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Finally, concerning the appellees' cross-appeal, we conclude that the court did not err when it denied the appellees' request for prejudgment interest, and we affirm such denial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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## CITY OF WAVERLY, NEBRASKA, APPELLEE, V. RICHARD M. HEDRICK, APPELLANT.

810 N.W.2d 706

Filed March 9, 2012. No. S-11-333.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Courts: Eminent Domain.** The powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.
4. **Eminent Domain: Words and Phrases: Appeal and Error.** Only when the appraiser's report is appealed to the district court do condemnation proceedings become judicial.
5. **Eminent Domain: Pleadings: Statutes.** The statutes relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.
6. **Judgments: Evidence.** Determination of questions of fact upon evidence, or the exercise of discretion in ascertaining or fixing an amount to be allowed, generally involves judicial rather than ministerial acts.
7. **Eminent Domain: Liens: Interest.** The existence and amount of a lien, the amount of accrued interest, and whether there should be a setoff from the condemnation award involve judicial, rather than ministerial, determinations.
8. **Eminent Domain: Courts: Jurisdiction.** Because the eminent domain statutes do not confer upon county courts the power to hear motions for setoff, they lack jurisdiction to do so.
9. **Eminent Domain: Courts: Jurisdiction: Appeal and Error.** In condemnation proceedings, the district court has original as well as appellate jurisdiction over

the subject matter and can determine matters beyond the question of the valuation of the land or interests taken.

10. **Courts: Equity: Judgments.** District courts have the inherent power in the administration of justice and, governed by the principles of equity, to order setoff from an award or judgment.
11. **Eminent Domain.** The general eminent domain statutes prescribe the manner and method by which condemnors may exercise the power of eminent domain.
12. **Eminent Domain: Parties.** It is generally true that failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party.
13. **Eminent Domain.** A condemnor cannot condemn its own property interest.
14. **Eminent Domain: Liens.** Condemnation money stands in place of the land, and belongs to a lienholder, to the extent of the value of the lien.

Appeal from the District Court for Lancaster County, ROBERT R. OTTE, Judge, on appeal thereto from the County Court for Lancaster County, SUSAN I. STRONG, Judge. Judgment vacated in part and in part reversed, and cause remanded with directions.

Donald J. Pepperl, P.C., L.L.O., for appellant.

Mark A. Fahleson and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

This case concerns a city's preexisting lien on land eventually condemned and whether the city can file a motion in either county or district court for setoff of the lien amount from the condemnation award. The landowner argues that the city must condemn the lien, as well as the subject property, in order to claim the land in condemnation proceedings. The landowner also argues that it was error for the county court in this case to grant such a setoff, because county courts lack jurisdiction to make judicial determinations in condemnation proceedings.

## BACKGROUND

The City of Waverly, Nebraska (City), as condemnor, filed a petition in the Lancaster County Court for appointment of appraisers to assess damages that the condemnee, Richard M. Hedrick, would sustain when the City condemned a fee simple interest in 5.504 acres of Hedrick's land. The petition stated that the site was selected for construction of a park, public grounds, public emergency services buildings, a municipal maintenance shop, and other public buildings near several recently approved residential developments. The petition stated that the City was unable to reach an agreement with Hedrick concerning acquisition of the property. The City sent notice to Hedrick, and the county court issued an order appointing three appraisers.

On December 14, 2005, the appraisers returned a "fee taking" valuation of $86,000. This valuation was filed in county court as a "Return of Appraisers" and signed by a county court judge. In its assessment of damages, the return did not consider any outstanding liens on the property.

On December 21, 2005, the City filed a motion in the county court requesting that the county court deduct a preexisting statutory lien against the property from the appraisers' return. According to the motion, the City had a lien which was filed with the Lancaster County register of deeds in 2004. The lien was in the amount of $8,500 and represented the cost the City incurred abating a nuisance on Hedrick's property as of March 27, 1997. Hedrick never paid the lien, and it incurred interest at the rate of 14 percent per annum, pursuant to Neb. Rev. Stat. § 45-104.01 (Reissue 2010). The City alleged that as of December 14, 2005, the lien amount, including interest, was $18,874.12.

The county court had not yet ruled on the City's December 21, 2005, setoff motion when, on December 29, Hedrick filed a notice of appeal to the district court on the ground that the $86,000 valuation was inadequate. The City filed another motion in district court to set off the statutory lien, and Hedrick filed a motion to deny the setoff.

On March 26, 2010, the district court ordered that any setoff would be made by the county court following a jury trial in the district court to determine the proper valuation of Hedrick's

land. The district court explained that the county court would address the City's setoff motion in the course of disbursing the condemnation proceeds. The district court accordingly found that Hedrick's motion to deny the setoff was moot.

The jury valued the taking at $117,400, and the district court entered judgment in favor of Hedrick in that amount. On May 4, 2010, the district court further awarded Hedrick interest on the condemnation award in the amount of $37,092.07. The district court then remanded the matter to the county court to determine what amount of the condemnation award, if any, should be reduced to account for the City's lien interest.

At hearings before the county court, the City introduced an affidavit of the city administrator, who testified as to the events leading up to the City's lien against Hedrick. The administrator further testified that as of June 4, 2010, the amount of the lien plus interest equaled $48,029.87. The lien, as recorded, was attached to the affidavit. The City entered into evidence numerous additional exhibits pertaining to the validity of the 1997 lien.

Hedrick argued that Nebraska law did not allow setoff. Hedrick pointed out that under Neb. Rev. Stat. § 77-209 (Reissue 2009), a lien is on the real estate and is not a personal liability. According to Hedrick, the City should have listed itself as a condemnee in order to condemn the lien and make it part of the appraisers' valuation. Otherwise, the City's only remedy was to bring a separate foreclosure action on the lien. The City responded that condemnation money stands in place of the land and belongs to the lienholder to the extent of the value of the lien. The City also pointed out that any right to foreclose after condemnation was illusory because it could not foreclose against itself as the owner of both the property and the lien.

On September 20, 2010, the county court granted the City's motion for setoff. The court concluded that the City did not have to name itself as a party condemnee in order to have its interest in the lien on the condemned property ascertained. The court set off the condemnation award by $24,547.07. That amount represented the original $8,500 lien plus $16,047.07 in interest pursuant to § 45-104.01.

Hedrick appealed the September 20, 2010, setoff order to the district court. In addition to the arguments Hedrick presented in county court, Hedrick asserted that the county court lacked jurisdiction to grant the City's setoff motion because a county court has no jurisdictional authority to hear motions or enter orders. The district court rejected Hedrick's arguments and affirmed the order of the county court.

## ASSIGNMENTS OF ERROR

Hedrick asserts, summarized and restated, that the district court erred in failing to conclude that (1) the county court lacked subject matter jurisdiction to hear the City's motion for setoff and (2) the City waived recovery of its lien interest by failing to condemn the lien as part of the condemnation proceedings.

## STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

[2] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[2]

## ANALYSIS

Hedrick makes two arguments as to why we must reverse the judgment below. First, he asserts that the county court, being a court of limited jurisdiction, lacked the power to determine a setoff. Second, Hedrick asserts that the City is procedurally barred from obtaining compensation for its interest in the land, because the City failed to name itself as condemnee in the petition for appointment of appraisers. We agree that the county court did not have subject matter jurisdiction to determine the setoff, but we disagree that the City

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[1] *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

[2] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

was procedurally barred from obtaining a setoff in district court. Accordingly, we remand the matter of the setoff for determination in district court.

## JURISDICTION

[3] We have explained that the powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.[3] No trial is conducted before a judge who pronounces a judgment.[4] No evidence is received, and no record is made.[5] Instead, the court appoints the appraisers, which appointment is a ministerial act.[6] And the hearing is before the appraisers, not the county court.[7] The issues in county court are limited to the amount of the damages.[8] In addition, Neb. Rev. Stat. § 76-726 (Reissue 2009) confers upon the county court jurisdiction to award costs and fees incurred by a party resisting a condemnation.

[4,5] "There can be no variance in the issues because no pleading, except the petition of the condemner, is contemplated in the administrative proceeding [before the county court]."[9] Only when the appraiser's report is appealed to the district court do the proceedings become "judicial."[10] The statutes

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[3] See, e.g., *Weiner v. State*, 179 Neb. 297, 137 N.W.2d 852 (1965); *Lane v. Burt County Rural Public Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956).

[4] See, *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975); *Lane v. Burt County Rural Public Power Dist., supra* note 3.

[5] *Estate of Tetherow v. State, supra* note 4.

[6] See *Scheer v. Kansas-Nebraska Natural Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954).

[7] *Id.*

[8] See *id.*

[9] *Id.* at 675, 64 N.W.2d at 337.

[10] See, e.g., *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010); *Lane v. Burt County Rural Public Power Dist., supra* note 3; *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953); *Ditter v. Nebraska Bd. of Parole*, 11 Neb. App. 473, 655 N.W.2d 43 (2002).

relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.[11]

Thus, in *Higgins v. Loup River Public Power Dist.*,[12] we explained that the issue of whether a condemnor had attempted to negotiate a sale prior to commencing condemnation proceedings, as required by law, was a judicial question which the county court lacked the power to decide. Similarly, in *Scheer v. Kansas-Nebraska Natural Gas Co.*,[13] we indicated that the question of whether a gas company took more land than described in the description of an easement in a condemnation petition was a judicial matter outside the county court's jurisdiction.

[6-8] Determination of questions of fact upon evidence, or the exercise of discretion in ascertaining or fixing an amount to be allowed, generally involves judicial rather than ministerial acts.[14] The existence and amount of a lien, the amount of accrued interest, and whether there should be a setoff from the condemnation award involve judicial, rather than ministerial, determinations. Because the eminent domain statutes do not confer upon county courts the power to hear motions for setoff, they lack jurisdiction to do so.

[9,10] But the district court has original as well as appellate jurisdiction over the subject matter and can determine matters beyond the question of the valuation of the land or interests taken.[15] The Nebraska Constitution, article V, § 9, confers upon the district courts general powers in both law and equity

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[11] See, *Armstrong v. County of Dixon, supra* note 1; *Estate of Tetherow v. State, supra* note 4; *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 66 N.W.2d 591 (1954); *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

[12] *Higgins v. Loup River Public Power Dist., supra* note 10.

[13] *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

[14] See *Allen v. Miller*, 142 Neb. 469, 6 N.W.2d 594 (1942).

[15] See, *Armstrong v. County of Dixon, supra* note 1; *Estate of Tetherow v. State, supra* note 4; *Jensen v. Omaha Public Power Dist., supra* note 11; *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

to make judicial determinations.[16] And district courts have the inherent power in the administration of justice and, governed by the principles of equity, to order setoff from an award or judgment.[17] The district court had the jurisdictional power to order a setoff from the condemnation award.

## PROCEDURE

[11] Hedrick points out, however, that the general eminent domain statutes prescribe the manner and method by which condemnors may exercise the power of eminent domain.[18] And Hedrick asserts that the condemnation statutes do not contemplate setoff. Rather, the statutes require lienholders to be named as condemnees and have their interests determined by the appraisers. Hedrick argues that courts cannot derogate from prescribed procedure. He also argues that because the City did not name itself as condemnee and obtain valuation of its interest before the valuation of the condemnation award became final, the City is now procedurally barred from obtaining relief in these eminent domain proceedings.

[12] It is generally true that failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party.[19] But there is no need to transfer to the City something it already owns. Indeed, Neb. Rev. Stat. § 76-704.01 (Reissue 2009) provides that the petition in eminent domain shall include the title, right, or interest in the property "to be acquired."

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[16] See, also, *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989); *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982).

[17] See, *Sherwood v. Salisbury*, 139 Neb. 838, 299 N.W. 185 (1941); *Dalton State Bank v. Eckert*, 135 Neb. 500, 282 N.W. 490 (1938).

[18] *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

[19] See *Papio-Missouri River NRD v. Willie Arp Farms*, 15 Neb. App. 984, 739 N.W.2d 776 (2007).

The parties focus on whether the City is a "[c]ondemnee" as defined by Neb. Rev. Stat. § 76-701(2) (Reissue 2003). The City claims that it cannot be a "person, partnership, limited liability company, corporation, or association" as described by § 76-701(2). This is incorrect. The law in Nebraska is clear that a public entity may be considered a "condemnee" under the eminent domain statutes.[20]

[13] Nevertheless, we agree with the City that it cannot condemn its own property interest. While all parties having an interest in the land may be "owners" within the meaning of the condemnation statutes,[21] the City is not a condemnee as that term is defined by § 76-701(2). Condemnee "means any person, partnership, limited liability company, corporation, or association owning or having an encumbrance on any interest in property *that is sought to be acquired by a condemner* or in possession of or occupying any such property."[22] As already stated, the City's interest is not one that "is sought to be acquired by a condemner."[23] One cannot "acquire" something one already has. We have been unable to find any cases in our long history of eminent domain jurisprudence in which the condemnor has also been the condemnee of its own property interest.

To the contrary, in *State v. Missouri P. R. Co.*,[24] we implicitly accepted the argument that it would be inconsistent for the State to condemn its own tax lien. The State in *Missouri P. R. Co.* had sued a railroad company to recover under a statutory tax lien on property acquired by the railroad company through condemnation proceedings. The railroad company argued that the condemnation had extinguished the lien. We disagreed and said that if the railroad company had wished to extinguish the tax lien upon condemnation, it should have joined the State

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[20] See *State v. Missouri P. R. Co.*, 75 Neb. 4, 105 N.W. 983 (1905).

[21] See *Ehlers v. Chicago, B. & Q. R. Co.*, 118 Neb. 477, 225 N.W. 468 (1929).

[22] § 76-701(2) (emphasis supplied).

[23] *Id.*

[24] *State v. Missouri P. R. Co., supra* note 20.

in the condemnation action. In so concluding, we rejected the railroad's argument that it would have been inconsistent for the railroad, as a representative of the State, to condemn its "own" lien. We held that the railroad company did not act as an agent of the State when condemning the property and that the profit resulting from the condemnation did not "inure to the treasury of the state."[25] The property condemned remained "private property the same as before."[26] "There is therefore no inconsistency in bestowing the power of eminent domain upon railway companies without at the same time giving to the railway company the power to annul . . . all tax liens upon the property it may desire to so take."[27]

[14] The eminent domain statutes do not explicitly contemplate a scenario where the condemnor has a lien interest in the land acquired. But we conclude that it is appropriate for a district court to consider the question of a setoff in such instances—upon a timely motion by the condemnor. It is well established that the condemnation money stands in place of the land, and belongs to the lienholder, to the extent of the value of the lien.[28]

Hedrick argues that allowing setoff falls afoul of the proposition that statutes prescribing proceedings for condemnation of property and the assessment of compensation must be strictly construed against the condemnor and in favor of the landowner.[29] We disagree. We find no reason to construe the statutes so as to bestow a windfall upon a condemnee. If the district court does not account for the City's preexisting lien on the property, the City's security for the debt Hedrick has refused to pay will be forever lost. As the City points out, it cannot foreclose against itself any more than it can condemn its own property.

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[25] *Id.* at 7, 105 N.W. at 984.

[26] *Id.* at 6, 105 N.W. at 984.

[27] *Id.* at 7, 105 N.W. at 984.

[28] See, e.g., *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Neb. 514, 96 N.W. 276 (1903).

[29] See *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

## CONCLUSION

The district court erred in remanding the matter of the setoff to the county court. Determining the City's lien and whether and to what amount it should be deducted from the condemnation award was a judicial matter within the jurisdiction of the district court. It was properly presented to the district court through a timely motion by the City. We vacate the county court's order of setoff. We reverse, and remand to the district court to determine the extent to which the proceeds from the award should be given to the City in payment of its lien on the condemned property.

VACATED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID M. WALOCHA, RESPONDENT.

811 N.W.2d 174

Filed March 9, 2012. No. S-11-422.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in light of its particular facts and circumstances.
5. ____. In imposing attorney discipline, the Nebraska Supreme Court considers the discipline that it has imposed in cases presenting similar circumstances.
6. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
7. ____. When determining appropriate discipline of an attorney, the Nebraska Supreme Court considers aggravating and mitigating factors.