufficient to rebut the strong presumption in favor of the court's finding of public purpose in the second condemnation. 124 H. 281, 242 P.3d 1136.

Cited: 39 H. 67; 44 H. 10, 13, 352 P.2d 320.

" **§101-28 Possession pending action; immediate occupation by plaintiff.** At any time after the service of summons the court may, upon motion of the plaintiff and upon notice to the

defendant, issue an order putting the plaintiff in possession of the land sought to be condemned and permitting the plaintiff to do such work thereon as may be required for the purpose for which the taking of the land is sought. The motion shall contain a statement of the reasons for requiring an immediate occupation of the land sought to be condemned and a statement of the sum of money estimated by the plaintiff to be just compensation or damages for the taking of the land. Upon the filing of the motion the court shall issue an order directed to the defendants and returnable not more than twenty days from the date of the filing of the motion, requiring the defendants to appear and show cause why the motion should not be granted. The court may require proof by affidavit or otherwise of the right of the plaintiff to maintain the action and of the facts set forth in the motion and shall grant or deny the motion as the public interest and the rights of the parties may require.

Where the plaintiff is not the State or a county, the court may, upon motion of any defendant and good cause shown therefor, require the deposit with the clerk of the court, of such additional amount of money, or of a surety bond approved by the court in such additional amount, as the court deems necessary to reasonably secure the defendant in the collection of the final award which may be made thereafter, taking into consideration the adequacy of the initial estimate, the financial responsibility of the plaintiff and other pertinent circumstances. [L 1937, c 184, pt of §5; RL 1945, §319, pt of subs 1; am L 1947, c 200, pt of §1(d); am L 1951, c 12, pt of §1(1); RL 1955, §8-26; HRS §101-28]

#### **Case Notes**

Filing of motion for order of possession will not be restrained as defendants may be heard on order itself to protect their rights. 39 H. 53.

Section is generally available to condemners while §101-29 is restricted to use by the State or a county. 49 H. 494, 421 P.2d 300.

" **§101-29 Possession pending action; alternative procedure.**

Where the plaintiff is the State or any county, the following alternative procedure may be followed. At any time after the commencement of an action pursuant to this part, the State or any county may file a motion for an order of possession invoking this section and supported by an affidavit alleging, or by oral evidence prima facie showing:

- (1) The right of the State or county to maintain the action;

- (2) The public use for which the real property sought to be condemned is being taken; and
- (3) The sum of money estimated by the State or county to be just compensation or damages for the taking of the real property.

Upon such motion and upon payment of such estimated sum of money to the clerk of the court for the use of the persons entitled thereto, the court shall issue an order ex parte putting the State or county in possession of the real property sought to be condemned and permitting the State or county to do such work thereon as may be required for the purpose for which the taking of the property is sought. The order placing the State or county in possession shall become effective upon the expiration of ten days after service thereof; provided that for good cause shown within the ten days, the court may vacate or modify the order or postpone the effective date thereof for an additional period of time. Service of the order shall be made personally on those defendants who are in actual possession, and in other cases may be made by depositing a copy thereof in a United States post office, postage prepaid, registered mail addressed to the defendants at their last known addresses, or to their attorneys of record. [L 1951, c 12, pt of §1(1); RL 1955, §8-27; HRS §101-29]

#### **Cross References**

Service by certified mail, see §1-28.

#### **Case Notes**

Entry of order of possession is not a bar to abandonment. 42 H. 415.

Section includes no provision for interlocutory appeal. 44 H. 7, 352 P.2d 333.

Paragraph (2) only requires a showing of ultimate public use. No showing of reasons for immediate occupation is required. 49 H. 494, 421 P.2d 300.

If no motion to vacate within ten days, condemning authority has absolute right to immediate possession. 49 H. 494, 421 P.2d 300.

Leasing on a temporary basis after possession obtained under this section. 49 H. 494, 500-03, 421 P.2d 300.

Purpose of section. 54 H. 385, 507 P.2d 1084.

" **§101-30 Order of possession.** No order of possession shall issue unless the plaintiff has paid to the clerk of the court issuing the order, for the use of the persons entitled thereto,



the amount of the estimated compensation or damages stated in the motion for the issuance of the order and, in the case of a plaintiff other than the State or a county, has so paid such additional amount, or furnished such additional security, as may be required by the court.

An order of possession issued under section 101-29 shall not become effective until (1) summons in the action has been served personally on the defendants within or without the State, as provided in section 101-20 or section 634-24, or (2) the first publication of the summons directed to the defendants has occurred and notice has been posted as provided in section 634-23, or (3) the papers mailed to the defendants have been received as provided in section 634-24, or (4) the best notice practicable under the circumstances has been given as ordered by the court for good cause shown. [L 1937, c 184, pt of §5; RL 1945, §319, pt of subs 1; am L 1947, c 200, pt of §1(d); am L 1951, c 12, pt of §1(1); RL 1955, §8-28; HRS §101-30; am L 1973, c 30, §3]

#### Case Notes

Remedy under section is adequate. 39 H. 53.

" **§101-31 Payment of estimated compensation; effect thereof.** Upon the application of the parties entitled thereto the court may order that the amount of the estimated compensation or damages stated in the motion and paid to the clerk of the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceedings. If an additional deposit of money has been paid to the clerk of the court pursuant to section 101-28 the amount of the additional deposit or of any portion thereof, shall not, without the consent of the plaintiff, be paid to the party. A payment to any party as aforesaid shall be held to constitute an abandonment by the party of all defenses interposed by the party, excepting the party's claim for greater compensation or damages. If the compensation or damages finally awarded in respect of the land or any parcel thereof exceeds the amount of the money so received by any person entitled, the court shall enter judgment for the amount of the deficiency. The unexpended moneys and any additional security so deposited with the clerk of the court shall be available for, or for enforcement of, the payment of any final judgment awarded by the court. [L 1937, c 184, pt of §5; RL 1945, §319, pt of subs 1; am L 1947, c 200, pt of §1(d); am L 1951, c 12, pt of §1(1); RL 1955, §8-29; HRS §101-31; gen ch 1985]

## Case Notes

Where estimate of compensation deposited to obtain immediate possession is in excess of final award, condemnee must make restitution with interest. 54 H. 385, 507 P.2d 1084.

" **§101-32 Possession pending appeal.** At any time after judgment has been rendered in the circuit court for or in favor of the plaintiff, or pending an appeal by either plaintiff or defendant, the plaintiff, if not already in possession of the land sought to be condemned under an order entered pursuant to sections 101-28 and 101-29, may be put into possession thereof upon the payment, to the clerk of the court, of the amount assessed as compensation or damages and such further sum as may be required by the court as a fund to pay any further compensation or damages that may be awarded, as well as all damages that may be sustained by the defendant if for any cause the property is not finally taken for public use. Upon such payment, the court shall make an order putting plaintiff into possession of the property sought to be condemned with the right to use the same during the pendency of and until the final conclusion of the litigation. If the plaintiff has appealed, the amount shall be held by the clerk until the entry of final judgment, and the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order letting plaintiff into possession. If the defendant who is entitled to the amount of money assessed as compensation or damages and paid into court under this section has appealed, the defendant shall have the right to demand and receive payment of the same at any time thereafter, upon filing a receipt therefor and an abandonment of all defenses to the action or proceeding, except as to the amount of compensation or damages that the defendant may be entitled to if a new trial shall be granted. [L 1896, c 45, §19; RL 1925, pt of §825; RL 1935, pt of §68; am L 1937, c 184, pt of §5; RL 1945, §319, subs 3; am L 1951, c 12, pt of §1(1); RL 1955, §8-30; HRS §101-32; gen ch 1985; am L 2004, c 202, §10; am L 2006, c 94, §1; am L 2010, c 109, §1]

## Case Notes

Remedy under section is adequate. 39 H. 53.

"Final judgment" means judgment entered after an appeal. 50 H. 237, 437 P.2d 321.

" **§101-33 Allowance of interest, etc.** If an order is made letting the plaintiff into possession as provided for in

sections 101-28, 101-29, and 101-32, the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order until paid by the plaintiff; provided that except in the case of an appeal by the plaintiff as provided in section 101-32, interest shall not be allowed upon any sum paid by the plaintiff to the clerk of the court from the date of the payment. The court may fix and include in the order or judgment the time within which and the terms upon which the parties in possession shall be required to surrender possession to the plaintiff. The court may make such orders in respect of encumbrances, liens, rentals, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. [L 1896, c 45, pt of §16; RL 1925, pt of §825; RL 1935, pt of §68; am L 1937, c 184, pt of §5; RL 1945, §319, subs 3; am L 1951, c 12, pt of §1(1); RL 1955, §8-31; HRS §101-33]

### Case Notes

Section applied in computing rate of interest from order of possession to date of judgment. 45 H. 650, 372 P.2d 348. Interest is allowable on amount stipulated as value. 48 H. 444, 404 P.2d 373.

Blight of summons damages are computed at 5% interest rate (State v. Coney, 45 H. 650, overruled). 54 H. 385, 507 P.2d 1084.

Blight of summons damages. 55 H. 226, 517 P.2d 7.

Section does not authorize award of "interest on interest" or require that interest be awarded for periods where condemnation trial continued at landowner's request. 64 H. 168, 637 P.2d 1131.

See 50 H. 237, 437 P.2d 321.

Cited: 30 H. 1, 6; 36 H. 348, 351.

" **§101-34 Issue as to use may be set for immediate trial.** If the defendant, in the defendant's answer or in return to the order to show cause, issued under section 101-28, denies that the use for which the property sought to be condemned is a public use, or a superior public use within the meaning of section 101-7, the issue, upon the motion of any party, may be set for immediate trial, without a jury and without regard to position on the calendar. Notwithstanding any provision of section 641-1, an interlocutory appeal shall lie from the decision on the issue as of right, and the appeal shall be given precedence in the intermediate appellate court. Failure of the defendant to raise the issue within ten days after service of an order granting immediate possession shall be deemed an admission

that the use is a public use or a superior public use, as the case may be. [L 1951, c 12, pt of §1(1); RL 1955, §8-32; HRS §101-34; am L 1973, c 30, §4; gen ch 1985; am L 2004, c 202, §11; am L 2006, c 94, §1; am L 2010, c 109, §1]

### Case Notes

Interlocutory appeal is a matter of right on the issue of public use. 44 H. 7, 352 P.2d 333. Appeal under section. 46 H. 279, 378 P.2d 882.

Trial should be held under this section with respect to issue of public use, rather than decide constitutionality of a statute by summary judgment. 65 H. 465, 653 P.2d 781.

Provides constitutional, adequate remedy to raise issue of public use in eminent domain proceedings under chapter 516. 72 H. 466, 822 P.2d 955.

Supreme court has jurisdiction under this section to hear appeal from order granting partial summary judgment in matter involving exercise of power of eminent domain. 79 H. 64, 898 P.2d 576.

Pursuant to this section, the trustee defendants were entitled as of right to an interlocutory appeal of the circuit court's adverse decision regarding public use. 100 H. 182, 58 P.3d 1229.

Cited: 39 H. 545, 547.

#### " **§101-35 Tax official as party; certificates, etc.**

Whenever an eminent domain proceeding is brought by the State or any county for the purpose of acquiring the fee simple estate in real property neither the director of taxation, county finance director, or any other tax official shall be joined as party respondent merely on account of any lien for state taxes set forth in title 14 or for county real property taxes. The appropriate director or tax official, as the case may be, may intervene in the proceeding as provided by section 101-21. Upon filing the complaint the plaintiff shall furnish a copy thereof to the appropriate director or tax official and shall also furnish the appropriate director or tax official a copy of any amended complaint. [L 1939, c 211, pt of §3; RL 1945, pt of §320; RL 1955, §8-33; am L Sp 1959 2d, c 1, §16; HRS §101-35; gen ch 1985; am L 1995, c 155, §2]

" **§101-36 Certificate of deposit of moneys in court; notice of lien.** If any moneys are paid into court by the plaintiff in the course of an eminent domain proceeding, the plaintiff or its attorney shall certify the fact of the payment to the director of taxation or county finance director, as the case may be, and

shall further certify the date when possession of the land on account of which the payment was made was acquired by the plaintiff, or in the event of entry of a final order of condemnation without previous possession of the land, shall certify the date of the final order of condemnation. A copy of the certificate shall be filed as part of the record in the case. In the event of a final determination granting the application of any party for the payment to the party of any of the moneys so paid into court, or if a final order of condemnation is entered, then immediately upon receipt of the certificate the appropriate director shall certify to the clerk of the court in which the eminent domain proceeding is pending the amount of state taxes set forth in title 14 or county real property taxes, penalties, and interest constituting a lien upon the land so coming into the possession of the plaintiff, or constituting a lien upon the land which was the subject of the final order of condemnation, as the case may be. In computing the amount of the lien the county director of finance shall cause the real property taxes due on the parcel of land or portion of a parcel of land so coming into the possession of the plaintiff or made the subject of the final order of condemnation, to be remitted for the balance of the taxation period or year from and after the date of possession or, in the event of entry of a final order of condemnation without previous possession by the plaintiff, from and after the date on which the final order of condemnation was entered, as the case may be. The county director of finance or other tax official may remit the taxes in the manner provided by this section upon the receipt of the certificate. [L 1939, c 211, pt of §3; RL 1945, pt of §320; RL 1955, §8-34; am L Sp 1959 2d, c 1, §16; HRS §101-36; gen ch 1985; am L 1995, c 155, §3]

" **§101-37 Payment of taxes out of deposit.** The amount of the taxes, penalties, and interest so certified shall be paid to the tax official making the certificate by the clerk of the court from the moneys paid into court, and no clerk shall distribute any moneys so paid into court without the consent of the director of taxation or county finance director, as the case may be, unless the certificate has been furnished. The clerk shall apportion the tax lien among the parties entitled to receive the moneys so paid into court in accordance with the direction of the court. Any of the parties may petition the court for determination of the correct amount of taxes, making the appropriate director a party to the proceeding. Upon the conclusion of the proceeding the appropriate director shall make a new certificate in accordance with the final decision upon the matter, and showing additional penalties and interest, if any.

[L 1939, c 211, pt of §3; RL 1945, pt of §320; RL 1955, §8-35; am L Sp 1959 2d, c 1, §16; HRS §101-37; am L 1995, c 155, §4]

" **§101-38 Further certificate of possession.** In the event possession of any land which is the subject of eminent domain proceedings commenced for the acquisition of the fee simple estate in such lands is obtained by the State or any county, whether or not any moneys are paid into court at the time, the plaintiff or its attorney upon the request of any interested person shall certify the date of the possession to the director of taxation or county finance director, as the case may be, and upon receipt of the certificate the appropriate director or appropriate state or comparable county tax collector and other tax official may remit the taxes in the manner provided in section 101-36. [L 1939, c 211, pt of §3; RL 1945, pt of §320; RL 1955, §8-36; am L Sp 1959 2d, c 1, §16; HRS §101-38; am L 1995, c 155, §5]

" **§101-39 Effect of abandonment of eminent domain proceedings.** If (1) possession is abandoned at any time prior to the entry of final order of condemnation, or (2) proceedings are abandoned or discontinued before reaching final judgment, or (3) the final judgment does not provide for the taking of the land for public use, or (4) the final order of condemnation is not entered within two years after final judgment, then:

- (A) The amount of taxes remitted for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be restored to the tax lists and tax rolls and shall be deemed delinquent if not paid within ten days after the mailing of notice and demand for payment; and
- (B) If the property has not been assessed for taxes in any year by reason of such possession by the plaintiff the property shall be assessed for taxes in the manner provided for property omitted from taxation, and the taxes due on the property for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be placed on the tax lists and tax rolls and collected as in the case of property omitted from taxation. [L 1939, c 211, pt of §3; RL 1945, pt of §320; RL 1955, §8-37; HRS §101-39]

## "PART II. IRRIGATION CORPORATIONS

**§101-41 Special power of eminent domain.** Corporations organized to develop, store, convey, distribute, and transmit

water for irrigation, and which shall have at least \$50,000 of fully paid in capital represented by cash or by tangible property of a market value equal to the amount at which the property is entered as assets on the books of the company, shall have the right to exercise the power of eminent domain as hereinafter provided. [L 1911, c 124, §1; RL 1925, §828; RL 1935, §71; RL 1945, §323; RL 1955, §8-38; HRS §101-41]

#### Case Notes

Cited: 74 F.2d 596, 601; 36 H. 692, 694, 698.

" **§101-42 Rights-of-way.** Such corporations shall have the right to condemn rights-of-way over lands and property for ditches, tunnels, flumes and pipelines necessary or proper for the construction and maintenance of a system for conveying, distributing, and transmitting water for irrigation, fluming, mill use, generation of electricity, and domestic purposes; provided that no such corporation shall exercise the right of condemnation in more than one county. [L 1911, c 124, §2; RL 1925, §829; RL 1935, §72; am L 1943, c 186, §1; RL 1945, §324; RL 1955, §8-39; HRS §101-42]

#### Case Notes

Cited: 74 F.2d 596, 601.

" **§101-43 Requirements prior to exercise of power.** Any corporation having the power of eminent domain under section 101-41 may continue to exercise the power, provided that prior to the exercise of the power:

- (1) The corporation submits to the public utilities commission its intention to exercise the power, with a description of the property to be condemned; and
- (2) The public utilities commission finds that the proposed condemnation is in the public interest, that the proposed condemnation is necessary, and that the corporation will use the property for its operations as a public utility. [L 1961, c 134, pt of §6; Supp, §8-39.5; HRS §101-43]

" **§101-44 Right-of-way lapses when.** Any right-of-way which is obtained under sections 101-41 and 101-42 shall lapse and immediately revert to the previous owner thereof in either of the following events:

- (1) If the corporation fails during a period of one year, at any time after acquiring the property, to use the right-of-way for the purposes herein set forth; or
- (2) If the corporation uses or diverts or sells any of the water which is conducted through the right-of-way for a purpose other than irrigation, fluming, mill use, generation of electricity, and domestic purposes, as well as for the watering of livestock and industrial use if the industrial use does not exceed five per cent of the water conducted through the right-of-way. [L 1911, c 124, §4; RL 1925, §831; RL 1935, §74; am L 1943, c 186, §2; RL 1945, §326; RL 1955, §8-40; HRS §101-44]

### **"PART III. SPECIAL PROCEEDINGS RELATING TO PUBLIC PROPERTY**

**§101-51 Definitions.** As used herein: "Public property" means real property (1) owned by a political subdivision of the State or (2) owned by the State in its own right and not owned by the United States. "Public property" shall not be deemed to include public lands, defined to be such by section 171-2. [L 1949, c 377, pt of §1; RL 1955, §8-50; HRS §101-51]

" **§101-52 Proceedings authorized.** Any officer authorized to bring eminent domain proceedings under part I, and any county when thereunto authorized in the manner provided by section 101-13, which is made applicable to this part, may file or cause to be filed a special proceeding for the acquisition by the State or county, as the case may be, of public property required for public uses which are under the officer's or county's jurisdiction and control. The circuit courts may try and determine the proceedings without a jury, subject only to an appeal in accordance with chapter 602, in the manner provided for civil appeals from the circuit courts. The circuit court, on its own motion or on motion of any party, may try and determine any issue in the case in advance of other issues. Compensation or damages shall be paid by the condemning authority for the condemnation of any public property taken under this chapter. [L 1949, c 377, pt of §1; RL 1955, §8-51; am L 1957, c 160, §1; HRS §101-52; am L 1973, c 30, pt of §5; am L 2004, c 202, §12; am L 2006, c 94, §1; am L 2010, c 109, §1]

" **§101-53 Property already appropriated to a public purpose.** Whenever the public property sought to be acquired has already been appropriated to some public purpose, in order that the property be acquired by the petitioner it must appear that the



use to which the property is sought to be put is more necessary than the purpose to which it has already been appropriated. [L 1949, c 377, pt of §1; RL 1955, §8-52; HRS §101-53]

### Case Notes

Condemnation by railroad company of public property held as navigable waters denied. 11 H. 717.

Not applicable unless State or county owns the land. 70 H. 18, 757 P.2d 647.

" **§101-54 Part I provisions adopted; consolidation of proceedings.** The provisions of part I are adopted for and made applicable to the proceedings authorized by this part, except insofar as the provisions of part I are inconsistent with the express provisions of this part.

Upon motion of any party, any special proceeding filed under this part may be consolidated for hearing and decision with any proceeding brought under part I for the same public use, and if so consolidated shall be heard and determined by the judge of the circuit court in which the proceeding under part I is pending, sitting without a jury. [L 1949, c 377, pt of §1; RL 1955, §8-53; HRS §101-54; am L 1973, c 30, pt of §5]

### "[PART IV. ACQUISITION OF PRIVATE PERSONAL PROPERTY]

**§101-71 Taking private personal property for public use.** In connection with the taking for public use of private real property, the State or any county may take for a public use private personal property which it deems necessary or convenient which has been permanently upon or has been used in connection with the real property being taken. Just compensation must be paid for personal property so taken. Actions under and by virtue of this section shall be commenced by filing a complaint and issuing a summons thereon. If an action is initiated for the taking of the real property, the action for the taking of the personal property must be joined to it. The complaint shall contain, with reference to the personal property sought to be condemned, a statement of the use to which the property is to be put and a description of the property and shall join as defendants all persons who are owners or claimants thereof. The procedure for the acquisition of private personal property shall, except as otherwise expressly provided in this section, be the same as in other actions brought under this chapter unless the provision by its terms is clearly inapplicable to the acquisition of personal property. [L 1972, c 84, pt of §1; am L 1974, c 77, §1]

" **[\$101-72] Negotiated purchase of private personal property under threat of condemnation.** Any law requiring governmental purchase of personal property pursuant to competitive bidding to the contrary notwithstanding, private personal property, sought to be acquired under threat of the exercise of the power of eminent domain, may be acquired through negotiated purchase. [L 1972, c 84, pt of §1]