

404-305

#36.300

Memorandum 74-46

Subject: Study 36.300 -- Condemnation Law and Procedure (Comprehensive Statute)

BACKGROUND

This memorandum will serve as the basis for Professor Van Alstyne's oral presentation at the September meeting of the Law Revision Commission. The memorandum presents an analysis of the basic differences between the Law Revision Commission tentative recommendation relating to The Eminent Domain Law (referred to as "LRC draft") and the Uniform Eminent Domain Code which was presented to the National Conference of Commissioners on Uniform State Laws at its August 1974 Hawaii meeting (referred to as "Uniform Code").

It is essential that the eminent domain recommendations be put into final form after the September meeting. Hence, it was necessary to prepare this memorandum using the text (copy attached) of the Uniform Eminent Domain Code presented to the August 1974 meeting of the National Conference of Commissioners on Uniform State Laws. As a result, this memorandum does not reflect any changes made in the code at the August 1974 meeting. Any such changes will be presented orally by Professor Van Alstyne at the meeting.

This memorandum follows the order of sections in the Law Revision Commission tentative recommendation. We will raise the matters in this memorandum as we reach the particular section in our coverage of Memorandum 74-45.

In this memorandum, we note, for example, possible changes in language in sections in the LRC draft, possible additional provisions that might be added to the LRC draft, and provisions of the Uniform Code that deal with matters covered by the LRC draft but adopt a different approach. We also note, for each section of the LRC draft, the comparable provisions (if any) of the Uniform Code.

Sections of the LRC draft (Law Revision Commission tentative recommendation) are noted below only where there is a comparable provision in the Uniform Code or where the Uniform Code deals with the subject matter of the particular LRC draft section.

COMPARISON OF LRC DRAFT WITH UNIFORM CODE

§ 1230.010. Short title

Comparable provision--Unif. Code § 101.

§ 1230.020. Law governing exercise of eminent domain power

Comparable provision--Unif. Code § 102. The Uniform Code adopts a different approach than the LRC draft. The Uniform Code provides: "In the event of conflict between this Code and any other law with respect to any subject governed by this Code, this Code prevails." The LRC draft makes the general eminent domain statute apply except as otherwise specifically provided by statute. No change should be made in the LRC draft; we want the special provisions to prevail over the general provisions and have repealed the special provisions we do not want to retain.

§ 1230.040. Rules of practice in eminent domain proceedings

Comparable provision--Unif. Code § 401.

§ 1230.050. Court may enforce right to possession

Comparable provision--Unif. Code §§ 1212(c)(last sentence), 613. You should compare LRC Section 1230.050(b) with Uniform Code Section 613. The staff prefers the LRC provision.

Agreement on Compensation and Other Relief

The Uniform Code (Section 104) contains a general section authorizing the parties to settle any issue. The LRC draft does not contain a general section of this nature. However, the LRC draft does contain provisions permitting agreement of the parties on particular issues. See, e.g., Sections 1240.150 (acquisition of all or a portion of remainder with owner's consent), 1240.240 (to be added--acquisition for future use with consent of owner), 1263.610 (performance of work to reduce compensation), and 1263.620 (performance of work to protect public from injury).

The staff believes that it would be desirable to include a general provision like Uniform Code Section 104 in the LRC recommendation to the Legislature. Provisions authorizing settlement or compromise of pending actions are found in the governmental liability legislation. E.g., Govt. Code §§ 948 (state), 949 (local public entity). However, the authority granted by the section proposed below is somewhat broader. We suggest that we use the language of Section 104 of the Uniform Code and include a section reading substantially as follows:

§ 1230.045. Agreement on compensation and other relief

1230.045. Except as otherwise specifically limited by statute, the parties at any time before commencement or during the pendency of the eminent domain proceeding may agree to, and carry out according to its terms, a compromise or settlement as to any issue, including all or any part of the compensation or other relief.

Comment. Section 1230.045 is the same in substance as Section 104 of the Uniform Eminent Domain Code. The primary purpose of the section is to provide assurance that the condemnor has adequate

authority to agree to a settlement of all or any part of the compensation or other relief in issue and to carry out the terms of the agreement, thereby eliminating any possible objection based on narrow statutory construction or on ultra vires grounds. The section applies to both parties since, in some instances, the condemnee may be a public entity with limited powers. Both complete and partial settlements are authorized; the latter may eliminate the necessity for trial as to the items agreed upon even though other elements remain to be tried.

Unlike the Uniform Code provision, Section 1230.045 applies except as otherwise specifically limited by statute. This introductory clause is included to preserve the effect of provisions such as Section 15854 of the Government Code (specifying the circumstances under which property may be acquired under the Property Acquisition Law pursuant to an agreement of the parties as to the price). See also Govt. Code §§ 948, 949 (authority of public entity or authorized representative to settle pending action).

Compliance With Federal Requirements

The Uniform Code contains a general provision (Section 105) and a special provision applicable to relocation assistance (Section 214(c)) relating to compliance with federal requirements. These provisions are intended to provide assurance "that public entities have adequate authority to comply with applicable conditions of federal assistance." See Section 105 of the Uniform Code.

The staff's initial reaction was to recommend that a provision comparable to Uniform Code Section 105 be included in the LRC draft. However, we believe that such a provision is unnecessary and undesirable. In the area where such a provision is most needed--relocation assistance--California already has enacted a comparable provision. See Govt. Code § 7272.3 (second paragraph) ("Any public entity may, also, make any other relocation assistance payment, or may make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter, if the making of such payment, or the payment in such amount, is required under federal law to secure

federal funds."). With respect to highways, California also has enacted a comparable provision. See Sts. & Hwys. Code § 820 ("The State of California assents to the provisions of Title 23, United States Code, as amended and supplemented, other acts of Congress relative to federal aid, or other cooperative highway work, or to emergency construction of public highways with funds apportioned by the government of the United States. All work done under the provisions of Title 23 or said other acts of Congress relative to highways shall be performed as required under acts of Congress and the rules and regulations promulgated thereunder. Laws, rules, or regulations of this state inconsistent with such laws, or rules and regulations of the United States, shall not apply to such work, to the extent of such inconsistency. Any major conflicts between the laws, rules, or regulations of this state and such federal law, rules, and regulations which have been resolved under this section during a calendar year shall be described in a report which the department shall submit to the Legislature no later than January 30th of the succeeding calendar year."). We believe that it would be dangerous to include the provision of the Uniform Code in the LRC draft because we do not know what its effect would be. We are concerned that it might be construed to permit payment of less compensation than otherwise would be required under the proposed legislation. For this reason, we would leave the situation as it now exists; no general provision would be included in the existing eminent domain law, and special provisions would be continued in various laws.

Operative Date

The staff recommends that a provision be added to the LRC draft to make the operative date of the new statute July 1, 1977. At the same

time, we suggest below that Section 1230.070 be revised to make the new statute applicable to some extent to actions pending on July 1, 1977.

To effectuate the staff recommendation, we recommend that a new provision be added to Chapter 1, to read:

§ 1230.065. Operative date

1230.065. This title shall become operative on July 1, 1977.

Comment. Section 1230.065 delays the operative date of this title until July 1, 1977, to allow sufficient time for state and local public officials, lawyers, and the public to become familiar with the new law.

§ 1230.070. Effect of enactment of title on prior proceedings

Section 1230.070 provides that the Eminent Domain Law applies only to proceedings commenced after its operative date; none of its provisions are applicable to pending proceedings. The Uniform Code takes a different approach. Section 1602 provides that the portions relating to precondemnation activities and pleadings apply only to condemnation actions commenced on or after the operative date of the code. The portions relating to prejudgment deposits, trial procedure, compensation, postjudgment procedure, and the like apply to condemnation actions commenced before the operative date of the code "to the fullest extent practical."

The staff believes that the scheme of the Uniform Code on this matter is preferable. If the reforms proposed in the Eminent Domain Law are necessary, they should take effect as soon as possible. Moreover, a delayed operative date would encourage condemnors to file a large number of actions immediately prior to the operative date in order to preserve old law for as many cases as possible.

The staff would substitute for Section 1230.070 the following sections:

§ 1230.065. Operative date

1230.065. (a) This title becomes operative July 1, 1977.

(b) Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding commenced prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues on which a judgment has not been entered or which are retried pursuant to an order of the trial or appellate court.

(c) Chapters 3, 4, and 5 of this title do not apply to an eminent domain proceeding commenced prior to the operative date.

(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law in effect immediately prior to the operative date governs the determination of the appeal or motion.

Comment. Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1977, to allow sufficient time for state and local officials, lawyers, and the public to become familiar with the new law.

Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings. In most proceedings, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not obstruct the parties or court in proceeding to judgment. Immediate application, moreover, would prevent inconsistencies of result as between proceedings commenced just prior to the operative date and those commenced shortly thereafter. The phrase "to the fullest extent practicable" is intended to give the court ample discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases effect an injustice.

Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

Subdivision (d) provides, in the interest of fairness, that any decision on a posttrial motion or appeal pending on the operative date should be based upon the law that was in effect when the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).

§ 1230.070. Effect of enactment of title on prior proceedings

1230.070. No judgment rendered prior to July 1, 1977, pursuant to a proceeding to enforce the right of eminent domain is affected by the enactment of this title and the repeal of former Title 7 of this part.

Comment. Section 1230.070 is new. It makes clear that the repeal of the former eminent domain title of this code and the enactment of new provisions of the Eminent Domain Law in no way affect the validity of judgments rendered prior thereto.

§ 1235.070. Constitutionality

Comparable provision--Unif. Code § 1604. The Uniform Act provision is the same in substance but is a better drafted provision. Absent an objection, the staff plans to conform the LRC draft to the Uniform Code provision.

Uniformity of Application and Construction

The Uniform Code was taken to a considerable extent from earlier versions of the LRC draft; we expect that a number of provisions of the LRC draft will be the same as or substantially the same as provisions of the Uniform Code. For example, the staff later recommends herein that the goodwill compensation section in the LRC draft be revised to adopt the language used in the Uniform Code (assuming that the goodwill section remains in the Uniform Code). Insofar as the provisions of the two statutes are the same, we think that the principle of uniform construction should apply. A provision to this effect would also serve to alert the reader to the fact that a number of the provisions of the California statute are the same as or the same in substance as the Uniform Eminent Domain Code. Accordingly, the staff recommends that the following section (taken from Section 1603 of the Uniform Act) be added to the LRC draft:

§ 1235.015. Uniformity of application and construction

1235.015. Any provision of this title that is the same as or the same in substance as a provision of the Uniform Eminent Domain Code shall be so applied and construed as to effectuate the general purpose of making uniform the law with respect to that provision among those states that enact it.

If the Commission decides to include this provision in its statute, we will write a Comment indicating provisions to which the section would apply. We cannot do this until both the Uniform Code and the LRC draft have been put in substantially final form.

Definition of "Proceeding"

Section 103(1) of the Uniform Code contains the following definition:

- (1) "action" means condemnation action.

The staff believes that a comparable definition in the LRC draft would be useful. We suggest the following definition be added to Article 2 (commencing with Section 1235.110):

§ 1235.165. Proceeding

1235.165. "Proceeding" means an eminent domain proceeding under this title.

"Property" and Related Definitions

Section 103 of the Uniform Code contains definitions of "property" [subsection (17)], "personal property" [subsection (16)], "real property" [subsection (18)], "improvement" [subsection (11)], and "crops" [subsection (10)]. The LRC draft contains a broad definition of "property" which is used uniformly throughout the draft. The issue of when an "improvement" constitutes real property is dealt with in a series of substantive provisions (Sections 1263.210-1263.280) in a better way than in the Uniform Code. Harvesting and marketing of crops is covered by a separate section (Section 1263.250); the definition of "crops" should be considered in connection with that section and the definition added to that section if it is thought to be desirable. Accordingly, the staff

recommends against including the definitions of the Uniform Code for "property," "real property," "personal property," "improvements," and "crops" in the LRC draft.

Definition of "Business"

Section 103(3) of the Uniform Code defines "business" in very broad terms. The definition is important in connection with relocation assistance. But it also has important uses in other areas of the Uniform Code. See, e.g., Section 1016 (compensation for loss of goodwill). The staff notes that a definition of "business" might be included in the LRC draft; the term is used in various important sections of the draft. See, e.g., Sections 1263.220 (when "business" equipment constitutes an improvement pertaining to the realty), 1263.510 (owner of "a business" entitled to compensation for loss of goodwill under specified circumstances).

The following definition might be added. It is derived from Government Code Section 7260(d) (defining "business" for purposes of relocation assistance) and is similar to the Uniform Code provision.

§ 1235.115. Business

1235.115. "Business" means any lawful activity conducted primarily by a nonprofit corporation or for any of the following purposes:

(a) The purchase, sale, lease, or rental of real or personal property.

(b) The manufacture, processing, or marketing of products, commodities, or any other personal property.

(c) The sale of services to the public.

Comment. Section 1235.115 is based upon Government Code Section 7260(d). Unlike the Government Code section, however, Section 1235.115 includes farm operations in the definition. For a comparable provision, see Section 103(3) of the Uniform Eminent Domain Code.

The staff has no opinion whether this definition should be included in the LRC statute. Perhaps the word "business" should be left undefined and its meaning determined by the context in which the word appears. However, the definition set out above is a broad one, and it does make clear that apartments and hotels are included as well as nonprofit activities.

Definition of "Appraisal"

Section 103(2) of the Uniform Code defines "appraisal." The staff recommends against including this definition in the LRC draft. We have various provisions where we state a requirement that an appraisal be made or appraisal data be provided the other party or exchanged with another party. See, e.g., Sections 1255.010(b) (appraisal in connection with deposit prior to judgment), 1258.210 (demand for exchange "statements of valuation data"). We believe each of the LRC provisions is carefully drafted to specify in some detail precisely what is required. We think a general definition of "appraisal" is unnecessary and would cause confusion if included in the LRC draft.

Definition of "Condemnee," "Condemnor," and "Condemnation Action"

The Uniform Code uses the terms "condemnee" and "condemnor" and refers to the process for taking property by eminent domain as the "condemnation action." Although I personally prefer "condemnee" and "condemnor" to the terms used in the LRC draft--"plaintiff" and "defendant"--the Commission, other staff members, and the existing California statute take the contrary view. It is too late in the game to change our basic terminology even if there were a fairly strong feeling (which I doubt exists) that it should be changed.

The Uniform Code definition of "condemnation action" does not appear to be necessary and, in fact, would create confusion. For example, does the procedure for making relocation payments become part of the eminent domain proceeding? The staff recommends against including the Uniform Code definition. However, if it is desired to add a definition to the LRC draft, the definition of 'condemnation action' in Section 103(5) could be rephrased for use in the LRC draft to read as follows:

§ 1235.117. "Eminent domain proceeding"

1235.117. "Eminent domain proceeding" includes all acts incident to the acquisition of property by eminent domain after the filing of the complaint.

Comment. Section 1235.117, which is comparable to Section 103(5) of the Uniform Eminent Domain Code, makes clear that steps in the acquisition of property for public use--such as the adoption of the resolution of necessity--prior to the commencement of the proceeding are not included within the term "eminent domain proceeding" or "proceeding" (see Section 1235.165) as used in this title.

Definitions of "Costs" and "Litigation Expenses"

Subsections (8) and (13) of Section 103 of the Uniform Code define "costs" and "litigation expenses," respectively. Section 1268.610(a) of the LRC draft defines "litigation expenses," and there is no definition of costs, this being left to other statutory provisions as under the existing California statute (see LRC draft, Sections 1268.710 and 1268.720). Absent any significant revision of the relevant provisions of the LRC draft, the staff sees no benefit to providing definitions of "litigation expenses" and "costs" in the general portion of the LRC draft.

Definition of "Lien"

Section 103(12) of the Uniform Code defines lien in the same way as Section 1265.210 of the LRC draft. The staff prefers to leave the definition of "lien" in Section 1265.210 since we do not believe the term is used other than in Sections 1265.210-1265.240.

Definition of "Court"

Section 103(9) of the Uniform Code defines "court" as the term is commonly used in California. Other statutes do not define court; we see no necessity to do so in the LRC draft.

§ 1235.150. Local public entity

Comparable provision--Unif. Code § 103(14)(same as LRC § 1235.150).

§ 1235.160. Person

The definition of "person" in Section 103(15) of the Uniform Code should be compared to the one provided in Section 1235.160 of the LRC draft. Should Section 1235.160 be revised to read:

§ 1235.160. "Person"

1235.160. "Person" includes a private individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity.

Comment. Section 1235.160 is the same as Section 103(15) of the Uniform Eminent Domain Code. Compare Code Civ. Proc. § 17.

Definition of "Work"

Section 103(19) of the Uniform Code defines "work." No comparable definition is used in the LRC draft; we generally use the term "project" rather than "work" and have not provided a definition of "project" but have instead allowed the meaning of the term to be determined by the context in which it appears. See, e.g., Sections 1240.210 (future use), 1245.230 (contents of resolution of necessity). But see Section 1240.430 (using the phrase "public work or improvement"). The staff recommends that no change be made in the LRC draft.

Definition of "Larger Parcel"

The LRC draft uses the term 'larger parcel' in a number of sections but does not define the term, thus leaving its definition to court interpretation. On the other hand, Section 1007 of the Uniform Code contains what is in substance a definition of "larger parcel." The staff recommends that the LRC draft include a definition of this important term and that it be defined the same in substance as the Uniform Act definition. Accordingly, we recommend that a new definition, taken from Section 1007 of the Uniform Code, be added to the general definition portion of the LRC draft, to read:

§ 1235.155. Larger parcel

1235.155. "Larger parcel" means all parcels of property, whether contiguous or noncontiguous, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit.

Comment. Section 1235.155, which adopts the substance of Section 1007 of the Uniform Eminent Domain Code, prescribes the rule for determining what constitutes a larger parcel. The definition is of practical importance in determining whether there is a partial taking, leaving a remainder which may be injured by the taking. See Sections 1263.410-1263.450. Section 1235.155 goes beyond the narrow holding in City of Los Angeles v. Wolfe, 6 Cal.3d 326, P.2d , Cal. Rptr. (1971), that there be a strong interdependent present use in order that physically separate parcels be treated as a single parcel and eliminates physical contiguity as a requirement. However, evidence as to contiguity or separation may still be relevant for its bearing on the principal criterion--unity of use. The issue of what constitutes the larger parcel is one to be decided by the court. E.g., Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 297, 153 P. 705, 707 (1915).

We have used the language of the Uniform Code in the above section so that we can get the benefits of uniform interpretation by the courts and by federal agencies granting funds for state projects. Assuming that the Uniform Act is approved without changing Section 1007, it is very

likely that the California Supreme Court over a period of many years--as cases are presented to it for decision--will adopt generally the same position as the Uniform Act. However, the staff believes that it is undesirable to retain the existing uncertainty and apparently narrower California view of what constitutes a larger parcel. We believe that the failure of the LRC draft to define larger parcel is a major deficiency. We believe the term should be defined, whether or not the definition follows the Uniform Code definition. Mr. Kanner, our consultant, and others have urged the Uniform Rule standard, but the Executive Secretary has in the past opposed it. As a result, the Commission failed to adopt any definition at all.

Preliminary Location, Survey, and Tests (LRC Draft §§ 1245.010-1245.070)

The special committee that drafted the Uniform Code started with the LRC draft provisions on preliminary location, survey, and tests. In Uniform Code Sections 301-305, the special committee has adopted a different approach than the LRC draft, and the Commission should consider the Uniform Code approach. The staff has revised the Uniform Code provisions to integrate them into the LRC draft, and the revised provisions are set out as Exhibit I. The basic differences between the Uniform Code and the LRC draft are stated in the Comment to the article which is found in Exhibit I.

Preliminary Efforts to Purchase

Uniform Code Sections 306-308 require that the condemnor, whether a public entity or other authorized condemnor, make an effort to purchase the property by agreement before commencing an eminent domain action. The requirement is stated in Section 306, the scope of the efforts to

purchase are specified in Section 307, and the circumstances where the purchase efforts are waived or excused are stated in Section 308. Section 306 provides that the eminent domain action cannot be maintained over timely objection by the owner that there has not been a good faith effort to acquire the property by purchase before commencing the action.

Sections 306-308 should be considered in connection with the California Government Code Sections 7267, 7267.1, 7267.2, and 7274:

7267. In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, be guided by the provisions of Sections 7267.1 to 7267.7, inclusive.

7267.1. (a) The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation.

(b) Real property shall be appraised before the initiation of negotiations, and the owner, or his designated representative, shall be given an opportunity to accompany the appraiser during his inspection of the property.

7267.2. Before the initiation of negotiations for real property, the public entity shall establish an amount which it believes to be just compensation therefor, and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the public entity's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, will be disregarded in determining the compensation for the property. The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

7274. Sections 7267 to 7267.7, inclusive, create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.

The Government Code sections do not make purchase efforts a prerequisite to maintenance of the eminent domain action, do not define the scope of the contemplated negotiations, and do not provide for exceptional circumstances in which noncompliance may be treated as wholly or partially excusable. These matters are covered by the Uniform Code provisions. More important, the Government Code provisions merely are a statement of guidelines for public entities in acquiring property, and they give the property owner no rights. See Section 7274.

The staff recommends against adding the substance of Uniform Code Sections 306-308 to the LRC draft. Although we have been advised that some state agencies have in the past commenced eminent domain proceedings without prior contact with the property owner, we believe that the preliminary-effort-to-purchase-requirement provides an additional procedural step and an additional opportunity to litigate a collateral issue in an eminent domain action and that the benefit to the property owner is greatly outweighed by the possible use of the provision as a means of delaying the eminent domain proceeding. Moreover, the Government Code sections quoted above adopt the policy that there should be a preliminary effort to purchase, and the public officials who fail to comply with the guideline can be held politically responsible.

§ 1245.220. Resolution of necessity required

Comparable provision--Unif. Code § 309. See also Section 309A. The Uniform Code requires that a public utility or other corporate non-public entity adopt a resolution of necessity. The LRC draft is limited to public entities. The staff recommends no change in the LRC draft.

The Uniform Code contains a provision that "The resolution may be amended or rescinded at any time before the commencement of the condemnation action." It might be desirable to include a provision in the LRC draft, reading in substance as follows:

§ 1245.255. Amendment or rescission of resolution

1245.255. Subject to any limitations or requirements imposed by law, the resolution of necessity may be amended or rescinded at any time before or after the commencement of the eminent domain proceeding.

Comment. [To be written.]

Definition of "Resolution"

Uniform Code Section 309A is drafted in recognition that official action authorizing the eminent domain proceeding may take forms other than a resolution. Since the resolution of necessity might actually be an ordinance rather than a resolution in some instances, the staff recommends the following additional definition to be added to the general preliminary definitions:

§ 1235.205. Resolution

1235.205. "Resolution" includes ordinance.

We note that the existing condemnation statute requires that the determination of necessity be by "resolution or ordinance." See Section 1241(2). Compare Section 1239 (necessity for taking fee to be by "resolution"). The definition is needed to avoid repeating "resolution or ordinance of necessity" in numerous places and to recognize that some public entities may act by ordinance rather than by resolution.

§ 1245.230. Contents of resolution

Comparable provision--Unif. Code § 310. Subsection (a) of Section 310 is the same in substance as LRC Section 1245.230, but the language of Section 310 may be preferable to the LRC draft. Subsection (b) of Section 310 contains a requirement not in the LRC draft--if possession is to be taken prior to judgment, the resolution shall also authorize

the taking of possession prior to judgment. The Commission may wish to make this a matter to be determined by the governing body of the public entity rather than by an administrative officer. The staff would not add the substance of subsection (c) of Section 310; the LRC draft makes clear that more necessary public use is not a matter that is within the scope of the effect of the resolution. See Section 1245.250 and third paragraph of Comment thereto.

§ 1245.250. Effect of resolution

Comparable provision--Unif. Code § 311. Note that a resolution adopted by a public utility is given the effect of a presumption under Section 311; the burden is shifted to the property owner to prove by clear and convincing evidence the lack of necessity. (See Section 507(b) of the Uniform Code.) Under the LRC draft, a nonpublic entity condemnor must prove necessity.

Another feature of the Uniform Code provision--one that the Commission may wish to adopt--is that the resolution of necessity is not conclusive "if it was adopted or last amended more than six months before the commencement of the action to which it relates." This provision is consistent with the policy stated in LRC Section 1245.260 (failure to initiate eminent domain proceeding within six months from adoption of resolution gives rise to cause of action for inverse condemnation). At one stage, the Uniform Code contained an exception for the case where the declaration of necessity was motivated by fraud, bad faith, or abuse of discretion. However, this provision has been deleted (but the Comment to Section 311 has not yet been adjusted to reflect the deletion).

§ 1245.260. Failure to initiate eminent domain proceeding within six months from adoption of resolution

The Uniform Code does not contain a provision like LRC Section 1245.260. Instead, the Uniform Code contains a provision requiring commencement of the eminent domain proceeding within six months after the adoption of the original or amended resolution. See Section 403 and Comment thereto. For a related provision, see Uniform Code Section 311 (effect of resolution of necessity).

Although Section 1245.260 (which retains language used in the existing California statute) is poorly drafted and leaves many matters for court interpretation, the staff believes that the section represents a desirable policy. The policy question for the Commission is whether that policy should be further implemented by including a section like Section 403 of the Uniform Code.

§§ 1250.010-1250.040, 1250.110. Jurisdiction and venue; commencement of proceeding

Section 402 of the Uniform Code covers in a more general fashion the matters covered by Sections 1250.010-1250.040 and 1250.110 of the LRC draft. The staff recommends no change in the LRC draft; we believe the LRC draft provides a better statement of the various matters covered in Uniform Code Section 402.

§§ 1250.120, 1250.130. Summons; service

Section 406 of the Uniform Code relates to the manner of service of process. The LRC draft does not deal with service generally, this being covered by the statutes relating to service. The LRC draft does deal with the content of the summons and requires posting when service is by publication. The staff recommends no additions to or changes in the LRC draft.

§ 1250.150. Lis pendens

Section 407 of the Uniform Code is comparable to LRC Section 1250.150, but the Uniform Code deals with the matter in great detail, the LRC draft leaving the matter to be covered by the same law that covers lis pendens generally. The staff recommends no change in the LRC draft.

§ 1250.210. Identification of parties

The staff has reviewed Section 1250.210 in light of the comparable provision of the Uniform Code--Section 404(a)(1), (2). We have concluded that subdivision (b) of Section 1250.210 should be deleted; this subdivision is unnecessary in light of Section 1250.220 which covers the naming of defendants in a comprehensive manner. Also, we believe that subdivision (a) should be revised to cover naming of plaintiffs in a way comparable to Section 1250.220. Accordingly, we suggest that Section 1250.210 be revised to read:

§ 1250.210. Naming plaintiffs

1250.210. Each person seeking to take property by eminent domain shall be named as a plaintiff.

Comment. Section 1250.210 requires that each condemnor be named as a plaintiff. This information may be relevant to the issue of the right to exercise the power of eminent domain. For example, if a joint and cooperative eminent domain proceeding is brought by agreement between different agencies (see Section 1240.140), each condemnor must be named as a plaintiff unless the proceeding is brought by a separate legal entity created pursuant to a joint powers agreement. See Govt. Code § 6508.

The plaintiff must be a person authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. See Section 1240.020. A proceeding may not be maintained in the name of any other person. See People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221 (1937); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 537, 12 Cal. Rptr. 836 (1961); Black Rock etc. Dist. v. Summit etc. Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Cf. City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924) (objection that real party in interest was a private person rejected). As to joinder of the owner of "necessary property" in a proceeding to acquire "substitute property," see Section 1240.340.

If Section 1250.210 is revised in this manner, we suggest that the first paragraph of the existing Comment to this section be made a Comment to Article 3.

§ 1250.220. Naming of defendants

Section 404(a)(2)(second sentence) of the Uniform Code covers in a very inadequate way the subject matter of LRC Section 1250.220. No change is recommended in the LRC draft.

§ 1250.240. Joinder of property

A major policy issue is presented by Uniform Code Section 405 which restricts the property that may be included in a condemnation proceeding to "only properties under substantially identical ownership that are sought to be taken." Also, Uniform Code Section 405 provides rules for the consolidation and separation of properties and issues, a matter that is left by the LRC draft to the general provisions dealing with consolidation and separation.

Despite the refusal of the Commission in the past to adopt the rules stated in Section 405 of the Uniform Code, the staff recommends that the entire section be substituted for Section 1250.240 of the LRC draft. We believe that the "substantially identical ownership" limitation is a sound one and that the standards provided for separation and consolidation are desirable ones. Public agencies will strongly object to this proposal.

§ 1250.310. Contents of complaint

Section 404 of the Uniform Code specifies the contents of the complaint and is generally comparable to the LRC draft. However, in light

of the Uniform Code section, the Commission should consider the following revisions in Section 1250.310:

(1) The Uniform Code requires that the complaint contain a 'legal description of the property and of the interest therein sought to be taken.' Compare subdivision (b) of Section 1250.310.

(2) Compare the allegation of the plaintiff's right to take under Section 404(a)(4) ("Allege the basis of the plaintiff's right to take the property by eminent domain and to maintain the action, including (i) a reference to the plaintiff's legal authority for taking the property; and (ii) a statement of the purpose for which the property is sought to be taken") with the requirement of subdivision (c)(3) of Section 1250.310. It is really necessary to require that the public entity engage in a search for all statutes that might authorize it to engage in a particular activity? For example, should a city that seeks to condemn land for airport purposes have to assign a lawyer the task of finding all provisions of the charter, statutes, and possibly PUC and FAA regulations that might authorize the city to engage in the aspect of the airport operation that requires the land acquisition? Why not omit this allegation of the specific statutory authority entirely and merely require a statement of the purpose of the acquisition? If the property owner contests the taking as an unauthorized activity, then the research to find the specific authorizing statutes will be needed and required; otherwise, this requirement serves merely to keep lawyers busy.

(3) The second sentence of subdivision (b) of Section 1250.310 perhaps should be a separate numbered subdivision as in the Uniform Code provision.

(4) We believe that subdivision (d) of Section 1250.310 should be rephrased--using some of the language of the Uniform Code--to read:

(d) A map or diagram portraying as far as practicable the property sought to be taken, showing its location in relation to the project for which the property is to be taken.

Also, we believe that the substance of the Uniform Code Comment on subdivision (c) should be incorporated in the LRC draft Comment.

§ 1250.320. Contents of answer

Section 1250.320 is comparable to subsection (a) of Section 502 of the Uniform Code which requires an allegation in the answer of "the nature and extent of the interest claimed by the answering defendant in the property sought to be taken." The staff prefers the Uniform Code language (and we would add to the LRC draft also a general definition of "interest" to include any "right, title, or interest").

We would revise the heading for Section 1250.320 to read: "Answer to state defendant's interest in property." Section 1250.320 does not specify the contents of the answer; it specifies only one item that must be included in the answer.

§ 1250.350. Pleading objections to right to take

Section 1250.350 contains no statement as to the effect of failing to plead an objection to the right to take nor does the section indicate the effect of failing to plead other objections to the complaint. As a result, the rule stated in Code of Civil Procedure Section 430.80 would apply ("If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, he is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action

alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.'). Note that Section 502(c) of the Uniform Code contains no exceptions to the waiver rule whereas Section 430.80 excepts from the waiver rule an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action. Consideration should be given to adopting the Uniform Code approach and adding the substance of the following to the LRC draft:

§ 1250.345. Waiver of objections to complaint

1250.345. Subject to the power to the court to permit an amendment of the answer, if the defendant fails to object to the complaint, either by demurrer or answer, he is deemed to have waived the objection.

We believe this section is desirable because--absent the section--we do not know how many right-to-take objections would be preserved by the exceptions to the waiver rule stated in Section 430.80. The staff does not recommend inclusion in the LRC draft of the portion of the Uniform Code provision providing that the defendant waives any right to compensation for any property sought to be taken except for his property as described in the answer. We do not know how this would affect the right to compensation of defaulting defendants or unknown defendants. As far as a defendant who answers is concerned, the statement of his interest in the answer would be an admission.

§§ 1250.360-1250.370. Grounds for objection to right to take

Uniform Code Section 502(b) specifies in general terms the preliminary objections that may be made to the maintenance of the action.

Insofar as the objections go to the right to take, the staff believes that the listing in Sections 1250.360 and 1250.370 of the LRC draft is more comprehensive and a better statement than the Uniform Code. Insofar as the objections go to other defects in the complaint, we believe the matter is better left to pleading law generally. Accordingly, we recommend no changes in Section 1250.360 or 1250.370 in light of Section 502 of the Uniform Code.

Disclaimer; Default on Failure to Respond

The Uniform Code contains provisions on filing a "disclaimer" (Section 503) and on the effect of a default for failure to respond (Section 504). The staff sees no need for the disclaimer provision, and we believe the matter of default for failure to respond can be left to the general rules governing the effect of failure to file a responsive pleading.

Additional Pleadings

Section 505 of the Uniform Code deals with additional pleadings. Subsection (a) of Section 505 is unnecessary in California since the matter of pleadings responsive to the answer is governed by the general California rules relating to pleading.

Subsection (b) is consistent with the rules reflected in the text and Comments to Sections 416.70 and 428.10 (pages 282-283 of LRC tentative recommendation) relating to compulsory cross-complaints. No revision of the LRC draft is needed in light of the Uniform Code provision.

Subsection (c) of Section 505 authorizes the court, for good cause shown, to permit a defendant to assert in the eminent domain proceeding an unrelated cause of action he has against another party or to bring in another party to assert such a cause of action. To permit unrelated causes to be asserted in the eminent domain proceeding goes against the clear policy stated in Section 428.10 of the Code of Civil Procedure (page 283 of LRC tentative recommendation), which is that an unrelated cause of action may not be asserted in an eminent domain proceeding. We see no need to change the policy reflected in Section 428.10. But see the Comment to subsection (c) of Section 505 of the Uniform Code.

§ 1255.010. Deposit of appraised value of property

In view of the comparable provision of the Uniform Code (Section 601), the staff suggests that subdivision (a) of Section 1255.010 be revised to read as follows:

(a) At any time after filing the complaint and prior to before entry of judgment, the plaintiff may deposit with the court the full amount indicated by the an appraisal referred to in subdivision (b) which the plaintiff believes to be the compensation for all or a specified part of the property for which the deposit is made sought to be taken in the proceeding . The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

Consideration also should be given to revising subdivision (c) of Section 1255.010 to use some of the language of the comparable provision of the Uniform Code--Section 601(e):

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared

before making the deposit, and (3) the amount of the deposit to be made is not less than the full amount of compensation that the plaintiff, in good faith, estimates will be payable for all or a specified part of the property sought to be taken in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order, and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

If this revision is made, a conforming change will be required in subdivision (c) of Section 1255.020.

§ 1255.020. Notice of deposit

Section 1255.020, which requires service of a notice of deposit on "all parties to the proceeding who have an interest in the property for which the deposit was made," imposes a new requirement in California and is much broader in scope than the comparable section of the Uniform Code. Section 602 of the Uniform Code requires service only upon parties who have appeared in the proceeding.

The notice of deposit is the first of several notices; its purpose is to alert persons who might want to withdraw the deposit that a deposit has been made. Before any withdrawal is permitted, service of notice of application to withdraw is required under Section 1255.230. Accordingly, the service of the notice of deposit is not needed to protect a non-appearing party against the possibility that the deposit will be withdrawn without his knowledge.

The staff recommends that service under Section 1255.020(a) be conformed to the comparable requirement of the Uniform Code and that service be required only on parties who have appeared in the proceeding. We further recommend that a provision be added to Section 1255.020 to permit a party appearing later to obtain the information referred to in

subdivision (b)(statement of valuation data). Finally, if subdivision (c) of Section 1255.010 is revised as recommended above, we recommend that a copy of all affidavits upon which an order for deposit under that subdivision was based be given with the notice of deposit. See Uniform Code Section 602.

The Uniform Code does not include a provision permitting the plaintiff merely to state where the valuation information is on file and may be obtained; the Uniform Code requires that the information be provided with the notice of deposit. If service of notice of deposit is limited to parties who have appeared in the proceeding or who later appear and request the valuation information, it would be desirable to require that the valuation information always be provided with the notice of deposit.

§ 1255.030. Increase or decrease in amount of deposit

Section 603 of the Uniform Code is comparable to Section 1255.030.

Subdivision (a) of both sections is the same in substance. However, the Uniform Code refers to a deposit of the "reasonable estimated compensation for the taking of that property" while the LRC draft refers to the "probable amount of compensation that will be awarded for the taking of the property." Unless the Commission has a strong preference for the Uniform Code terminology ("reasonable estimated compensation" -- which is a more accurate term), the staff would prefer not to rework the various sections to replace the LRC language with the Uniform Code terminology. The staff does recommend elimination as unnecessary of the introductory phrase of subdivision (a), "At any time after a deposit has been made pursuant to this article."

Subsection (b) of Section 603 deals with the situation where the plaintiff has not taken possession and the court determines that the

estimated compensation exceeds the amount of the deposit. Subsection (b) permits the court to order an increase in the deposit or simply to deny the right to possession until the deposit is increased. Subsection (d) of Section 603 provides for dismissal of the action for failure to increase the deposit when ordered by the court.

The LRC draft does not deal with this matter specifically but, by implication, the plaintiff is not required to deposit the greater amount but cannot take possession unless such amount is deposited. Consideration should be given to covering this matter specifically in the LRC draft.

Subsection (c) of Section 603 adopts the same rule as subdivision (b) of Section 1255.030 for the case where the plaintiff has taken possession and the deposit is determined to be inadequate.

Subsection (e) of Section 603 expressly permits the plaintiff to withdraw any amount deposited in excess of the amount determined to be the estimated compensation for the property if such amount has not previously been withdrawn by a defendant. The right of the plaintiff to withdraw the excess is left to implication by the LRC draft. Should the right be expressly granted as in the Uniform Code?

§§ 1255.040, 1255.050. Deposit on motion of certain defendants

Sections 1255.040 and 1255.050 provide for deposit on motion of certain defendants. Under existing California law, the condemnor determines whether it will make a deposit; the property owner has no right to compel a deposit. The LRC draft sections are narrowly drawn to require deposits on demand of a homeowner for relocation purposes and on demand of the owner of rental property. The sections are fairly complex because they are written in light of the narrow cases they are designed to

cover. A broad general provision requiring deposit on demand of any property owner was considered by the Commission but not included because of the strong opposition of public entities to any provision requiring a deposit on demand of the property owner in even very limited circumstances. It was thought desirable to limit the right of the property owner to obtain a deposit to those cases where such a deposit can best be justified.

Unlike the LRC draft, the Uniform Code--Section 601(b), (c)--gives any defendant the right to apply for an order requiring the plaintiff to make a deposit. The court, after hearing on noticed motion and for good cause shown, may order that the plaintiff make a deposit. Failure to comply with such an order under the Uniform Code permits the defendant to move to have the eminent domain proceeding dismissed. The Uniform Code scheme is much simpler and permits the court to order a deposit in any case where good cause is shown. See the Comment to subsection (b) of Section 601 of the Uniform Code.

A major policy issue is presented: Should the LRC draft be revised to adopt the scheme of the Uniform Code? There are two parts to this issue: (1) When should the property owner have a right to require a deposit and (2) what sanction should be used to enforce an order requiring a deposit? The LRC draft has no effective sanction although there are certain adverse consequences if the deposit is not made. See Comments to Sections 1255.040 and 1255.050.

One change that should be made in Sections 1255.040 and 1255.050 if no other change is made is to adopt the Uniform Code scheme that the court merely order in a proceeding under one of those sections that a deposit be made and not determine the amount to be deposited. For further discussion of this point, see Memorandum 74-45.

§ 1255.060. Amount deposited inadmissible in evidence

Comparable provision--Section 607 of the Uniform Code (balance of Section 607 is found in LRC draft as Section 1255.270).

§§ 1255.210-1255.250. Withdrawal of deposit

The Uniform Code provisions--Sections 604 and 605--are concise provisions dealing with withdrawal procedure. Unlike the LRC draft, the Uniform Code provisions place on the defendant the obligation to give notice of an intended withdrawal even though the plaintiff is the party that will be liable to pay persons who do not actually receive notice of the withdrawal. The staff's view is that the LRC provisions continue existing California law with revisions designed to remedy defects discovered in existing law and that it would be a serious mistake to adopt the comparable Uniform Code provisions in their place.

§ 1255.260. Effect of withdrawal

Comparable provision--Unif. Code § 606.

§ 1255.270. Amount withdrawn inadmissible in evidence

Comparable provision--Unif. Code § 607.

§ 1255.280. Repayment of amount of excess withdrawal

Comparable provision--Unif. Code § 1206(b). The Uniform Code does not contain the substance of subdivisions (b)--(d) of the LRC Section 1255.280. The staff recommends no change in Section 1255.280.

Deposit at Interest

The parties can, under present conditions, obtain a greater rate of interest on secure investments than the legal rate of interest (seven percent). The staff recommends that consideration be given to including a provision like Section 609 of the Uniform Code, which enables a party, upon motion, to have the deposit placed in interest-bearing investments, pending actual withdrawal of the deposit by the parties entitled to it. The LRC draft has a comparable provision--Section 1268.150(b)--but that applies only after entry of judgment. In any case, Uniform Code Section 609 should be compared with Section 1268.150(b).

§§ 1255.410-1255.480. Order of possession

Sections 610-613 of the Uniform Code cover the same general subject as Sections 1255.410-1255.480. The Uniform Code provisions give the property owner substantially greater protection than the LRC draft. The two sets of provisions are compared generally below.

Under the LRC scheme, the plaintiff obtains an ex parte order for possession upon a showing it has deposited the probable compensation and is authorized to take the property by eminent domain. See Section 1255.410. The order is served on the owners of legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments and on the occupants, if any, not less than 90 days prior to the time possession is to be taken (if property is unoccupied, only 30 days' notice is required). See Section 1255.450. The court may grant a stay of the order upon a showing that the hardship to the defendant or occupant is substantial unless the plaintiff shows it needs the property within the time specified in the order and that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial. See Section 1255.420.

By way of contrast, the Uniform Code provides that an order for possession may be granted on noticed motion to all parties and persons in actual physical occupancy upon such terms and conditions (including date of possession) as the court determines justice may require. See Section 610(a). Also, under the Uniform Code, a specific weighing of the hardship to the plaintiff and owner or occupant is required and a standard is provided. See Section 610(b). Notice of the order is given only to parties who have appeared in the action and to persons in actual physical possession of the property described in the order. Issuance of a writ of possession appears to be discretionary with the court (under the LRC draft, the court is required to issue a writ of possession when the time for possession in the order for possession arrives).

The staff believes that serious consideration should be given to the service requirement--who should be served? Is it necessary to serve every party, no matter how remote his interest may be, with the order for possession? The LRC provision substantially broadens existing California law and is much broader than the service requirement under Section 612 of the Uniform Code.

The staff believes that the Uniform Code scheme of noticed motion and weighing of hardships has considerable appeal. However, we do not recommend that the LRC draft scheme be changed. We believe that the condemnor should be able to obtain possession at a time certain--after the required notice has been given (90 days for occupied property and 30 days for unoccupied property) if the condemnor needs the property for a project. Accordingly, the staff recommends no change in the basic LRC scheme for orders for possession. The LRC draft in our opinion properly places on the property owner or occupant the burden of showing the need to delay the date of the order or the need for conditions or limitations on the taking of possession.

§§ 1258.010-1258.300. Discovery; exchange of valuation data

The LRC draft continues the substance of the existing California statutory provisions relating to discovery and exchange of valuation data in eminent domain proceedings with a few revisions to correct defects in the existing procedure. Sections 701-708 of the Uniform Code provide liberal discovery rules with respect to valuation issues that go beyond the purview of conventional discovery in other civil actions. You should read the Uniform Code provisions to determine whether you believe that the adoption of similar discovery rules in California for eminent domain would be desirable. The staff has not made an analysis of the Uniform Code provisions and compared them to the general California discovery provisions, but we will ask Professor Van Alstyne to do so at the meeting.

Offer to Compromise

Section 704 of the Uniform Code establishes a procedure whereby a party to an eminent domain proceeding may make a formal offer to settle. Under Section 1205 of the Uniform Code, if the amount awarded by the trier of fact exceeds the amount of the rejected settlement offer made by the condemnee, the condemnee will be entitled to an award of his litigation expenses. If the condemnee rejects the plaintiff's settlement offer and recovers less, he will be denied recovery of his costs. See Section 1205(b), (c) of the Uniform Code.

There is considerable merit to the Uniform Code provision. However, the staff does not recommend that this provision be added to the LRC draft. A bill has passed the Assembly and will be heard in the Senate this session that would provide that the property owner can recover his litigation expenses if the condemnor does not make a reasonable

offer. See discussion of this bill in Memorandum 74-45. The staff recommends that Section 998 of the Code of Civil Procedure (which applies to civil actions generally) be made applicable to eminent domain proceedings. The effect would be to allow recovery of expert witness fees (but not attorney's fees) where the plaintiff fails to recover a more favorable judgment than an offer made by the defendant. See Exhibit II attached for a suggested revision of Section 998.

Informal Procedure for Disputes Involving Limited Amounts

Sections 801-804 of the Uniform Code provide a procedure for informal determination of disputes involving limited amounts. No comparable provisions are included in the LRC draft. Some time ago, the staff presented to the Commission the draft of a tentative recommendation for distribution for comment to obtain the views of interested persons as to whether provisions similar to the Uniform Code were needed or desirable in California. The Commission declined to approve the tentative recommendation for distribution. Commissioner McLaurin was strongly of the view that formal court proceedings were essential and should not be dispensed with by use of a procedure similar to the small claims court. Other Commissioners took the view that the Uniform Code provisions might have some merit but left many unanswered problems, and these Commissioners were unwilling to leave the details of the procedure to Judicial Council rule as proposed by the staff in the tentative recommendation. The Commission indicated a willingness to consider the problem on a nonpriority basis if and when time permitted. In view of the Commission's prior decision, the staff recommends that no further consideration be given to these provisions of the Uniform Code at this time and

that the matter be given further consideration at some time in the future. It should be noted, however, that--as the Executive Secretary reported--the Legislature and others take the view that something must be done about the small claims. The approach appears to be to allow attorney's fees and expert witness fees if the condemnor does not make a reasonable offer to settle. Should such a proposal be enacted, consideration should be given to regulating such fees. We considered this problem when we drafted the governmental liability statute at the time when we considered whether the plaintiff should be restricted to his actual pecuniary losses. It was then proposed that, if such a limitation were imposed, the plaintiff also be awarded his attorney's fees, and the manner in which such fees could be limited by statute was given considerable consideration. For a discussion of the problem, see 5 Cal. L. Revision Comm'n Reports 305 (1963).

§ 1260.010. Trial preference

Section 1260.010 is comparable to Uniform Code Section 901(a), but the Uniform Code provision is more concise than Section 1260.010 which basically continues existing law.

Setting Issues for Trial

Subsection (b) of Section 901 of the Uniform Code authorizes the court to set severable issues for trial separately in advance of the trial on the issue of the amount of compensation. This provision is not needed in California. See Code Civ. Proc. § 1048.

§ 1260.110. Priority for hearing [preliminary objections]

Section 506 of the Uniform Code is comparable to Section 1260.110. We recommend no change in Section 1260.110. The second sentence of the Uniform Code provision is unnecessary in view of Code of Civil Procedure Section 1048 (consolidation of actions or issues).

Burden of Proof at Hearing on Objections

Section 507 of the Uniform Code specifies that, as a general rule, the plaintiff has the burden of proof on all issues of fact raised in connection with a preliminary objection. No comparable provision is found in the LRC draft; instead, the LRC draft indicates with respect to each issue which party has the burden of proof or the particular rule is phrased in the LRC draft in such a way that the party having the burden of proof is apparent. The staff strongly recommends against including the substance of Section 507 in the LRC draft.

§ 1260.120. Disposition of objections to right to take

Comparable provision--Unif. Code § 507.

§ 1260.210. Order of proof and argument; burden of proof

Sections 903 and 904 of the Uniform Code are comparable to Section 1260.210. The staff believes that the language of the Uniform Code sections is better than that used in the LRC draft. Accordingly, we recommend that the following be substituted for Section 1260.210:

§ 1260.210. Right to open and close; order of presentation of evidence

1260.210. (a) The defendant shall make the first opening statement, proceed first in the presentation of evidence on the issue of the amount of compensation, and make the final closing argument.

(b) The court may designate the order in which multiple parties make their respective opening statements and closing arguments, and the order in which they present evidence.

§ 1260.215. Burden of proof

1260.215. No party has the burden of proof on the issue of the amount of compensation.

Compare the suggested language with Section 1260.210 as set out in the LRC draft.

§ 1260.220. Procedure where there are divided interests

Comparable provision--Unif. Code § 905.

Power of Court to Control Scope of Trial Participation

Section 907 of the Uniform Code authorizes the court to control the scope of trial participation by any party. No comparable provision is included in the LRC draft, and the LRC draft, in fact, goes the other way in the last sentence of Section 1260.220(b). Compare the LRC sentence with Section 907 of the Uniform Code. The staff recommends against including the substance of Section 907 in the LRC draft. We think that the court has inherent authority to control the scope of trial participation so long as the rights of the parties are not prejudiced. We think that Section 907 might be construed to give the court authority to unduly restrict the right of a party holding only an interest in the property from presenting evidence as to the value of the entire property in the first phase of the proceeding. Such presentation may be important since it is essential that the amount obtained in the first phase of the proceeding be adequate to cover compensation for all interests when divided among them in the second phase of the proceeding.

§ 1260.230. Separate assessment of elements of compensation

Comparable provision--Unif. Code § 906.

§ 1263.010. Right to compensation

Comparable provision--Unif. Code § 1001(a), (c). Is the wording of the Uniform Code better than the LRC draft?

§ 1263.020. Accrual of right to compensation

Comparable provision--Unif. Code § 1001(b).

§§ 1263.110-1263.150. Date of valuation

The Uniform Code adopts the date of trial on the issue of the amount of compensation as the basic date of valuation. An earlier date can be established by a deposit. See Section 1003. Interest is payable on the compensation awarded from the date of valuation as a general rule. See Section 1202.

The staff believes that the Uniform Code scheme for date of valuation has considerable merit and is in substance a scheme that various persons have urged the Commission to adopt. However, to adopt the Uniform Code scheme not only would require substantial revision of major portions of the LRC draft but also would propose a scheme that would meet strong objections from condemning agencies. We have corrected the major defects in our existing law relating to date of valuation. Accordingly, we do not recommend adoption of the Uniform Code scheme.

§§ 1263.210-1263.220. Compensation for improvements pertaining to the realty

A major policy issue is presented in connection with compensation for improvements pertaining to the realty. This term is not defined in

the LRC draft. However, various sections do make clear that certain improvements are improvements pertaining to the realty. For example, see Section 1263.220 (business equipment). The LRC draft basically continues the existing language of the California statute and extends to some extent the scope of former Section 1248b (equipment designed for manufacturing or industrial purposes).

The Uniform Code in effect defines improvements. The definition of "real property" defines the term to mean land and "any improvements upon or connected with land." See Section 103(18). "Improvement" in turn is defined to include "any building or structure, and any facility, machinery, or equipment that cannot be removed from the real property on which it is situated without substantial economic loss or substantial damage to the real property." See Section 103(11). In other words, the Uniform Code somewhat broadens the principle stated in Section 1263.220 (to include "cannot be removed . . . without . . . substantial damage to the real property") and makes the principle applicable to all property--not just business purposes equipment. If it is desired to adopt the broader Uniform Code rule, a definition of "improvement pertaining to the realty" could be included in Article 3. This definition, which would make Section 1263.220 unnecessary, might be phrased as follows:

§ 1263.205. "Improvement pertaining to the realty"

1263.205. "Improvement pertaining to the realty" includes any building or structure, and any facility, machinery, or equipment that is installed for use on the property taken or damaged and cannot be removed without a substantial economic loss or substantial damage to the property on which it is situated, regardless of the method of installation.

The definition combines features of Section 1263.220 with features of the definition in Section 103(11) of the Uniform Code.

Right to Use Property Pending the Plaintiff's Taking Possession

Section 1263.240 provides that improvements pertaining to the realty made subsequent to the date of service of summons are not taken into account in determining compensation unless one of the limited exceptions listed in the section is applicable. Section 1009 of the Uniform Code, on the other hand, gives the property owner the full right to use his land until the plaintiff is authorized to take possession. He can improve it, plant crops, and the like. However, the condemnor may obtain a court order limiting the use of the property before possession is taken, but the property owner is entitled to compensation for the resulting losses. The staff recommends that the substance of the Uniform Code provision be substituted for Section 1263.240. Since interest runs from the date of the final judgment or from the date possession is taken by the plaintiff, the property owner can, under existing law, be deprived of the use of his property but receive no compensation for the loss of use. For example, if the property owner has a piece of land he is in the process of developing, the condemnor can stop the development by filing the condemnation proceeding. The property owner receives no compensation for the resulting loss of use of the land (in which he has his money tied up) under existing law. To compound the problem, he also is faced with a date of valuation that is the date the complaint is filed and loses the increase in the value of the land between that time and the time of the judgment. The Uniform Code recognizes this situation and provides a fair rule. If the condemnor desires to substantially limit the property owner's use of his land--as where the owner is engaged in a major improvement on the land--the condemnor can obtain a court order stopping the improvement and pay compensation for this interference with the owner's use of his land.

Risk of Loss

Section 1263.230 of the LRC draft covers risk of loss and continues the substance of existing California law. The Uniform Code in Section 1009(b) covers the matter in a similar way but one that is consistent with the rules provided in the code on use of the property by the owner after the eminent domain proceeding is commenced. If the latter Uniform Code rules are adopted, the Uniform Code risk of loss provision should be also adopted.

§ 1263.250. Harvesting and marketing of crops

Under the Uniform Code, crops are treated the same as any other improvement. The rule of compensation is stated in Section 1010--the higher of (1) the current fair market value of the crops in place, assuming the right to bring them to maturity and to harvest them, or (2) the amount by which the existence of the crops enhances the fair market value of the property. This rule makes the crops something the appraiser takes into account in determining his opinion as to the value of the property rather than requiring a separate and somewhat complex determination like that required under Section 1263.250 of the LRC draft of "the reasonable value of the material and labor reasonably expended in connection with the crops up to the date the plaintiff is authorized to take possession." The effect of the LRC provision is to require an accounting for the materials and labor expended rather than merely the appraiser's including the value of the crops in his determination of the value of the property.

The more serious defect in Section 1263.250 is that it precludes the property owner from planting any crops after the complaint is served (unless the condemnor consents) and provides no compensation for the

resulting loss of use of the land. In other words, if the condemnor refuses to consent to the planting of the crops, the only fair rule (as in the Uniform Code) is to require that the condemnor compensate the owner for his loss of use of the land. This deficiency in Section 1263.250 causes the staff to again recommend that the Uniform Code rules on the owner's right to use his land be adopted in place of the rules stated in the LRC draft.

The definition of "crops" in Uniform Code Section 103(10) might be a desirable addition to Section 1263.250.

Compensation for Improvements Other Than Crops

The LRC draft compensates improvements to the extent that they enhance the fair market value of the property. The Uniform Code rule, stated in Section 1010(b), compensates such improvements at "the higher of (1) the fair market value of the improvements, assuming their immediate removal from the property, or (2) the amount by which the existence of the improvements enhances the fair market value of the property." Where an improvement does not actually increase the value of the property for its highest and best use but can be sold for a substantial amount, it seems only fair to give the property owner the amount for which the improvement can be sold if the condemnor is to acquire the improvement and then sell the improvement and keep the money. This rule seems to be consistent with Section 1263.260 (removal of improvements pertaining to the realty). Although we do not recommend that the substance of the Uniform Code provision be added to the LRC draft, we suggest a sentence be added to the second paragraph of the Comment to Section 1263.210 to the effect that the existence of improvements on the property that do

not serve the highest and best use of the property but that have salvage value may be taken into account in determining the fair market value of the property.

Improvements Partially Located on Land Not Taken

Section 1011 of the Uniform Code is designed to deal with an improvement located in part upon the property sought to be taken and in part on property not sought to be taken. The staff recommends that the substance of this section be included in the LRC draft. The Commission decided not to deal with this problem because it concluded that it was not an important one and could be handled as an excess condemnation problem. However, the excess condemnation authority is quite limited, and public entity representatives have expressed concern that there is no provision that permits them to take only the improvement and not the land not needed for the project. Note that the Uniform Code provision gives the court discretion to make such determination "as justice and equity" require.

Compensation for Divided Interests

Section 1012 of the Uniform Code states a rule for determining the amount of compensation for the taking of property in which divided interests exist. The rule stated purports (according to the Comment) to be consistent with People v. Lynbar (sum of value of divided interests may exceed value of undivided whole). The Commission decided not to attempt to codify the rule in People v. Lynbar. See the Comment to Section 1260.220. We think this is a sound decision and recommend against including the rule stated in the Uniform Code in the LRC draft.

§ 1263.320. Fair market value

Serious consideration should be given to substituting all or a portion of the Uniform Code definition of fair market value for the definition set out in Section 1263.320. Since there is a line omitted in the Uniform Code draft attached, and for your convenience, we set out the entire Uniform Code section below (with minor editorial revisions):

Section 1004. [Fair Market Value Defined.]

(a) Fair market value is the price which would be agreed to by an informed seller who is willing but not obligated to sell and an informed buyer who is willing but not obligated to buy. The fair market value of property for which there is no relevant market for purchase or sale is its value as determined by any method of valuation that is just and equitable.

(b) Notwithstanding subsection (a), the fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if both of the following conditions exist:

(1) The property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function or to render nonprofit educational, religious, charitable, or eleemosynary services.

(2) The facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) includes all of the following:

(1) The cost of a functionally equivalent site.

(2) The cost of relocating and rehabilitating improvements taken or, if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility.

(3) The cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities.

The staff recommends that the above section be substituted for Section 1263.320. The Uniform Code section has the following advantages: (1) It is a more concise statement of fair market value where market data is available; (2) it expressly recognizes that, in the case of some special

services properties, there will be no relevant market data; and (3) it deals with replacement of schools, churches, and the like in a more fair manner. The latter provision was inserted at the suggestion of the federal officials who participated in the meetings of the special committee that drafted the Uniform Code. It would give the condemnee more than fair market value--such as an earthquake-proof school in place of one that was not earthquake proof. If the Commission decides to make the recommended substitution, the staff will add the relevant portions of the Uniform Code comment to the relevant portions of the Comment we have drafted for existing Section 1263.320.

Effect of Condemnation Action on Value

Section 1263.330 and subdivision (b) of Section 1263.440 deal with the problem of the effect of the condemnation action on value. The comparable provision is Section 1005 of the Uniform Code. The staff believes that the LRC draft is preferable to the Uniform Code provisions.

§§ 1263.410-1263.450. Compensation for injury to remainder

The Commission has decided to retain the present California method of determining compensation in case of a partial taking: The property owner is entitled to (1) fair market value of part taken and (2) compensation for injury to remainder (excess of damages to remainder over benefits to remainder). The extent to which the damages and benefits must be "special" is not stated in the statute and is left to continuing development by the courts.

The special committee that drafted the Uniform Code after considerable discussion first adopted a strict "before and after values"

rule. However, after members of the committee had discussed the matter with legislators and others in their own states, the committee concluded that the property owner should always get at least the fair market value of the property taken. Accordingly, the committee drafted the rule now found in Section 1002(b) of the Uniform Code:

(b) If there is a partial taking of property, the measure of compensation is the greater of (1) the value of the property taken as determined under subsection (a)[fair market value as of the date of valuation] or (2) the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

The Commission will recall the discussion of this problem and the fact that all persons present at our meetings seemed to agree that the present LRC draft was satisfactory. We know that public agencies would strongly object to the Uniform Code provision. Accordingly, the staff recommends no change in the basic scheme used for compensation in the LRC draft. For further discussion, you can refer to the Comment to Section 1001.

§§ 1263.440-1263.450. Compensation to reflect project as planned

Section 1006 of the Uniform Code is comparable to Sections 1263.440 and 1263.450. The staff recommends that no change be made in the LRC draft. We do suggest, however, that "planned" is a better word (used in the Uniform Code provisions) than "proposed" in describing the project in various sections and recommend that the phrase "the construction and use of the project in the manner planned by the plaintiff" be substituted for "the construction and use of the project in the manner proposed by the plaintiff" in various places in the LRC draft.

Rule as to What Constitutes the Larger Parcel

We note again that the Uniform Code contains a section (Section 1007) stating the rule as to what constitutes a larger parcel. We strongly recommend a similar provision be added to the LRC draft, preferably as a definition.

Special Assessment Proceedings Excluded

The Uniform Code contains in Section 1008 a provision relating to valuation where the taking is for a project for which special assessments or charges are to be imposed. We do not recommend the inclusion of the Uniform Code provision. We are satisfied with the existing California law and fear that the inclusion of the Uniform Code provision would create problems unless the Commission undertakes to review all the special assessment acts to make conforming revisions.

§ 1263.510. Loss of goodwill

The staff recommends that the exact language of the Uniform Code provision on compensation for loss of goodwill (including any revisions made at the Hawaii meeting) be included in the LRC draft. This will not only be of assistance in obtaining federal contributions where goodwill compensation is paid but also will make the provision conform with federal regulations relating to the payment of compensation for goodwill and will give us the benefit of uniform interpretations as to the meaning of the term goodwill, thus providing a body of law relevant to this matter within a minimum of time. The Uniform Code provision in the form it was presented in Hawaii is found in Section 1016.

§ 1263.610. Performance of work to reduce compensation

The Uniform Code does not contain a provision authorizing an agreement to perform work to reduce compensation. However, the Uniform Code does contain a provision recognizing that such an agreement has been made and providing for recognition of the agreement in the judgment and containing various provisions designed to implement the agreement. See Section 1207 of the Uniform Code. Consideration should be given to whether it would be desirable to include the substance of Section 1207 in the LRC draft.

§ 1263.620. Partially completed improvements; performance of work to protect public from injury

Comparable provision--Unif. Code § 1010(d).

§§ 1265.110-1265.160. Leases

Comparable provision--Unif. Code § 1013.

§§ 1265.210-1265.240. Encumbrances

Subsection (1) of Section 1014 of the Uniform Code provides that the lienholder share in the award only to the extent determined by the court to be necessary to prevent an impairment of his security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness until it is paid. This rule applies notwithstanding any agreement to the contrary. The staff believes the Uniform Code provision would be a desirable one to add to the LRC draft. It would be consistent with the holding in Milstein v. Security Pac. Nat'l Bank, 27 Cal. App.3d 482, 103 Cal. Rptr. 16 (1972) (beneficiary under deed of trust bound by implied covenant of fair dealing to

exercise right to award under terms of note only to extent his security is impaired), and would preclude avoidance of the Milstein rule by draftsmanship in the terms of the deed of trust.

Subsection (2) of Section 1014 is comparable to Section 1265.240 but may be better worded. Does the Commission wish to adopt the wording of subsection (2) of Section 1014?

§ 1265.420. Property subject to life tenancy

Comparable provision--Unif. Code § 1015.

Evidence in Condemnation Actions

This subject, covered by Article XI of the Uniform Code, is the subject of a separate memorandum.

Contents of Judgment

Section 1201 of the Uniform Code prescribes the contents of the judgment. No comparable provision is included in the LRC draft. Should a comparable provision be included in the LRC draft? It is difficult to draft a provision relating to the contents of the judgment because we have two judgments with which we are concerned: (1) the "judgment" (defined in Section 1235.130--"the judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff") and (2) the judgment entered after the proceeding is concluded (which will include the determination of the amount apportioned to divided interests). The contents of the judgment are not specified by the existing eminent domain statute.

§ 1268.010. Payment of judgment

Section 1268.010 is the same in substance as Sections 1206 (crediting amounts paid or withdrawn from deposited funds) and 1208 (payment of judgment by plaintiff) of the Uniform Code with some significant differences.

The time under Section 1208 for paying the judgment is within "30 days after entry or judgment, or within 10 days after the judgment has become final, whichever is later," but the Uniform Code section also provides: "For good cause shown, the court may extend the time within which payment must be made for an additional period not exceeding 90 days." The staff recommends no change in the 30-day time limit stated in Section 1268.010. In connection with this time limit, it should be noted that Section 1268.020--which specifies the remedies of the defendant if the judgment is not paid--requires that the defendant give notice that the plaintiff has failed to pay the judgment within the time specified in Section 1268.010 and gives the plaintiff 20 days after service of the notice to correct this deficiency. The effect of this requirement of Section 1268.020 is to give the plaintiff a minimum of 50 days within which to pay the judgment. The Uniform Code has no similar notice-and-opportunity-to-correct provision.

§ 1268.020. Remedies of defendant if judgment not paid

Section 1210 of the Uniform Code is comparable to Section 1268.020.

§ 1268.030. Final order of condemnation

Section 1209 of the Uniform Code is comparable to Section 1268.030, but the Uniform Code refers to "an order transferring and vesting in the plaintiff the title to the property taken."

§§ 1268.110-1268.170. Deposit and withdrawal of award

Sections 1208 and 1211 of the Uniform Code are comparable to Sections 1268.110-1268.170. Note that Section 1208(c) provides that failure to give notice of the deposit results in the plaintiff's paying interest until the date the notice is given or the defendant withdraws the deposit, whichever is earlier. Presumably, amounts deposited for unknown claimants would draw interest.

§§ 1268.210-1268.240. Possession after judgment

Section 1212 of the Uniform Code is comparable to Sections 1268.210-1268.240.

§§ 1268.310-1268.340. Interest

Under the Uniform Code, interest accrues on the unpaid amount of compensation awarded from the earlier of the date of valuation or the date upon which plaintiff takes physical possession of the defendant's property. The LRC draft does not contain a comparable provision, but such a provision should be given serious consideration. Under existing California law, which is continued in the LRC draft, the date of valuation is the date of the filing of the complaint if the issue of compensation is brought to trial within one year of the filing of the complaint. Interest does not commence to accrue until the judgment becomes final, which may be as much as 18 months after the date of valuation. As a result, the amount the owner actually receives is the value of his property 18 months prior to the time he is paid--an amount that often will be more than 10 percent less than the amount he will require to obtain comparable property since in many cases property is increasing in value at a rate close to 10 percent a year. Accordingly, it makes sense

to award interest in the judgment to cover the time from the date of valuation to the time the judgment is entered. Once judgment is entered, interest would accrue on the judgment until paid in the same manner as any other judgment, taking into account any deposits made either prior to or after judgment.

§§ 1268.410-1268.430. Proration of property taxes

Section 1204 of the Uniform Code covers adjustment of taxes. This same matter is covered by Sections 1268.410-1268.430, and the staff recommends no change in the LRC draft. The LRC draft provisions are the same in substance as existing law. The existing law has been perfected over a period of about 10 years, and we are unaware of any problems.

§ 1268.510. Abandonment

Section 1301 of the Uniform Code contains a listing of the circumstances when the court may dismiss the eminent domain proceeding, in whole or in part, as justice may require. The LRC draft does not contain such a comprehensive listing; instead, various sections of the draft dealing with different aspects of eminent domain procedure provide for dismissal under specified circumstances. The Commission at one time considered a listing similar to that provided in Section 1301 of the Uniform Code but concluded that such listing was mere duplication of other provisions that cover the circumstances in more detail where the action must be involuntarily dismissed. Moreover, there was a fear that some circumstance where involuntary dismissal was required might inadvertently be omitted. The staff recommends no change in the LRC draft.

Section 1302 of the Uniform Code is comparable to Section 1268.510 which covers voluntary abandonment by the plaintiff. The two sections

are consistent in policy, but the Uniform Code provision provides: "In its order of dismissal, the court shall impose any conditions, including a requirement of restitution of property or money, that are just and equitable." Also, under the Uniform Code, the dismissal of the action is upon noticed motion of the plaintiff. Under the LRC draft, the plaintiff serves a notice of abandonment, and the burden is on the defendant to move to set the abandonment aside. Since Section 1268.510 is the same in substance as existing California law, the staff recommends no change in the LRC draft.

§ 1268.610. Litigation expenses

Comparable provision--Unif. Code § 1303.

§ 1268.620. Damages caused by possession

Comparable provision--Unif. Code § 1304. The staff believes that the Uniform Code provision is better worded than the LRC draft and recommends that its substance be substituted for Section 1268.620.

§ 1268.710. Court costs

Section 1205 of the Uniform Code covers recoverable costs as does Section 1268.710 of the LRC draft. Note that the Uniform Code provides that costs are awarded the defendant as a general rule. If the defendant obtains a higher award than the amount specified in his final settlement offer, he gets in addition to costs his litigation expenses (limited in amount by the section). An optional subsection provides that, if the plaintiff's settlement offer is equal to or in excess of the judgment, the defendant is not entitled to his costs incurred after the date of service of the offer.

The staff recommends no change in Section 1268.710. If the settlement offer concept is to be made applicable to eminent domain, we recommend the amendment proposed in Exhibit II, attached, be the method by which the concept is made applicable.

Relocation Assistance

The Commission decided not to include the relocation assistance statute within the eminent domain law, primarily because that statute is not limited to eminent domain takings but applies to any taking of property for public use. We believe this is a sound decision. If the Commission wishes, we will make a careful study of the Uniform Code provisions (Article XIV) and report at a future meeting any suggestions we have for revision of the California relocation assistance statute.

Arbitration

The Uniform Code article (Article XV), authorizing arbitration of compensation, is basically the same as Sections 1273.010-1273.050 of the LRC draft.

Section 1501 of the Uniform Code should be compared with Section 1273.010. Should the Comment to Section 1273.010 (or the text of the statute) indicate that two or more condemnees may arbitrate the issue of the apportionment of the award among divided interests? This case appears to be a gap in the LRC draft.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

404-161

Memorandum 74-46

EXHIBIT I

CHAPTER 4. PRECONDEMNATION ACTIVITIES

Article 1. Entry for Suitability Studies

Comment. Article 1 (commencing with Section 1245.010) supersedes former Sections 1242 and 1242.5. The article, which is substantially the same as Sections 301-305 of the Uniform Eminent Domain Code, makes three significant changes in prior California law. First, the condemnor is permitted to enter and make suitability studies if a reasonable effort is made to notify the owner and any other person occupying the property, the entry is during reasonable daylight hours, is accomplished peacefully and without inflicting substantial injury, and is not in violation of any other statute. Under existing California law, entry and suitability studies are authorized only where the condemnor has obtained the written consent of the owner or a court order. Second, where the owner denies or interferes with the entry, a show cause procedure which places the burden on the owner to show cause why entry should not be permitted is used to obtain a court order permitting the entry. Under existing law, the condemnor has the burden of persuasion as to the need for the entry and study. Third, if the condemnor acts unlawfully, arbitrarily, or substantially fails to comply with a court order, the condemnor is liable for the other party's litigation expenses (reasonable attorney's fees and other expenses incurred in the proceeding). Under existing law, the condemnor is liable for reasonable attorney's fees whether or not the condemnor acted arbitrarily and without any reasonable justification.

§ 1245.010. Right to enter to make suitability studies

1245.010. (a) Any person authorized to acquire property for a particular use by eminent domain may enter upon property and make surveys, examinations, photographs, tests, soundings, borings, and samplings and engage in other activities for the purpose of appraising the property or determining whether it is suitable for that use if all the following conditions are satisfied:

(1) The entry is preceded by reasonable efforts to notify the owner, and any other person known to be in actual physical occupancy of the property, of the time, purpose, and scope of the planned entry and activities.

(2) The entry is undertaken during reasonable daylight hours and is accomplished peaceably and without inflicting substantial injury.

(3) The entry is not in violation of any other statute.

(b) The entry and activities authorized by this section do not constitute a trespass, but the condemnor is liable for resulting damages under Section 1245.060.

Comment. Section 1245.010 provides statutory authority to enter upon land to appraise it or to determine its suitability for public use. The section is the same in substance as Section 301 of the Uniform Eminent Domain Code and supersedes subdivision (b) of former Section 1242 and portions of former Section 1242.5. No time limitation upon entry is prescribed. Although appraisal and suitability studies generally precede the commencement of the eminent domain proceeding, this section does not preclude such studies after the proceeding to acquire the property has been commenced.

Under subdivision (a), it is not necessary that the consent of the owner or occupier of the property be obtained, provided all of the requirements stated are satisfied. In this respect, the section eliminates the requirement under former Section 1242.5 that either the written consent of the owner or a court order be obtained before entry was authorized. If some other statute requires the owner's consent, however, the entry would be unlawful under paragraph (3) unless the consent were first obtained. Subdivision (a) leaves the ultimate determination of the "reasonableness" of efforts to give notice under paragraph (1) and the "reasonableness" of the time of entry and the "peaceable" nature of the entry under paragraph (2) to the sound discretion of the court in light of all of the circumstances.

Under subdivision (b), an entry and related activities are lawful, and nontrespassory, if the criteria of subdivision (a) are met. However, the condemnor may be liable for damages to the extent provided in Section 1245.060.

§ 1245.020. Court order permitting entry

1245.020. (a) If reasonable efforts to accomplish a lawful entry or to perform authorized activities upon property under Section 1245.010 are obstructed or denied by the owner or any other person or if the planned activities would inflict substantial injury, the person seeking to enter or perform such activities may apply to the superior court for the county where the property or any part is located for an order permitting entry.

(b) Unless good cause to the contrary is shown after notice to the person obstructing or denying the entry or activities, the court shall make its order permitting and describing the purpose of the entry and setting

forth the nature and scope of the activities which the court determines are reasonably necessary and authorized to be made upon the property. In addition to requiring a deposit under Section 1245.030, the order may include terms and conditions with respect to the time, place, and manner of entry and authorized activities upon the property which will facilitate the purpose of the entry and minimize damage, hardship, and burden.

Comment. Section 1245.020, which is the same in substance as Section 302 of the Uniform Eminent Domain Code, authorizes judicial assistance to a person seeking to obtain entry upon property for appraisal and study purposes. This procedure presumably would not be used routinely, but only in those instances in which a lawful entry cannot otherwise be obtained (e.g., cases in which the owner vigorously forbids entry) or the pursuit of the desired activities is obstructed by the owner or some other person (e.g., a tenant). The existence of a clear judicial remedy should facilitate lawful entries by reducing any incentives of the owner or occupant to deny permission. Section 1245.020 supersedes portions of former Section 1242.5.

Section 1245.020 contemplates the use of procedures in the nature of an order to show cause as the procedural framework for the application, with the burden of persuasion resting upon the person resisting entry. Since the owner will be compensated under Section 1245.060 for damages caused by the entry, it seems reasonable to require him to show cause for not permitting a proposed entry or for limiting the scope and nature of the activities. Under former Section 1242.5, it appears that the condemnor had the burden to show the need for the order.

Subdivision (b) does not define what circumstances would constitute "good cause" for refusing or restricting entry. That determination must be based upon legal and equitable considerations relevant to the circumstances of individual cases. Lack of power to take the property for the use for which the proposed studies are to be made, for example, would be an adequate legal ground of refusal. See Section 1245.010. Where the power to take exists, a showing that comprehensive, reliable, and recent data of the kind sought were readily available to the condemnor so that the entry would merely produce cumulative information about the property might constitute sufficient equitable grounds for denying entry. A showing that certain aspects of the proposed activities were not reasonably necessary to support a rational judgment as to value or suitability, or that the condemnor proposed to employ unnecessarily onerous investigation techniques that would interfere with the occupant's use and enjoyment of the premises, might justify a limiting order restricting the time, place, or manner of the proposed activities. Under subdivision (b), the court has full discretion to condition and otherwise shape its order in the manner conducive to an equitable reconciliation of the competing interests disclosed at the hearing.

An order for entry under this section must also include provisions for the deposit of probable compensation where the likelihood of compensable damage is determined to exist. See Section 1245.030. As to recovery of damages caused by the entry and studies, see Section 1245.060. The order may be modified upon a showing of changed circumstances. See Section 1245.050.

§ 1245.030. Deposit of probable compensation

1245.030. An order permitting entry under Section 1245.020 shall include a determination by the court of the probable amount that will fairly compensate the owner and any other person in lawful possession or actual physical occupancy of the property for damages for physical injury to, and for substantial interference with possession or use of, the property deemed likely to be caused by the entry and activities authorized by the order and shall require the person seeking to enter to deposit that amount, if any, with the court prior to actual entry.

Comment. Section 1245.030, which is the same in substance as Section 303 of the Uniform Eminent Domain Code, requires the condemnor to post security for damage likely to be caused by his entry and appraisal or suitability studies as a condition to obtaining a court order permitting entry. The statutory terms "physical injury" and "substantial interference" are intended to preclude nominal and insignificant damages. See Comment to Section 1245.060. Thus, in cases where the probable damage for actual injury to land or for interference with use and enjoyment is de minimis, Section 1245.030 does not require a deposit. An order for a deposit is proper, however, where the foreseeable physical damages may be substantial, giving rise to a cause of action either in tort or inverse condemnation. See, e.g., Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923); Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 483, 485 (1969). Under some circumstances, the anticipated annoyance and interruption of peaceful use and enjoyment by the occupant may also be a probable source of more than merely nominal damages. Because the range of possible factual circumstances is wide, the occasions

upon which a deposit should be required, as well as the amount of the deposit, are left to the court's determination, based on the evidence presented in conjunction with the order to show cause. The amount of the deposit is subject to modification on motion. See Section 1245.050.

§ 1245.040. Management of amount deposited

1245.040. Unless sooner disbursed by court order, the amount deposited under this article shall be retained on deposit for six months following the termination of the entry. The period of retention may be extended by the court for good cause. Such amount shall be deposited in the Condemnation Deposits Fund in the State Treasury and shall be held, invested, deposited, and disbursed in accordance with Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Comment. Section 1245.040 requires the deposit to be retained by the court for six months or such longer time as the court orders. During this period, the owner or occupant of the property may apply to the court for payment of compensation, out of the deposited sum, if compensable damages are incurred by reason of the entry and suitability studies. See Section 1245.060.

§ 1245.050. Modification of order

1245.050. (a) The court after notice and hearing may modify any of the provisions of an order made under Section 1245.020.

(b) If a deposit is required or if the amount required to be deposited is increased by an order of modification, the court shall specify the time

within which the required amount must be deposited and may direct that any further entry or that specified activities under the order as modified be stayed until the required deposit has been made.

Comment. Section 1245.050 is the same in substance as Section 304 of the Uniform Eminent Domain Code.

Following an initial entry and survey, the condemnor may decide that more extensive exploratory studies of the subject property should be made including, perhaps, substantial excavations, soil tests, or cutting of trees. If the newly conceived activities were not authorized by the original court order obtained under Section 1245.020, a modification of its terms may be granted under the present section, including an initial or increased deposit for compensation.

To ensure the effectiveness of the security deposit requirement, a stay of proceedings may be imposed under subdivision (b) until the deposit is made. The stay, however, is not automatic but is discretionary with the court in light of the circumstances. For example, if the condemnor is of undoubted solvency, or if the damages likely to accrue prior to the date upon which the newly required or additional deposit is to be made are amply covered by the amount of the original deposit less accrued damages, an order denying an interim stay of suitability studies might be appropriate. Another factor that could be considered in this connection might be the incurring of unnecessary expense by the condemnor if crews and equipment used in current work-in-progress, as part of the activities authorized under the original order, were suddenly required to be withdrawn by a stay order.

In some circumstances, a modification order may properly decrease the amount of the required deposit; in such an event, the excess can be disbursed at once to the condemnor pursuant to Section 1245.040.

§ 1245.060. Recovery of damages, costs, and expenses

1245.060. (a) The person who entered upon the property is liable for physical injury to, and for substantial interference with possession or use of, property caused by his entry and activities upon the property. This liability may be enforced in a civil action or by application to the court in the circumstances provided by subdivision (c). No notice of claim is necessary or prerequisite to the action or motion.

(b) In an action or other proceeding for recovery of damages under this section, the prevailing claimant shall be awarded his costs. In addition, reasonable attorney's fees and other litigation expenses incurred in any proceedings under Sections 1245.020 and 1245.050 shall be awarded if the court finds that any of the following occurred:

(1) The person entered the property unlawfully.

(2) The person entered the property lawfully but thereafter engaged in activities upon the property that were abusive or lacking in due regard for the interests of the owner or occupant.

(3) The person failed substantially to comply with the terms of an order made under Section 1245.020 or 1245.050.

(c) If funds are on deposit under Section 1245.030 or 1245.050, the owner or other person entitled to damages under subdivision (a) may apply to the court for an award of the amount he is entitled to recover. The court shall determine the amount and award it to the person entitled thereto and shall direct that its payment be made out of the money on deposit. If the amount on deposit is insufficient to pay the full amount, the court shall enter judgment against the person who entered upon the property for the unpaid portion.

Comment. Section 1245.060 is the same in substance as Section 305 of the Uniform Eminent Domain Code.

Subdivision (a) provides the substantive basis for the condemnor's liability for damages arising out of entries for suitability studies. Damages required by this section are not dependent upon the existence of a court order under Section 1245.020; liability also exists where a lawful entry is made under Section 1245.010 without judicial assistance as well as where the entry is unlawful. No claim need be filed against the state or a local public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

The general criteria of damages under subdivision (a), as reflected in the terms "physical injury" and "substantial interference," require a common sense interpretation. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142, N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). See, e.g., Cal. Govt. Code § 816; Kans. Stat. Ann. § 68-2005 (1964); Pa. Stat. Ann., tit. 26, § 1-409 (Supp. 1969). The term "physical," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on tangible harm to property. Similarly, the term "substantial interference" excludes liability for minimal annoyances or interferences that do not seriously impinge upon or impair possession and use of the property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923).

Subdivision (b) requires the court to award costs to the prevailing claimant in an action or proceeding for damages under this section. In addition, this subdivision requires an award of litigation expenses incurred in any proceedings previously held under Section 1245.020 or 1245.050 if

the condemnor entered unlawfully, abused the right of lawful entry, or violated the terms of an order permitting entry. The prospect of such an award constitutes an inducement to condemnors to adhere to the requirements of this article. "Litigation expenses" includes not only a reasonable attorney's fee but also any appraisal and engineering fees necessarily incurred by the claimant. Under subdivision (e) of former Section 1242.5, reasonable attorney's fees--but not other litigation expenses--were required to be awarded in any case where the owner recovered a judgment.

Subdivision (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses where a deposit has been made and the funds deposited have not been disbursed. Similar provision was made in subdivision (e) of former Section 1242.5.

EXHIBIT II

Offer to Compromise

Sec. Section 998 of the Code of Civil Procedure is amended to read:

998. (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) Not less than 10 days prior to commencement of the trial as defined in subdivision 1 of Section 581, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If such offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. If such offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

(c) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding ~~other than an eminent domain action~~, the court, in its discretion, may require the plaintiff to pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the defendant.

← language to be deleted

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the plaintiff, in addition to plaintiff's costs.

(e) Police officers shall be deemed to be expert witnesses for the purposes of this section; plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment entered pursuant to this section shall be deemed to be a compromise settlement.

(f) The provisions of this chapter shall not apply to an offer which is made by a plaintiff in an eminent domain action.

FOR DISCUSSION ONLY
UNIFORM EMINENT DOMAIN CODE

NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

MEETING IN ITS EIGHTY-THIRD YEAR
MAUI, HAWAII
August 1-10, 1974

Third Tentative Draft
UNIFORM EMINENT DOMAIN CODE
With Comments

The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters, or Commissioners. Proposed statutory language may not be used to ascertain legislative meaning of any promulgated final law.

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UNIFORM EMINENT DOMAIN CODE

Prefatory Note

The Uniform Eminent Domain Code is a response to widely felt concern for the potential injustices that may result from the diversities of eminent domain procedures in the several states. Public improvement programs, most notably the federal interstate highway program and various urban renewal projects, annually require the taking of thousands of parcels of property, representing many millions of dollars of property values. Most of these takings occur under state systems of eminent domain procedure that are sometimes outmoded and based on archaic concepts; even within a single state, there may be many different forms of condemnation procedure, the application of which depends upon the identity of the condemnor, the purpose of the taking, or the nature of the property being taken.

In recent years many states have perceived the need for reform of their own condemnation laws, and have undertaken programs of study and revision of their eminent domain laws. Particularly notable efforts in this regard have been pursued in California, Florida, Maryland, New York, New Hampshire, Pennsylvania, and Virginia. In the preparation of this Uniform Code, an effort has been made to draw upon the studies and drafting efforts in the several states which have adopted or are in the process of drafting comprehensive eminent domain statutes. In addition, the comprehensive annual reports of the Committee on Condemnation and Condemnation Procedure of the American Bar Association Section of Local Government Law have been a valuable reference source.

The Uniform Eminent Domain Code has been drafted upon the basic premise that condemnation litigation, which in many jurisdictions is the special province of the highly specialized practitioner familiar with its unique procedural and substantive content, can and should be conducted much like other civil litigation, under procedural rules that can readily be understood and followed by the general practitioner. While the parties in eminent domain litigation generally occupy positions that are the reverse of that which is typical in ordinary civil actions (i. e., the party aggrieved by the taking, and who is seeking an award of compensation, is the defendant, while the party against whom the judgment for compensation is awarded is the plaintiff), this drafting premise has proven to be practicable and promotive of simplicity. Accordingly, the Code builds upon typical civil procedural systems in the American states, assimilating eminent domain actions into the mainstream of such litigation, adding only those special provisions relating to pleading, discovery, trial, and judgment practice which are responsive to the peculiar attributes of the subject matter.

The Code has been drafted to reflect six operational policies which, in the judgment of the Special Committee charged with the drafting project, are essential to a cohesive, equitable, and comprehensive state statutory treatment of eminent domain procedure in our federal system:

1. The Code should, insofar as practicable, apply equally to public and to private condemners.
2. The Code should not attempt to establish the substantive law concerning who may condemn property or for what purposes property

may be condemned.

3. The Code's subject matter should be limited to the procedures for condemning property and to the methods and standards for compensating property owners.

4. The Code should establish procedures that are consistent with federal standards so that state and local agencies may, by complying with this Code, be eligible for federal assistance in carrying out projects that require the use of the eminent domain power.

5. The Code should set standards for payment of the owner's litigation expenses when the condemnor abandons the condemnation efforts or is adjudged not to have the right to take the property at issue.

6. The Code should set standards for relocation assistance in all eminent domain land acquisitions.

This Code was presented to the Annual Conference of Commissioners on Uniform State Laws, in preliminary draft form, at its meeting in San Francisco in 1972, and again was reviewed in substantially complete, but semifinal draft form, at the Annual Meeting in Hyannis, Massachusetts, in August 1973. It is now submitted in final draft form for full review at the Hawaii meeting in 1974.

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ARTICLE I

[General Provisions and Definitions]

1 Section 101. [Short Title.]

2 This Act may be cited as the "Uniform Eminent Domain Code."

Comment

This is the customary "short title" provision. It may be placed in such order in the bill for enactment as the legislative practices of the state indicate. If parts of the Uniform Code are introduced as separate measures, the short title should be adjusted accordingly.

1 Section 102. [Scope of the Code.]

2 (a) This Code provides standards for the acquisition of property
3 by condemnors, the conduct of condemnation actions, and the determina-
4 tion of just compensation. It does not confer the power of eminent domain,
5 and does not prescribe or restrict the purposes for which or the persons
6 by whom that power may be exercised.

7 (b) This Code supplements the law of this state relating to the
8 acquisition of property and to the exercise of the power of eminent domain.
9 In the event of conflict between this Code and any other law with respect
10 to any subject governed by this Code, this Code prevails.

Comment

The Uniform Eminent Domain Code is conceived primarily as a procedural statute. It does not attempt to prescribe which governmental and private bodies are authorized to exercise the power of eminent domain, or for what purposes the power may be exercised. Subsection (a). The Code has been drafted on the assumption that those matters are covered by other statutes. In preparing the bill for enactment, other statutory law of the state should be examined

in light of this premise, so that appropriate repeals and conforming changes can be enacted simultaneously.

Paragraph (b) makes it clear that the Uniform Code is intended to supplement and not displace other provisions of law dealing with the substantive powers of land acquisition and eminent domain. It is recognized, however, that some provisions of the Code (e. g., the land acquisition policies in Article II) may arguably have at least a quasi-substantive effect in certain applications. This paragraph avoids possible disputes as to whether a particular provision is properly classifiable as "procedural" (and thus governed exclusively by the Uniform Code). In the event of conflicting statutory provisions of either kind, the Uniform Code prevails.

1 Section 103. [Definitions.]

2 As used in this Act:

3 (1) "action" means condemnation action;

4 (2) "appraisal" means a written statement of the value of or com-
5 pensation payable for property, prepared by or under the direction of an
6 individual qualified by knowledge, skill, experience, training, or educa-
7 tion to express an opinion as to the value of property;

8 (3) "business" means a lawful activity, whether or not for profit,
9 other than a farm operation, conducted primarily for the purchase, sale,
10 lease, rental, manufacture, processing, or marketing of products, com-
11 modities, or other property, or for the sale of services;

12 (4) "condemn" means to take property under the power of eminent
13 domain;

14 (5) "condemnation action" includes all acts incident to the process
15 of condemning property after commencement of suit;

16 (6) "condemnee" means a person who has or claims a right or
17 interest in property that is the subject of a prospective or pending con-
18 demnation action;

19 (7) "condemnor" means a person empowered to condemn;

20 (8) "costs" means the reasonable fees, charges and expenses
21 necessarily incurred in an action, including the fees and charges of
22 expert witnesses, the cost of transporting the court and jury to view
23 the premises, and other recoverable costs;

24 (9) "court" means a [] court of this state, and includes,
25 when the context requires, any [judge] [justice] of the court;

26 (10) "crops" means any form of cultivated vegetation, including
27 grass, flowers, fruits, vegetables, trees, vines, and nursery stock,
28 intended to be removed and used or sold for commercial purposes;

29 (11) "Improvement" includes any building or structure, and any
30 facility, machinery, or equipment that cannot be removed from the real
31 property on which it is situated without substantial economic loss or
32 substantial damage to the real property;

33 (12) "lien" means a mortgage, deed of trust, or other security
34 interest in property, whether arising from contract, statute, common
35 law, or equity;

36 (13) "litigation expenses" means the sum of the costs, disburse-
37 ments, and expenses, including reasonable attorney, appraisal, and
38 engineering fees, necessary to preparation for anticipated or participa-
39 tion in actual court proceedings;

40 (14) "local public entity" means a public entity other than the
41 State;

42 (15) "person" includes a private individual, partnership, corpora-
43 tion, association, other legal or fiduciary entity, and a public entity;

44 (16) "personal property" means any assets other than real pro-
45 perty;

46 (17) "property" means any interest in real or personal property
47 under the law of this state;

48 (18) "real property" means land and any improvements upon or
49 connected with land; and includes an easement, servitude, or other right,
50 title, or interest therein;

51 (19) "work" includes construction, alteration, repair, remodeling,
52 excavation, demolition, rehabilitation, relocation, and landscaping.

Comment

The definitions in the Uniform Code are designed to carry out the purpose of the Code to make uniform the eminent domain procedures of the enacting state in all condemnation actions by either public or private condemners.

1 Section 104. [Agreement on Compensation and Other Relief.]

2 The parties at any time before commencement or during the
3 pendency of the action may agree to and carry out according to its terms,
4 a compromise or settlement as to any issue, including all or any part of
5 the compensation or other relief.

Comment

The primary purpose of this section is to provide assurance that the condemner has adequate authority to agree to a settlement of all or any part of the compensation or other relief in issue, and to carry out the terms of the agreement, thereby eliminating any possible objection based on narrow statutory construction or on ultra vires grounds. The section applies to both parties, since in some instances the condemnee may be a public entity with limited powers. Both complete and partial settlements are authorized; the latter may eliminate the necessity for trial as to the items agreed upon, even though other elements remain to be tried.

The concept of "other relief" includes the full range of matters that may be the subject of either adjudication or settlement in the action, including litigation expenses, the terms and conditions of relocation of underground structures, fencing of agricultural lands, design changes in the public improvement to reduce its detrimental effect upon remainder property, the harvesting of growing crops, or any other matter regarded by the parties as appropriate for agreement.

1 Section 105. [Compliance With Federal Requirements.]

2 [This Code does not prevent a condemnor from complying] [Notwith-
3 standing any provision of this Code, a condemnor may comply] with any
4 federal statute, regulation, or policy prescribing a condition precedent
5 to the availability or payment of federal financial assistance for any
6 program or project for which the condemnor is authorized to exercise
7 the power of eminent domain.

Comment

This section provides assurance that public entities have adequate authority to comply with applicable conditions of federal financial assistance.

ARTICLE II

[Policies Governing Land Acquisition]

Prefatory Comment

This Article is intended to bring state law governing land acquisition into accord with the federal requirements prescribed by the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, Public Law No. 91-646, 84 Stat. 1894 (1971), herein referred to as the "Federal Acquisition Policies Act." Federal financial assistance to any state or local governmental project involving the acquisition of real property after July 1, 1972, must be withheld, pursuant to Section 305 of the Federal Acquisition Policies Act, unless the state can provide the federal agency head concerned with "satisfactory assurances" that the acquisition policies declared in Sections 301-304 of that Act will be adhered to. This Article provides a statutory basis for the giving of the required assurances, and, in addition, extends the same acquisition policies to projects that are not federally funded, and to acquisitions by private, as well as public, condemnors.

1 Section 201. [Application of Article.]

2 (a) In order to encourage and expedite the acquisition of property
3 by agreement, to avoid litigation and relieve congestion in the courts, to
4 assure consistent treatment for owners, and to promote public confidence
5 in practices and procedures relating to the acquisition of property for
6 public use, a condemnor, when acquiring property, shall comply with
7 applicable provisions of Sections 202 to 211.

8 (b) Sections 202-211 apply to the purchase and acquisition of
9 materials, supplies, equipment, or other personal property only if the
10 condemnor determines to exercise its power of eminent domain with
11 respect to that property.

Comment

This section is an adaptation of the introductory paragraph to Section 301 of the Federal Acquisition Policies Act, which provides: "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies. . ."

The quoted language from the federal act is applicable only to state and local governmental land acquisitions funded, in whole or in part, by the Federal Government. Present Section 201, however, goes beyond the federal requirements, and is made applicable (1) whether or not federal financial assistance is available, (2) to acquisitions of both real and personal property, and (3) to acquisitions by both public and private condemnors. In addition, this section makes compliance mandatory ("shall comply") and does not merely set guidelines, as in the Federal Act. If this section were given a more restricted purview, it could conceivably raise questions of possible inconsistency with the Equal Protection Clause, and with special legislation and uniformity requirements of state constitutions.

The term "condemnor" (line 6) makes it clear that this section applies to both public entities and private persons if the acquisition is one which, absent agreement with the owner, is intended to be achieved by an exercise of the power of eminent domain. See the definition of "condemnor" in Section 103(6). Under Subsection (b), routine purchasing and procurement actions are excluded from the general purview of this Article, since its purposes are not applicable, and its application would be unnecessarily burdensome, in such cases.

The phrase "to the greatest extent practicable," which is in the Federal Act, has not been included after the word "shall" on line 6. This phrase appears intended primarily to accommodate minor differences between federal and state acquisition procedures, and to give federal administrators a measure of flexibility in assessing the adequacy of state compliance with the federal policy standards. It is deemed to be both inappropriate and unnecessary in the Uniform Eminent Domain Code. Moreover, inclusion of the same phrase in the Code could conceivably create doubts as to whether reliable state assurances of conformity with federal policy guidelines can be given in cases where federal financial aid is sought. A limited "escape" provision designed to meet exceptional circumstances is included in the Code, below, as Section 213.

1 Section 202. [Negotiation and Appraisal.]

2 (a) A condemnor shall make every reasonable and diligent effort
3 to acquire property by negotiation.

4 (b) Before initiating negotiations, the condemnor shall cause the
5 property to be appraised for the purpose of determining the amount that
6 would constitute compensation for its taking. The owner or his representa-
7 tive shall be given a reasonable opportunity to accompany the appraiser
8 during his inspection of the property.

Comment

This section is an adaptation of Section 301, pars. (1) and (2) of the Federal Acquisition Policies Act, which provide: "(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation. (2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property."

The intent of this section is to require good faith negotiations for purchase, based upon an appropriate appraisal openly made after reasonable notice to the owner or other person with whom a prospective purchaser would ordinarily deal in relation to the property. What is an adequate appraisal sufficient to meet the requirements of this section depends upon the nature, size, functional purpose, and other characteristics of the property to be acquired. See also, Section 203(c) (appraisal data to be furnished to owner). Similarly, what is a "reasonable opportunity" to accompany the appraiser depends upon the relevant circumstances, including the identity and location of the owner, the use and occupancy of the property, and the customary practices in the community in connection with buying and selling like property. As defined in Section 103(17), the "property" to which this section applies includes any interest in real or personal property.

1 Section 203. [Offer to Purchase at Full Appraised Value.]

2 (a) Before initiating negotiations for the purchase of property, the

3 condemnor shall establish an amount which it believes to be just compen-
4 sation therefor, and shall submit to the owner a prompt offer to acquire
5 the property for the full amount so established. The amount shall not be
6 less than the condemnor's approved appraisal of just compensation for the
7 property.

8 (b) In establishing the amount believed to be just compensation, the
9 condemnor shall disregard any decrease or increase in the fair market
10 value of the property caused by the project for which the property is to
11 be acquired or by the reasonable likelihood that the property will be
12 acquired for that project, other than that due to physical deterioration
13 within the reasonable control of the owner.

14 (c) The condemnor shall provide the owner of the property with
15 an appraisal, if one has been prepared, or if one has not been prepared,
16 with a written statement and summary, showing the basis for the amount it
17 established as just compensation for the property. If appropriate, the
18 compensation for the property to be acquired and for the damages to remain-
19 ing property shall be separately stated.

Comment

Section 203 is an adaptation of section 301, par. (3) of the Federal Acquisition Policies Act. Unlike the federal statute, the section has been divided into lettered paragraphs for ease of reference. Section 301(3) provides: "(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to

physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated."

The appraisal or summary statement required by Subsection (c) is required to show the "basis" or factual rationale for the amount determined by the public entity or private condemnor to be just compensation. A mere statement in conclusory terms, without supporting data, would be insufficient for this purpose. Moreover, under Subsection (a), the amount offered for the property may not be less than the amount of compensation shown by this appraisal or statement, but it may be more than that amount. The term "appraisal" is defined in Section 103(2).

1 Section 204. [Payment or Deposit Before Surrender of Possession.]

2 An owner shall not be required to surrender possession of property
3 before the condemnor:

4 (1) . pays the agreed purchase price;

5 (2) pays, or deposits for the benefit of the owner in accordance
6 with this Act, not less than the amount established as just compensation
7 for the property as shown by an appraisal approved by the condemnor or
8 the amount required by the court under Section 603; or

9 (3) pays, or deposits in accordance with this Act, the
10 amount awarded by the judgment in the condemnation action.

Comment

Section 204 is an adaptation of Section 301, par. (4) of the Federal Acquisition Policies Act, which provides: "(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 1 of the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a), for the benefit of the owner, an amount not less than the agency's approved

1 Section 207. [Coercive Action Forbidden.]

2 A condemnor shall not advance the time of condemnation, defer
3 negotiations or condemnation and the deposit of funds in court for the use
4 of the owner, nor take any other action coercive in nature, in order to
5 compel an agreement on the price to be paid for the property.

Comment

 Section 207 is an adaptation of Section 301, par. (7) of the
Federal Acquisition Policies Act, which provides: "(7) In no event
shall the head of a Federal agency either advance the time of con-
demnation, or defer negotiations or condemnation and the deposit
of funds in court for the use of the owner, or take any other action
coercive in nature, in order to compel an agreement on the price to
be paid for the property."

1 Section 208. [Offer to Acquire Uneconomic Remnant.]

2 (a) If the acquisition of only part of a property would leave its
3 owner with an uneconomic remnant, the condemnor shall offer to acquire
4 the remnant concurrently and may acquire it by purchase or by condemna-
5 tion if the owner consents.

6 (b) "Uneconomic remnant" as used in this section means a remainder,
7 following a partial taking of property, that is left in such size, shape, or
8 condition as to be of little value or to give rise to a substantial risk that
9 the condemnor will be required to pay in compensation for the part taken
10 an amount substantially equivalent to the amount that would be required to
11 be paid if it and the remainder were taken as a whole.

Comment

Subsection (a) of Section 208 is based upon section 301, par. (9) of the Federal Acquisition Policies Act, which provides: "If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property."

Section 208, however, goes beyond the federal act and expressly authorizes a condemnor to acquire an uneconomic remnant--a power which, under the language of the Federal Act, is only implied. The statutory powers of condemnors under state law are, in many states, construed strictly; if an express grant of power were not included, this section might be deemed applicable only to acquisitions by agencies which are elsewhere empowered to acquire uneconomic remnants. Under Section 102(b), this section prevails over any statutory provisions inconsistent with it.

Subsection (b) is not based upon the Federal Act, but is believed to be consistent with its intent. Subsection (b) limits the operative effect of paragraph (a) to instances in which a partial taking results in one or more "physical" or "financial" remnants. Examples include remnants that are totally "landlocked" so that no physical use of the property is practicable; remnants reduced below minimum zoning area requirements where there is no reasonable possibility of a zoning change; remnants in such physical condition as to preclude economical practicable use for any plausible application; and remnants that are of significant potential value only to one or a few persons (e. g., adjoining landowners). See, e. g., Department of Public Works v. Superior Court, 68 Cal. 2d 206, 65 Cal. Rptr. 342, 436 P. 2d 342 (1968); State v. Buck, 226 A. 2d 840 (N. J. 1968). The duty of the condemnor to offer to acquire the remnant is limited to cases in which a failure to acquire it along with the rest of the "take" could impose a substantial economic hardship on the owner while acquisition would not be likely to increase total costs appreciably.

Section 208 does not require the acquiring agency to condemn the remnant if the offer is rejected; but it also does not preclude a condemnor from acquiring an "uneconomic" remnant by eminent domain if the owner refuses the offer. On the other hand, if the owner is willing to agree to the amount of compensation offered, this section authorizes the parties to agree to its acquisition by condemnation proceedings, so that the compensation will be ascertained by the trier of fact.

This section does not confer, nor does it affect, any authority which a public entity or private condemnor may have to acquire remnants other than those which are "uneconomic." For example,

the acquisition of usable remnants for "protective" or "recoupment" purposes is not included within the mandatory offer here required. This section assumes that any offer in such cases, if elsewhere authorized by state law, ordinarily should be optional with the acquiring agency, and not mandatory, so that it will be free in light of the relative advantages and corresponding costs to decide whether to undertake the acquisition.

A separate offer required by subsection (a) must be made with respect to each remnant that meets the definition of subsection (b), and each may be acquired by different means, subject to the owner's consent. The offer in each instance must meet the requirements of Sections 202-203 (prior appraisal, and offer at not less than appraised compensation). The appraisal made of the portion of the owner's property included within the "take" may be used as the basis for the offer to acquire the uneconomic remnant if it contains sufficient valuation and severance damage data for that purpose.

1 Section 209. [Acquisition of Improvements to be Removed.]

2 A condemnor that acquires any interest in real property shall also
3 acquire at least an equal interest in all buildings, structures, or other
4 improvements located upon the real property acquired, which the con-
5 demnor requires to be destroyed or removed or which will be adversely
6 affected by the use to which the real property will be put.

Comment

Section 209 is based upon Section 302(a) of the Federal Acquisition Policies Act, which provides: "Sec. 302. (a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be affected by the use to which such real property will be put."

The substantive content of the operative terms of this section, including "at least an equal interest" and "adversely affected," is intended to be consistent with authoritative interpretations of the identical federal terms.

Subject to the waiver and excuse provisions of Section 213 this section confers an enforceable right upon the property owner, in the circumstances here provided, to compel the public entity to acquire an interest in improvements substantially identical to, or greater than, the interest acquired in the real property on which they are situated. The extent of the interest that must be acquired is suggested, inferentially, by the purpose underlying the two alternative conditions upon which acquisition of the improvements becomes mandatory: (a) to facilitate removal of the improvements without loss to their owner, and (b) to prevent loss to the owner of the improvements due to adverse effects from the use to which the land is put. Cf. Section 210. Under Section 302(a) of the Federal Act, the determination that the second of these conditions exists is left to the federal agency head. To avoid objections of nondelegability of authority and of inadequacy of decisional standards under state law, section 209 treats this issue as one of fact to be decided, in the event of dispute, by the court.

1 Section 210. [Compensation for Tenant-Owned Buildings and Structures.]

2 (a) If a building, structure, or other improvement to be acquired
3 by a condemnor under Section 209 is owned by a tenant,

4 (1) it shall be deemed for the purpose of determining
5 compensation to be a part of the real property to be acquired not-
6 withstanding the right or obligation of the tenant, as against the
7 owner of any other interest in the real property, to remove it at
8 the expiration of his term; and

9 (2) the compensation awarded shall include an amount
10 sufficient to pay the tenant the larger of the enhancement to the
11 fair market value of the real property contributed by the improve-
12 ment, or the fair market value of the improvement, assuming its
13 removal from the real property.

14 (b) Payment under this section shall not duplicate any payment
15 authorized by law, and may be made only if the owner of the real

16 property disclaims any interest in the improvement. In consideration
17 for the payment, the tenant shall assign, transfer, and release to the
18 condemnor all of his interest in the improvement.

19 (c) This section does not deprive the tenant of any right to reject
20 payment hereunder and to seek to obtain payment for his interest in or
21 damage to the improvement under any other law.

Comment

Section 210 is based upon Section 302(b) of the Federal Acquisition Policies Act, which provides: "(b) (1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for the removal from the real property, whichever is the greater, shall be paid to the tenant therefor. (2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this subsection."

1 Section 211. [Expenses Incidental to Transfer of Title.]

2 (a) As soon as practicable after payment of the purchase price,
3 or payment of or deposit in court of funds to satisfy the judgment in a
4 condemnation action to acquire property, whichever is earlier, the
5 condemnor shall pay, or reimburse the owner, for, any reasonable

6 and necessarily incurred expenses for,

7 (1) recording fees, transfer taxes, and similar expenses
8 incidental to conveying the property to the condemnor;

9 (2) penalty costs for prepayment of any preexisting lien,
10 entered into or created in good faith, encumbering the property;
11 and

12 (3) the prorated portion of property taxes allocable to a period
13 after the date of vesting of title in, or the effective date of possession
14 of the property by, the condemnor, whichever is earlier.

15 (b) The condemnor shall pay the owner interest at the annual rate
16 of [6%] upon any part of the amount required by Subsection (a) that is not
17 paid within 60 days after the owner has made written demand for payment.

Comment

Section 211(a) is based upon section 303 of the Federal Acquisition Policies Act, which provides: "Sec. 303. The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for--

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier."

The Federal Act provides for reimbursement of the expenses here described only "to the extent the head of such [acquiring] agency deems fair and reasonable." The quoted words have been omitted from this section, thereby making payment or reimbursement under state law both mandatory and subject to a uniform statutory standard (i. e., that they be "reasonable" and "necessarily incurred").

Subsection (b) has no counterpart in the federal act. It is intended to encourage prompt payment of amounts required by subsection (a), and to clarify the acquiring agency's duty to pay interest. An appropriate statutory interest rate should be inserted within the indicated brackets.

1 Section 212. [Waiver and Excuse.]

2 If not inconsistent with the requirements of an applicable statute or
3 regulation, a failure to satisfy the requirements or limitations imposed
4 under Sections 201 to 211, inclusive:

5 (1) is waived by the failure of the property owner, in the exercise
6 of reasonable diligence, to object to or seek relief based upon noncom-
7 pliance;

8 (2) may be waived by valid written instrument between the property
9 owner and the condemnor seeking to acquire an interest in the property.

Comment

Section 212 is intended to relieve the parties in acquisition and condemnation proceedings from an unduly restrictive application of Article II. The introductory clause, however, makes it clear that waiver and excuse are not recognized where to do so would be inconsistent with an "applicable" law, including federal statutes prescribing conditions of federal funding of state or local projects. If federal standards are either not "inconsistent" or are not "applicable," for example, the provisions of this section would control.

The provisions of Article II are drafted in mandatory language. Acquiring agencies are under a duty to comply with the requirements of Sections 201-211 even though, as provided in Section 213, noncompliance would not affect the validity of a completed property acquisition. Accordingly, the sanctions for noncompliance are conceived

primarily as procedural techniques for compelling condemnors to comply. For example, the failure of a public entity to make a preliminary purchase offer based on an approved appraisal (as required by Sections 202-203), could be asserted as a preliminary objection to a condemnation action involving the property, leading to a stay of proceedings until a proper offer is tendered and rejected. See Section 508(a). Similarly, if a condemnor fails to make an offer to acquire an uneconomic remnant (as required by Section 208), or fails to seek to acquire improvements located on the land which were to be removed from it (as required by Section 209), the owner by appropriate defensive pleadings in the condemnation action, may insist that these deficiencies be corrected. The proper remedy for noncompliance with the provisions of Sections 201-212 will necessarily vary with the individual circumstances, including the nature of the particular noncompliance.

The present section provides an "escape value" from the general principle requiring full compliance with Sections 201-211. Paragraph (1) recognizes that noncompliance may be waived either by failure to object or by failure to seek relief pursuant to available state procedures. If waiver were claimed by the condemnor, the court would have broad latitude, in light of the relevant facts, to determine whether the adversely affected party had taken appropriate steps to require compliance, and had done so with reasonable diligence. Under paragraph (2), the issue would center around whether there had been a waiver by "valid" written instrument. Fraud, undue influence, coercion, incompetency, or any other legally recognized ground for declaring such an agreement invalid would make this basis for a claimed waiver inoperative.

1 Section 213. [Takings Without Condemnation Action.]

2 (a) If property is to be acquired by a condemnor through the exer-
3 cise of its power of eminent domain, the condemnor shall commence a
4 formal condemnation action for that purpose. A condemnor shall not
5 intentionally make it necessary for an owner of property to commence
6 an action, including an action in inverse condemnation, to prove the fact
7 of the taking of his property.

8 (b) The judgment and any settlement in an inverse condemnation

9 action awarding or allowing compensation to the plaintiff for the taking
10 [or damaging] of property by a condemnor shall include the plaintiff's
11 litigation expenses.

Comment

This section is a paraphrase of Section 301(8) of the Federal Uniform Acquisition Policies Act which provides: "If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property."

Subsection (b) is based upon Section 304(c) of the Federal Uniform Acquisitions Policy Act, which provides: "The court rendering a judgment for the plaintiff in a proceeding brought under Section 1346(a)(2) or 1491 of title 28, United States Code, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

The words in brackets in Subsection (b) are suggested for use in states in which there is a constitutional provision requiring payment of just compensation for both a "taking" and a "damaging" of private property for public use.

The definition of "litigation expenses" in Section 103(13) is parallel to the concluding language in Section 304(c) of the Federal Act, quoted above.

1 Section 214. [Interpretation and Effect of Article.]

2 (a) A failure to satisfy the requirements or limitations of Sections
3 201 to 212, inclusive, does not affect the validity of the condemnor's
4 interest in any property which it acquires by purchase or condemnation.

5 (b) This Article shall be construed to be consistent with the
6 requirements of federal law governing financial assistance for any

7 project or purpose.

8 (c) This Code does not confer the power of eminent domain, nor
9 affect the purposes for which the power of eminent domain may be exer-
10 cised. Notwithstanding any provision of this Code, every condemnor is
11 specifically authorized to act in full compliance with federal laws pre-
12 scribing conditions precedent to the availability or payment of federal
13 financial assistance for any program or project in which the condemnor
14 is authorized to engage or participate.

Comment

Subsection (a) of this section is an adaptation of Section 102(a) of the Federal Acquisition Policies Act, which states: "Sec. 102(a) The provisions of Section 301 of title III of this Act create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

While noncompliance with Sections 201-213 has no substantive effect on completed acquisitions, it may constitute the basis for defensive pleadings in the condemnation action and for corrective orders of the court, absent a waiver or appropriate ground for excusing compliance, pursuant to Section 213.

Subsections (b) and (c) are intended to provide assurance that the Uniform Code will be construed, and that condemnors will have adequate authority, to comply with applicable federal requirements for obtaining federal financial assistance. It also serves a precautionary purpose of assuring that in the event of inconsistency in the interpretation or application of federal requirements and Article II, the federal requirements will control.

Article III

[Proceedings Before Action]

1 Section 301. [Entry for Suitability Studies.]

2 (a) A condemnor and its agents and employees may enter upon
3 real property and make surveys, examinations, photographs, tests,
4 soundings, borings, and samplings, or engage in other activities for
5 the purpose of appraising the property or determining whether it is suit-
6 able and within the power of the condemnor to take for public use, if
7 the entry,

8 (1) is preceded by reasonable efforts to notify the owner,
9 and any other person known to be in actual physical occupancy of
10 the property, of the time, purpose, and scope of the planned entry
11 and activities;

12 (2) is undertaken during reasonable daylight hours;

13 (3) is accomplished peaceably and without inflicting sub-
14 stantial injury; and

15 (4) is not in violation of any other statute.

16 (b) The entry and activities authorized by this section do not con-
17 stitute a trespass, but the condemnor is liable for resulting damages under
18 Section 305.

Comment

Section 301 provides statutory authority for a condemnor to enter upon land to appraise it, or to determine its suitability for the public use and whether its acquisition is authorized. About three-fourths of the states have statutory provisions authorizing such entries. Guy, State Highway Condemnation Procedures 23-24 (1971). No time

limitation upon entry is prescribed. Although appraisal and suitability studies generally precede the initiation of a formal condemnation action; this section does not preclude such studies after an action has been commenced with respect to the property.

Under Subsection (a), it is not necessary that the consent of the owner or occupier of the property be obtained, provide all of the requirements stated are satisfied. If some other statute requires the owner's consent, however, the entry would be unlawful under paragraph (4) unless the consent were first obtained. Subsection (a) leaves the ultimate determination of the "reasonableness" of efforts to give notice under paragraph (1), the "reasonableness" of the time of entry under paragraph (2), and the "peaceable" nature of the entry under paragraph (3) to the sound discretion of the court in light of all of the circumstances.

Under Subsection (b), an entry and related activities are lawful, and non-trespassory, if the criteria of Subsection (a) are met. However, the condemnor may be liable for damages to the extent provided in Section 305.

1 Section 302. [Court Order Permitting Entry.]

2 (a) If reasonable efforts to accomplish a lawful entry or to perform
3 authorized activities upon real property under Section 301 are obstructed or
4 denied by the owner or any other person, the condemnor may apply to the
5 court [in the county where the property or any part is located] for an order
6 permitting entry.

7 (b) Unless good cause to the contrary is shown after notice, the
8 court shall make its order permitting and describing the purpose of the entry
9 and setting forth the nature and scope of the activities which the court
10 determines are reasonably necessary and authorized to be made up-
11 on the property. In addition to requiring a deposit under Section 303, the
12 order may include terms and conditions with respect to the time, place, and
13 manner of entry and authorized activities upon the property which will

14 facilitate the purpose of the entry and minimize damage, hardship, and
15 burden.

Comment

Section 302 authorizes judicial assistance to a condemnor seeking to obtain entry upon property for appraisal and study purposes. This procedure presumably would not be used routinely, but only in those instances in which a lawful entry cannot otherwise be obtained (e.g., cases in which the owner vigorously forbids entry) or the pursuit of the desired activities is obstructed by the owner or some other person (e.g., a tenant). The existence of a clear judicial remedy should facilitate lawful entries by reducing any incentives of the owner or occupant to deny permission.

This section contemplates the use of procedures in the nature of an order to show cause as the procedural framework for the application, with the burden of persuasion resting upon the person resisting entry. Since the owner will be compensated under Section 305 for damages caused by the entry, it seems reasonable to require him to show cause for not permitting a proposed entry, or for limiting the scope and nature of the activities.

Subsection (b) does not define what circumstances would constitute "good cause" for refusing or restricting entry. That determination must be based upon legal and equitable considerations relevant to the circumstances of individual cases. Lack of power to take the property for the use for which the proposed studies are to be made, for example, would be an adequate legal ground of refusal. See Section 301. Where the power to take exists, a showing that comprehensive, reliable, and recent data of the kind sought were readily available to the condemnor, so that the entry would merely produce cumulative information about the property, might constitute sufficient equitable grounds for denying entry. A showing that certain aspects of the proposed activities were not reasonably necessary to support a rational judgment as to value or suitability, or that the condemnor proposed to employ unnecessarily onerous investigation techniques that would interfere with the occupant's use and enjoyment of the premises, might justify a limiting order restricting the time, place, or manner of the proposed activities. Under Subsection (b), the court has full discretion to condition and otherwise shape its order in the manner conducive to an equitable reconciliation of the competing interests disclosed at the hearing.

An order for entry under this section must also include provisions for the deposit of probable compensation, where the likelihood of compensable damage is determined to exist. See Section 303. As to re-

covery of damages caused by the entry and studies, see Section 305. The order may be modified upon a showing of changed circumstances. See Section 304.

1 Section 303. [Deposit of Probable Compensation.]

2 (a) An order permitting entry under Section 302 shall include a de-
3 termination by the court of the probable amount that will fairly compensate
4 the owner and any other person in lawful possession or actual physical oc-
5 cupancy of the property for damages for physical injury to, and for substan-
6 tial interference with possession or use of, the property deemed likely to be
7 caused by the entry and activities authorized by the order, and shall require
8 the condemnor to deposit that amount, if any, with the court prior to actual entry.

9 (b) Unless sooner disbursed by court order, the amount deposited
10 shall be retained on deposit for [six months] following termination of the entry.
11 The period of retention may be extended by the court for good cause.

Comment

 Section 303 requires the condemnor to post security for damage likely to be caused by his entry and appraisal or suitability studies, as a condition to obtaining a court order permitting entry. The statutory terms, "physical injury," and "substantial interference," are intended to preclude nominal and insignificant damages. See Comment to Section 305. Thus, in cases where the probable damage for actual injury to land or for interference with use and enjoyment is de minimis, Section 303 does not require a deposit. An order for a deposit is proper, however, where the foreseeable physical damages may be substantial, giving rise to a cause of action either in tort or inverse condemnation. See, e.g., *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923); *Van Alstyne, Inverse Condemnation: Unintended Physical Damage*, 20 *Hastings L.J.* 431, 483, 85 (1969). Under some circumstances, the anticipated annoyance and interruption of peaceful use and enjoyment by the occupant may also be a probable source of more than merely nominal damages. Because the range of possible factual circumstances is wide, the occasions upon which a deposit should be required, as well as the amount of the deposit, are left to

the court's determination, based on the evidence presented in conjunction with the order to show cause. The amount of the deposit is subject to modification on motion. See Section 304.

Subsection (b) requires the deposit to be retained by the court for a specified period, suggested as six months. During this period, the owner or occupant of the property may apply to the court for payment of compensation, out of the deposited sum, if compensable damages are incurred by reason of the entry and suitability studies. See Section 305.

1 Section 304. [Modification of Court Order.]

2 (a) The court after notice and hearing may modify any of the provisions
3 of an order made under Section 302.

4 (b) If a deposit is required or if the amount required to be deposited
5 is increased by an order of modification, the court shall specify the time with-
6 in which the required amount must be deposited, and may direct that any fur-
7 ther entry, or that specified activities or studies, under the order as modified
8 be stayed until the required deposit has been made.

Comment

Following an initial entry and survey, the condemnor may decide that more extensive exploratory studies of the subject property should be made, including, perhaps, substantial excavations, soil tests, or cutting of trees. If the newly conceived activities were not authorized by the original court order obtained under Section 302, a modification of its terms may be granted under the present section, including an initial or increased deposit for compensation.

To ensure the effectiveness of the security deposit requirement, a stay of proceedings may be imposed under Subsection (b) until the deposit is made. The stay, however, is not automatic but is discretionary with the court, in light of the circumstances. For example, if the condemnor is of undoubted solvency, or if the damages likely to accrue prior to the date upon which the newly required or additional deposit is to be made are amply covered by the amount of the original deposit less accrued damages, an order denying an interim stay of suitability studies might be appropriate. Another factor that could be considered in this connection might be the incurring of un-

necessary expense by the condemnor if crews and equipment used in current work-in-progress, as part of the activities authorized under the original order, were suddenly required to be withdrawn by a stay order.

In some circumstances, a modification order may properly decrease the amount of the required deposit; in such an event, the excess can be disbursed at once to the condemnor pursuant to Section 303(b).

1 Section 305. [Recovery of Damages, Costs, and Expenses.]

2 (a) A condemnor is liable for physical injury to, and for substantial
3 interference with possession or use of, property caused by his entry and
4 activities upon the property. This liability may be enforced in a civil ac-
5 tion against the condemnor or by application to the court in the circum-
6 stances provided by Subsection (c). [No notice of claim is necessary or
7 prerequisite to the action or motion.]

8 (b) In an action or other proceeding for recovery of damages under
9 this section, the prevailing claimant shall be awarded his costs. In addi-
10 tion, his litigation expenses incurred in any proceedings under Sections 302
11 and 304 shall be awarded if the court finds that the condemnor,

12 (1) entered the property unlawfully;

13 (2) entered the property lawfully but thereafter engaged in ac-
14 tivities upon the property that were abusive or lacking in due regard
15 for the interests of the owner or occupant; or

16 (3) failed substantially to comply with, or wrongfully exceeded
17 or abused the authority of, an order made under Section 302 or 304.

18 (c) If funds are on deposit under Section 303 or 304, the owner
19 or other person entitled to damages under Subsection (a) may apply
20 to the court for an award of the amount he is entitled to recover. The
21 court shall determine the amount and award it to the person entitled there-
22 to, and shall direct that its payment be made out of the money on deposit.
23 If the amount on deposit is insufficient to pay the full amount, the court
24 shall enter judgment against the condemnor for the unpaid portion.

Comment

Subsection (a) of Section 305 provides the substantive basis for the condemnor's liability for damages arising out of entries for suitability studies. This statutory rule overrides the doctrine of governmental immunity which, in some states, might otherwise apply. The bracketed language in this subsection is for use in states where a notice of claim requirement might otherwise be invoked to limit liability. Damages required by this section are not dependent upon the existence of a court order under Section 302; liability also exists where a lawful entry is made under Section 301 without judicial assistance, as well as where the entry is unlawful.

The general criteria of damages under Subsection (a), as reflected in the terms, "physical injury" and "substantial interference," require a common sense interpretation. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142, N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). See, e.g., Calif. Govt. Code § 816; Kans. Stat. Ann. §68-2005 (1964); Pa. Stat. Ann., tit. 26, § 1-409 (Supp. 1969). The term, "physical," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on tangible harm to property. Similarly, the term, "substantial interference," excludes liability for minimal annoyances or interferences that do not seriously impinge upon or impair the possession and use of the property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923).

Subsection (b) requires the court to award costs to the prevailing claimant in an action or proceeding for damages under this section. See the definition of "costs" in Section 103(8). In addition, this subsection requires an award of "litigation expenses" incurred in any proceed-

compensation, minimizing acquisition costs through reduction of litigation, and promotion of citizen cooperation with governmental programs involving land acquisitions.

Section 306 should be read in conjunction with Sections 202 and 203, which are based on the Federal Acquisition Policies Act. Section 202 requires condemnors to try to acquire real property by negotiated purchase based upon an appraisal, subject to waiver under Section 213. Section 203 requires that the offer to purchase be made at the full appraised value of the property, and that the owner be supplied with the basic appraisal data on which it is based. Those sections, however, do not explicitly make purchase efforts a prerequisite to maintenance of a condemnation action; do not define the scope of the contemplated negotiations; and do not provide for exceptional circumstances in which noncompliance may be treated as wholly or partially excusable. See Section 307-308, below.

Section 306 requires the condemnor to attempt "negotiations" (as defined in Section 307) only to the extent reasonably necessary to satisfy the "good faith effort" requirement. An inflexible negotiation rule could well prove a source of unnecessary litigation, and, unless carefully defined, the requirement could provide an opportunity for dilatory tactics by property owners.

Subsection (b) makes technical conformity with Sections 202, 203, and 307, prima facie and not conclusive evidence of "good faith." Under this standard, for example, the unjustified refusal of a condemnor to discuss possible modifications in the terms of a formal offer that meets the letter of Section 203 might be deemed a failure of "good faith." On the other hand, use of the terms, "substantial compliance" and "reasonable efforts," provides latitude for a court to determine that an offer supported by informal negotiations, but not strictly in conformity with the policies declared in Sections 202 and 203, may, nonetheless, be sufficient. The ultimate question of compliance is one of fact, depending on the circumstances of the case. See also, as to waiver or excuse, Section 308. This section thus provides an incentive to condemnors to develop offer-to-purchase procedures that clearly meet or exceed the minimum standards of Sections 202, 203, and are not mere routine administrative formalities.

Subsection (c) precludes any implication that settlement negotiations are limited by the procedures here required or to the period before commencement of the condemnation action.

1 Section 307. [Scope of Efforts to Purchase.]

2 (a) In attempting to acquire the property by purchase under
3 Section 306, the condemnor, acting within the scope of its powers and
4 to the extent not otherwise forbidden by law, may negotiate and con-
5 tract with respect to:

6 (1) any element of valuation or damages recognized by law
7 as relevant to the amount of just compensation payable for the pro-
8 perty;

9 (2) the extent or nature of the property interest to be
10 acquired;

11 (3) the quantity, location, or boundary of the property;

12 (4) the acquisition, removal, relocation, or disposition of im-
13 provements upon the property and of personal property not sought to be
14 taken;

15 (5) the date of proposed entry and physical dispossession;

16 (6) the time and method of payment of agreed compensation or
17 other payments authorized by law; and

18 (7) any other terms or conditions conducive to acquisition of
19 the property by agreement.

20 (b) This section does not authorize a condemnor to enter into a
21 contract in violation of law or in excess of its authority.

Comment

Section 307 authorized public and private condemnors to engage in broadly defined purchase negotiations, restricted only by the scope of their lawful powers. In the absence of this authorization, doubts as to specific authority to negotiate on the matters here designated,

and to contract with respect to them, might reduce the practical effectiveness of the "good faith effort" rule of Section 306. On the other hand, Subsection (b) precludes any contract in excess of existing powers or contrary to any limitations imposed by law.

Nothing in Section 307 requires a condemnor to discuss all of the matters enumerated in paragraph (a) or to reach agreement on any of them. This section merely authorizes negotiations to proceed along the broad lines contemplated by the "good faith effort" rule, to the extent that such negotiations are reasonable under the circumstances. A refusal or failure to agree on any of the matters discussed is not, per se, evidence of lack of good faith.

1 Section 308. [Purchase Efforts Waived or Excused.]

2 A condemnor's failure or inability substantially to comply with Section
3 306 does not bar the maintenance of a condemnation action notwithstanding
4 timely objection, if:

5 (1) compliance is waived by written agreement between the property
6 owner and the condemnor;

7 (2) one or more of the owners of the property is unknown, cannot
8 with reasonable diligence be contacted, is incapable of contracting and has
9 no legal representative, or owns an interest which for any reason cannot be
10 acquired by contract;

11 (3) due to conditions not caused by or under the control of the con-
12 demnor, there is a compelling need to avoid the delay in commencing the ac-
13 tion which compliance would require;

14 (4) facts known to the condemnor support its reasonable belief that
15 an offer and negotiations for purchase would be futile or useless; or

16 (5) noncompliance is excused in whole or in part by order of the
17 court under Section 508.

Comment

Section 308 provides an "escape" from what might otherwise be an unduly rigorous application of the requirement in Section 306 that the condemnor undertake good faith efforts to purchase before commencing a condemnation action. This section makes it clear that the requirement is not jurisdictional, but is a waivable procedural prerequisite to suit. See also, Section 502(c).

Paragraph (1) recognizes the possibility of waiver by agreement. This might occur, for example, where preliminary informal discussions disclose the unlikelihood of a meeting of the minds on purchase terms, or where the owner, under Section 208, insists upon a condemnation suit to determine the just compensation for an uneconomic remnant.

Paragraph (2) excuses compliance in cases where it would be legally impracticable or impossible to acquire the property by purchase.

Paragraph (3) permits the condemnor to avoid compliance in order to prevent unacceptable delay in the filing of the contemplated condemnation action. When an excuse under paragraph (3) is advanced, the condemnor would be under the burden of showing, to the court's satisfaction, not only the factual sufficiency and bona fides of the claimed "compelling need" to avoid delay, but also such related matters as the degree of diligence it has exercised, and the practical effect of strict compliance upon program commitments and budgetary allocations beyond the condemnor's control.

Paragraph (4) excuses compliance when prior circumstances (e.g., a confused title situation; known dispute as to the condemnor's right to condemn the property; adamant insistence upon an exorbitant price repeatedly demanded by the property owner) reasonably convince the condemnor that a purchase-offer and related negotiations would be a useless formality. The test under this paragraph is not the fact of improbability that the offer would be accepted but the reasonableness of the condemnor's belief to that effect.

Paragraph (5) recognized the court's power under Section 508 to grant relief from the usual consequences of noncompliance, upon a proper showing of lack of prejudice.

1 Section 309. [Condemnation Authorization.]

2 (a) A condemnor [other than a natural person] may not commence a
3 condemnation action until it has first adopted a written resolution in substan-
4 tial conformity with Section 310, authorizing commencement and prosecution

5 of the action .

6 (b) The resolution may be amended or rescinded at any time before
7 the commencement of the condemnation action .

[Alternate Version]

1 Section 309A. [Condemnation Authorization .]

2 (a) A condemnor [other than a natural person] may not commence a
3 condemnation action until it has first adopted an order, ordinance, resolution
4 or other written statement required or permitted by law constituting a formal
5 authorization for commencement and prosecution of the action . In addition
6 to other legal requirements, the condemnation authorization shall include o:
7 be accompanied by the condemnor's determination of the matters designated
8 in Section 310 .

[Comment]

Section 309 is presented in alternative versions. Both versions, as drafted, apply to public entities and private corporations vested with the power of eminent domain. The bracketed words should be used if private individuals are authorized to exercise eminent domain power under the law of the adopting state, since the purpose of the section does not apply in such cases.

The first version (Section 309) contemplates a uniform practice calling for adoption of a formal resolution. Accordingly, where inconsistent statutory requirements, prescribing other methods by which condemnors may authorize a taking by eminent domain, are repealed concurrently, this version would be appropriate. The alternate version (Section 309A) is for use when retention of other authorized forms for official authorization is contemplated.

This section (in both versions) requires that a formal determination to invoke the power of eminent domain be taken by a condemning corporation or public entity, conforming to the requirements of Section 310, before a condemnation action is commenced. The requirement has several purposes: (a) to assure that a considered decision to exercise the power of eminent domain is made by responsible officers of the condemnor; (b) to provide a clear record of the condemnor's determination to maintain the condemnation action and to commit the necessary resources (including the amount of just compensation expected to be awarded) to take the

subject property; and (c) to establish an evidentiary basis for certain determinations of law and fact which are essential to an exercise of eminent domain power. See Section 311. The identity of the person, board, or other body authorized to adopt or amend the required authorization is determined by the applicable legislation governing the condemnor and its powers.

While this section makes the adoption of the required condemnation authorization a prerequisite to maintenance of a condemnation action, defects or omissions in the authorization may be cured by amendment before the action is commenced. Moreover, a failure to comply with this section is waived unless defendant pleads the defect as a preliminary objection in the answer. See Section 502(c).

1 Section 310. [Contents of Authorization.]

2 (a) In addition to other requirements imposed by law, the condemna-
3 tion authorization required by Section 309 shall include:

4 (1) a general statement of the proposed public use for which
5 the property is to be taken and a reference to the specific statute that
6 authorizes the taking of the property by the condemnor;

7 (2) a description of the general location and extent of the
8 property to be taken, with sufficient detail for reasonable indentifica-
9 tion; and

10 (3) a declaration that

11 (i) the proposed use is required by public convenience
12 and necessity;

13 (ii) a taking of the described property is necessary and
14 appropriate for the proposed public use; and

15 (iii) the proposed public use is planned and located in a
16 manner most compatible with the greatest public good.

17

18 (b) If possession of the property is to be taken prior to judgment,
19 the authorization shall also contain a direction and authorization to de-
20 signated officers or agents of the condemnor to take appropriate action in
21 anticipation of, and to invoke procedures authorized by law for, obtaining
22 early possession of the property.

23 (c) This section does not affect the determination of priorities
24 between public uses.

Comment

Section 310 prescribes the contents of the condemnation authorization required by Section 309.

The requirements here set out are not exclusive. Additional conditions may be established by other statutes, including, for example, the making of proper fiscal arrangements or appropriations, the promulgation of an environmental impact statement, adoption of a relocation program, or obtaining the concurrent approval of designated public agencies. Moreover, this section does not affect the determination of "more necessary public use," which may be required by statutes governing condemnation of property already dedicated to public use. See Subsection (c). This section does not replace other requirements of this kind, but is cumulative with them.

Subsection (a)(1) requires a statement of the public use for which the property is to be taken, and of the condemnor's authority to take it. These recitals are intended to facilitate a determination by the condemnee as to whether the condemnor is acting within its lawful power of eminent domain. The question whether a particular use is a "public use" is left to determination under state law.

Subsection (a)(2) calls for a general description of the property sought, but does not require a full legal description as long as the property can be reasonably identified by the condemnee. A complete legal description is not regarded as essential at this preliminary stage of the proceedings and may not be available.

Subsection (a)(3) is designed to focus the attention of the responsible officers of the condemnor upon the fundamental policy determinations subsumed by a decision to exercise the power of eminent domain. Under clause (i), the determination of "public convenience and necessity" should include consideration of all matters that may be relevant to the general public good, including but not limited to environmental, aesthetic, economic, and social factors. Clause (ii) contemplates a determination of two aspects of the decision to take: first, that the particular interest sought to be taken is necessary for the proposed public use, and second, that the property is reasonably adaptable or suitable ("appropriate") for the particular use contemplated. Absolute

necessity or indispensability are not required. Clause (iii) contemplates a comparative assessment of the site chosen for the public use and other alternative locations, in respect to their relative compatibility with public welfare. Ordinarily, a particular site may properly be approved unless another site would entail clearly greater public good.

Subsection (b) requires a formal official authorization for use of "quick-take" procedures where early possession of the property is desired. A taking of possession before judgment is regarded as a sufficiently important policy decision that it should be formally included in the condemnation authorization and not left to administrative discretion.

1 Section 311. [Effect of Condemnation Authorization.]

2 (a) Except as otherwise provided by law and in this section, a
3 sufficient condemnation authorization duly adopted by a public entity con-
4 clusively establishes the matters referred to in Subsection (a)(3) of Section
5 310.

6 (b) A condemnation authorization creates only a rebuttable presump-
7 tion that the matters referred to in Subsection (a)(3) of Section 310 are true,
8 if (1) it was adopted or last amended more than six months before the com-
9 mencement of the action to which it relates; (2) the condemnor is a local
10 public entity and the property described in its condemnation authorization is
11 not located entirely within its territorial boundaries; or (3) the condemnor
12 is not a public entity.

Comment

Section 311 provides for the effect of a condemnation authorization.

Subsection (a) states the general rule that a public entity's authorization conclusively establishes the matters recited pursuant to Section 310(a)(3): public convenience and necessity for the project; the property is necessary and appropriate for the project; and the project is planned and located in a manner most compatible with the greatest public good.

The authorization, however, is not conclusive in the following circumstances:

First, under Subsection (a), the rule of conclusive effect does not apply to cases in which it is "otherwise provided by law and in this section." Inclusion of other "law" recognizes that in special circumstances (e. g., condemnation by certain special districts or other public entities) the legislature may wish to give the condemnation authorization less than conclusive effect.

Second, under Subsection (a), the authorization must have been "duly adopted" in conformity with the law pertaining to official actions taken by the public condemnor, and must be "sufficient" under Section 310 with respect to its contents.

Third, under Subsection (b)(1), the authorization creates only a rebuttable presumption if it is more than six months old, thereby casting doubt upon its reliability as a reflection of present circumstances and related political judgments as to public use and necessity. See Section 403.

Fourth, under Subsection (b)(2), the authorization has only rebuttably presumptive effect if the property in question lies partly or wholly outside the boundaries of the local public entity seeking to condemn it. Under these circumstances, the decision to take the property may affect owners and territory for which the governing body has no direct political accountability. As a practical matter this qualification affects only those local public entities which have power to condemn extra-territorial property. It does not apply to takings by the state or other agencies with state-wide jurisdiction, nor by private condemnors.

Fifth, under Subsection (b)(3), the authorization is never conclusive, but at most creates only a rebuttable presumption, if the condemnor is a private corporation.

Sixth, under Subsection (c), the authorization is vitiated by fraud, corruption, bad faith, or gross abuse of discretion. Where one of these factors is established, the resolution may still be given partial effect; it is declared of no force or effect only "to the extent" that its adoption, contents, or declarations were influenced or affected thereby.

A resolution with conclusive effect under Subsection (a) of this section only precludes judicial review of the matters designated in Section 310(a)(3). It does not affect a condemnee's right to plead objections to the taking upon other grounds. For example, a condemnee could still contend that the condemnor was acting ultra vires, that the taking was not for an authorized public use, that the property was exempt from being taken, or that other specific statutory requirements applicable to the proposed taking or to the institution of the particular project had not been met.

ARTICLE IV

[Commencement of Action by Condemnor]

Prefatory Comment

This Article provides certain special procedures related to the commencement of an eminent domain action. Only provisions which are uniquely responsive to the peculiar character of condemnation litigation are included. All other procedural aspects of the action are governed by state law, as in other civil actions. See Section 401. In states where procedural law is promulgated primarily by rules of court, many if not all of these provisions may be required to be redrafted in appropriate form for adoption as court rules.

1 Section 401. [Procedure Generally.]

2 The procedure for the condemnation of property under the power of
3 eminent domain is governed by the [Code] [Rules] of Civil Procedure ex-
4 cept as otherwise provided in this Code.

Comment

Section 401 makes the general provisions for procedure and practice in the adopting state applicable to condemnation actions, except to the extent that inconsistent provisions are included in this Code. The special procedural provisions of the Code are designed to facilitate the determination of eminent domain actions in respects that differ materially from other civil litigation, and therefore should prevail over general legal provisions relating to these matters.

Appropriate references should be inserted, upon adoption, where the brackets appear. Consideration should also be given to the advisability of amending the state's code or rules of civil procedure to eliminate conflicts with this act and to include therein an express reference to the fact that the special procedural provisions of this Code apply in eminent domain actions.

1 [Section 402. [Commencement of Condemnation Action; Venue.]

2 A condemnation action is commenced by filing a complaint for

3 condemnation with the [] court in the county in which the property
4 or any part thereof sought to be taken is located. The court in which the
5 action is commenced is the proper court for trial of the action, except
6 that the place of trial may be changed as in other civil actions.]

Comment

The Uniform Code treats eminent domain proceedings as a form of civil action. Accordingly, a formal eminent domain action is referred to as a "condemnation action," and the initiating document as a "complaint." As to the form and contents of the complaint, see Section 404.

Section 402 is bracketed, since it may not be strictly necessary in those states where civil actions generally are commenced by filing the complaint and appropriate venue rules are applicable. Even in those states, however, this section may serve a useful purpose in clarifying the relevant terminology for condemnation actions.

1 Section 403. [Time for Commencement of Condemnation Action.]

2 A condemnor shall commence a condemnation action within [six] months
3 after the date of adoption of the original or amended condemnation authoriza-
4 tion upon which it relies for the taking of the property, but not later than
5 [three] months after negotiations for the purchase of the property have ter-
6 minated.

Comment

Section 403 requires a condemnation action to be commenced within a relatively short period of time after (1) the adoption of the condemnation authorization required by Section 309, or (2) the breakdown of the purchase negotiations contemplated by Section 306. The date on which these events occur is treated as a question of fact, and the time limits for suit are bracketed to indicate that appropriate limits consistent with local practice should be inserted.

A prolonged delay in the initiation of the action, following the required preliminary steps, may create avoidable uncertainties and personal anxieties for a property owner, as well as cause a diminution in the profitability of his property. In addition, the passage of considerable time following the adoption by a condemnor of a formal condemnation authorization (as required by Sections 309-310) could cloud the reliability of its determinations expressed therein. The requirement of expeditious initiation of the action provides a measure of assurance that the factual basis for the authorization is reasonably current.

The time limits here suggested are not true statutes of limitations, since the condemnor is, and in principle should be, free to initiate a condemnation action at any time. Failure to file within the prescribed period thus does not bar the action. Instead, the Code discourages delay by denying conclusive evidentiary effect to the condemnor's condemnation authorization. See Section 311(d). In addition, a failure to meet the time limits prescribed in this section may, on timely pleading of an objection by the defendant, be the basis for imposition of sanctions under Section 508.

The time requirements of this section should not be unduly burdensome. If unforeseen circumstances (e.g., a curtailment of available funds; engineering modifications requiring a change in the size of the project; unanticipated postponements in the scheduling of contemplated work, etc.) require a delay beyond the period prescribed in this section, the condemnation resolution can be amended or a new one adopted. See Section 309. In appropriate cases, a reopening of purchase negotiations would also start a new period running for initiation of the action.

1 Section 404. [Contents of Complaint.]

2 (a) In addition to other allegations required or permitted by law,
3 the complaint shall:

4 (1) Designate as a plaintiff each person on whose behalf
5 the property is sought to be taken.

6 (2) Name as defendants all persons who to the plaintiff's
7 knowledge are owners of or who have or claim any right or interest
8 in the property sought to be taken. Defendants whose names are

9 not known may be included under the designation "unknown
10 claimants."

11 (3) Contain a legal description of the property and of the
12 interest therein sought to be taken.

13 (4) Allege the basis of the plaintiff's right to take the pro-
14 perty by eminent domain and to maintain the action, including

15 (i) a reference to the plaintiff's legal authority for taking the
16 property; and (ii) a statement of the purpose for which the pro-
17 perty is sought to be taken.

18 (b) If a plaintiff claims any right or interest in the property sought
19 to be taken or that the property is devoted to a public use, the complaint
20 must describe that right, interest, or public use.

21 (c) For purposes of information and notice, the complaint shall
22 be accompanied by a map or diagram portraying as far as practicable
23 the property sought to be taken and the property that will be affected by
24 the taking, showing their location in relation to the project for which the
25 property is to be taken.

Comment

Section 404 describes the essential minimum contents of the complaint in a condemnation action. A complaint that does not contain all of the elements provided in this section is subject to preliminary objection. See Section 502. Allegations not required by Section 404 (e. g., market value; necessity for the taking) may, but need not, be made.

Under Subsection (a)(1), each condemnor must be identified, since this information may be relevant to the issue of the right to exercise the power of eminent domain. For example, if a joint and cooperative condemnation action is brought by agreement between different agencies, each condemnor must be named as a plaintiff.

Under Subsection (a)(2), the complaint is required to name as defendants all persons who are known or believed to be owners of or to have or claim any interest, including a lien or other security interest, in the property sought to be taken by the condemnor. Under this rule, it would not be necessary to join a lessee if the plaintiff seeks to take the property "subject to" the lease, for the lessee's interest would not be described in the complaint as property sought to be taken. Since persons who have an interest in the property, but who are not named and served with process either personally or constructively, ordinarily are not bound by the judgment, this rule permits the condemnor to secure full title without collateral litigation.

Subsection (a)(3) requires a "legal" description of the property sought to be taken. Present practice in this regard varies from state to state; the Code seeks to provide a uniform rule of accurate description as a means for giving the defendants notice of the scope of the take. In this respect, notice through the pleadings is deemed more efficient than to rely on discovery, as in other civil litigation. The complaint is not required to describe the interest which each defendant has or claims in the property; specification of the defendants' individual interests is a matter for their several responses. The complaint is sufficient if it merely alleges that each defendant has or claims to have some interest in the property described.

Clauses (i) and (ii) of Subsection (a)(4) require allegations of legal authority and purpose in order to show the plaintiff's right to take. Since there may be many different statutory provisions of varying scope that relate to the right to take, specification of the source of authority and public use claimed by the condemnor should assist in reducing the number of unnecessary challenges to the right to take by clarifying that issue from the inception of the action.

Subsection (b) is intended to provide notice of any claim by the condemnor of an existing interest in the property, and of any issue of "higher public use" arising from the fact that the property sought to be taken is already devoted to public use.

Subsection (c), requiring a map or diagram to be annexed to the complaint, is designed for informational assistance only. Practice currently varies in this regard, with some states requiring a map, others making no such requirement, and still others requiring a map to be filed and made available for examination to interested parties. Since a well prepared map may explain graphically and give better notice than a legal description of the property which the plaintiff seeks to take, or which may be affected by the taking, its attachment to the complaint is

required. The map or diagram, however, need only attempt to portray the property sought to be taken "as far as practicable," thereby recognizing that certain interests, such as mineral or water rights, air rights, or development easements, may not be capable of fully accurate representation by cartographic means. The map or diagram, as part of the complaint, is subject to amendment as are other pleadings; and it may constitute an admission of the plaintiff to the same extent as other parts of the complaint.

This section does not prescribe an explicit rule for designating condemnees whose interests may be affected by death, pendency of probate proceedings, or other analogous circumstances. The determination of who should be named as a defendant in an action affecting the property of a decedent, or property under guardianship, conservatorship, or included within a trust, should be conformed to the requirements of acceptable title practice in the state where the action is pending. The appointment of a guardian or other representative for a minor, an incompetent person, or some other similarly situated condemnee, is also left to local practice and procedure.

1 Section 405. [Consolidation and Separation of Properties and Issues.]

2 [(a)] The plaintiff shall include in the complaint in a condemnation
3 action, to the extent permitted by the law of venue, only properties under
4 substantially identical ownership that are sought to be taken.

5 [(b)] Upon noticed motion, the court may order the consolidation
6 of two or more condemnation actions pending in that court if the court
7 finds that (1) all defendants in the actions have either consented to the
8 proposed consolidation or, after notice, have failed to object there-
9 to, or (2) consolidation would promote the interests of justice and
10 the economical resolution of similar or related issues of law or fact in
11 the actions, but would not significantly prejudice the rights of any party
12 or significantly increase the expenses of any defendant.

13 [(c)] Upon noticed motion, the court may order a separation of

14 condemnation actions previously consolidated, or may direct that desig-
15 nated issues, or issues relating to designated property, shall be tried
16 and determined in the action before other issues, or issues relating to
17 other property, are tried.]

Comment

Section 405 provides basic rules relating to the inclusion of properties in condemnation actions and the consolidation and separation of actions or issues. Since the adopting state may have appropriate provisions governing these matters in existing law, Subsections (b) and (c) are bracketed as optional and to underscore the need to assure the adaptability of the existing provisions.

Subsection (a) requires the joinder, subject to the applicable law of venue, of all properties that are under substantially the same ownership. Contiguity of boundaries, however, is not required. The term, "substantially identical ownership," is intended to induce a joinder of properties notwithstanding minor variations in the status of their respective titles. The purpose of this requirement is to assure fairness to property owners and to promote ease and simplicity in management of the litigation.

Subsection (b) gives the court flexible authority, upon motion by a defendant, to consolidate any two or more pending condemnation actions, if all defendants consent or fail to object, or if the court makes specified findings in support of its order. Consolidation of actions, for example, might be appropriate as to adjoining or nearby parcels involving similar valuation issues but different owners. See also, Section 506 (consolidated hearing on preliminary objections).

Subsection (c) permits a separation of previously consolidated actions, or a separation of issues for purposes of trial, on motion of any party (i. e., not limited to a motion by a defendant). For example, a separation might be ordered as to joined parcels that are in widely separated places or pose quite dissimilar issues of valuation. The procedure for exercising the authority here conferred is left to the general practice in the adopting state.

1 [Section 406. [Service of Process.]

2 (a) Except as provided in Subsection (b), the summons together
3 with a copy of the complaint shall be served upon each defendant in the

4 manner provided for personal service under the [Rules] [Code]of Civil
5 Procedure.

6 (b) If service cannot be made under Subsection (a), the defendant
7 shall be served with process by any method reasonably calculated to
8 give the defendant actual notice and an opportunity to be heard.]

Comment

Section 406 is an optional section prescribing the method for serving process in the condemnation action. Each defendant named in the complaint must be served under this section in order for the court to obtain jurisdiction to render a judgment binding him. The form of the summons is left to state law.

The primary requirement in Subsection (a) that process be served in the manner required by state law for personal service is intended to avoid an objection that due process standards for giving notice, as articulated by the Supreme Court, have not been met. See Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956). The expression, "personal service," as used in this section is intended to have the meaning understood for that term under the law of the adopting state.

Subsection (b) authorizes use of any reasonable method for serving process that satisfies constitutional standards when the primary requirement of in personam service within the state is not feasible. In some instances, registered or certified mail to the defendant's last known address may be appropriate. See Walker v. City of Hutchinson, supra. A defendant whose address is unknown and cannot be ascertained by due diligence could presumably be served by publication accompanied by a posting of the summons and complaint upon the property to be taken. See Schroeder v. City of New York, supra. The method to be used is left to the court's sound discretion in light of the circumstances, subject to the state's Code or Rules of Civil Procedure. The language in Subsection (b) requiring process "reasonably calculated to give the defendant actual notice and an opportunity to be heard" is a paraphrase of the Supreme Court's Due Process language in Mullane v. Central Hanover Bank, 339 U.S. 306, 314, quoted approvingly in Schroeder v. City of New York, 371 U.S. 208, 211.

1 [Section 407. [Recording Notice of Pending Action.]

2 (a) After commencement of a condemnation action, the plaintiff

3 shall cause a notice of the pendency of the proceedings to be recorded
4 in the office of the [recorder] in each county which any real property
5 described in the complaint is located.

6 (b) The notice shall contain:

7 (1) the title of the action and the court, docket number, and
8 date of filing of the complaint;

9 (2) a legal description of the real property sought to be taken
10 as described in the complaint;

11 (3) the name of each plaintiff and each defendant designated
12 in the complaint.

13 (c) The notice shall be filed for record and indexed in the same
14 manner as a notice of lis pendens in other cases.

15 (d) If, after the filing of a notice, the complaint in the action is
16 amended to enlarge the quantity of, or nature of the interest in, the
17 real property to be taken, or to add or substitute parties, the plaintiff
18 shall cause a supplemental notice to be recorded in conformity with this
19 section.

20 (e) Upon entry of a judgment of dismissal, any party may cause
21 a notice of the dismissal to be recorded in same office.

22 (f) A recorded notice of the pendency of a condemnation action
23 under this section constitutes notice to purchasers and encumbrances
24 of the described property to the same extent as like notices of pending
25 litigation in other cases relating to real property.]

Comment

Section 407 is included, in brackets, as an optional provision for adoption in states where existing lis pendens statutes are inadequate or not applicable. It provides for constructive notice of the pendency, amendment, and dismissal of a condemnation action through recordation of a written statement. The exact place of recordation and method of indexing is left to local practice. See Subsection (c).

Recordation of a notice of lis pendens is optional with the plaintiff, Subsection (a). But if a notice is filed for record, the plaintiff has a duty to file a supplemental notice if the complaint is amended to increase the scope of the taking. Subsection (d). A failure to file an original or supplemental notice only affects the extent to which third persons obtain constructive notice; it does not impair the plaintiff's rights to take the property or to maintain the condemnation action.

Paragraph (f) refers to local law to determine the effect of recordation of notice under this section. Upon enactment, other statutes in the state should be reviewed for consistency with this provision.

ARTICLE V

[Defendant's Response]

Prefatory Comment

Upon the approach to the defendant's responsive pleadings adopted in this Article, all objections to sufficiency of the complaint and defenses to the condemnation action (as distinguished from claims to greater compensation) must be included in a timely answer. Neither a demurrer nor a motion may be used for these purposes. However, all preliminary objections and defenses pleaded in the answer must be heard and decided prior to trial on the question of the amount of compensation.

To avoid default, the defendant must timely file either an answer, or a disclaimer of any interest in the action, within the response period allowed by state law. Section 501. A disclaimer, however, may subsequently be filed at any time, even after the defendant's default has been entered. See Section 503(b). Thus, the scheme of the Code contemplates three procedural postures for a defendant:

(1) The defendant may answer and thereby raise and litigate any permissible issues of law or fact. See Section 502. A failure to plead objections and defenses to the taking abandons them, but maintains the defendant as a party in the action who may introduce proof at the trial with respect to the scope and extent of his claimed property interest and the amount of compensation to be paid for it.

(2) The defendant may file a disclaimer. This removes him as a party to the action for all purposes, and he is not entitled to share in the award. See Section 503.

(3) The defendant may default by making no response within the time allowed. Section 504. After default, the defendant is no longer entitled to notice of the proceedings, cannot file pleadings or motions, and may not introduce evidence at the trial, except by leave of the court on timely application. See Section 506. In effect, the default waives all objections and defenses to the taking. A defaulting defendant, however, is entitled to share in the award of compensation to the extent of his interest, and the plaintiff must prove the amount of such compensation, unless a disclaimer is filed.

1 Section 501. [Required Response.]

2 The defendant's response shall consist solely of: (1) an answer,
3 which must include any counterclaim or cross-complaint under Section
4 507, or (2) a disclaimer of any interest in the action.

Comment

 Under Section 501, the defendant's response to the complaint
must be filed within the period allowed by the law of the adopting
state for such responses in other civil actions. See Section 401.
To the extent authorized by state practice, the time for response
may be extended by stipulation, court order, or operation of law.

 This section designates the only forms of response that are
permitted. No pleading or motion other than an answer (see Section
502) or a disclaimer (see Section 503) may be filed by way of response.
The response must be served on other parties in accordance with the
procedural rules of the adopting state.

1 Section 502. [Answer.]

2 (a) In addition to other matters required or permitted by law, an
3 answer shall state,

4 (1) the nature and extent of the interest claimed by the answer-
5 ing defendant in the property sought to be taken; and

6 (2) the nature of and basis for any preliminary objections.

7 (b) The preliminary objections must include any available ground
8 for objecting to the maintenance of the action, including, but without
9 limitation thereto, the grounds that,

10 (1) the plaintiff is not lawfully entitled to take the defendant's
11 property for the purpose described in the complaint;

12 (2) a mandatory condition precedent to the commencement
13 or maintenance of the action has not been satisfied; and

14 (3) the court lacks jurisdiction of the defendant or of subject
15 matter, or is not the proper venue, or the complaint or any other
16 procedural aspect of the action is defective, insufficient, or im-
17 proper.

18 (c) Subject to the power of the court to permit an amendment to
19 the answer, the defendant waives (1) any ground of objection not fairly
20 set forth in his answer, and (2) any interest in or compensation for any
21 property sought to be taken in the action, except for his property as
22 described in the answer.

Comment

Section 502 prescribes the contents of the answer. While the answer must "state" the "nature and extent" of the defendant's claimed interest in the property sought to be taken, it need not contain a "legal description" of that interest; a general description adequate for identification is sufficient. However, all preliminary objections which the defendant wishes to assert must be pleaded in the answer. The objections need not be consistent with one another, and any objections not set forth are waived. The answer is the only pleading by which the defendant may assert that the condemnation action is unauthorized or has been defectively prosecuted. Section 501 precludes assertion of objections or defenses by way of motion or demurrer as in other kinds of civil actions.

As in the case of civil actions generally, well-pleaded allegations in the complaint that are not denied in the answer are deemed admitted. Conversely, by describing the interest claimed by the defendant, the answer may place in issue any conflicting or inconsistent interest in the property claimed by the plaintiff. See Section 505.

The objections that may be asserted by answer are described in broad and flexible terms by Subsection (b). For example, under paragraph (1), the defendant may place in issue the plaintiff's authority to invoke the power of eminent domain for the purpose described in the complaint, may contend that the purpose is not a lawful public use for which private property may be condemned, or may assert that the property is exempt from condemnation. Under paragraph (2), defendant may assert that the plaintiff has filed to adopt a legally effective con-

demnation authorization (as required by Section 309), has filed to conduct preliminary purchase negotiations (as required by Section 306), or has failed to satisfy some other condition precedent to the maintenance of the action (e.g., promulgation of an environmental impact statement required by an applicable statute; establishment of a required relocation assistance program; etc.). Under paragraph (3), any procedural defects, including lack of jurisdiction of subject matter or of the defendant, improper venue, insufficiency of the complaint, improper joinder, untimely filing of the complaint, or other procedural omission (e.g., a failure to seek to take an uneconomic remnant under Section 208, or to condemn improvements required to be taken under Section 209) may be asserted as an objection.

The procedures for determining preliminary objections are provided in Sections 506-508.

1 Section 503. [Disclaimer.]

2 (a) A disclaimer need not be in any particular form, may be signed
3 either by the defendant or his attorney, and shall contain a statement that
4 the defendant claims no interest in the property that is the subject of the
5 action, or in the compensation that may be awarded.

6 (b) A disclaimer may be filed at any time, whether or not the de-
7 fendant is in fault, and supersedes an answer previously filed by the dis-
8 claiming defendant.

9 (c) Subject to Subsection (d), a defendant who has filed a disclaimer
10 has no right of or to participate in any further proceedings, or to share in
11 any award of compensation or damages.

12 (d) The court may implement the disclaimer by appropriate orders,
13 including where justified, an award of costs and litigation expenses.

Comment

Section 503 provides a simplified method for a defendant to disclaim any interest in the property or award of compensation involved in the action.

Under Subsection (a), the disclaimer may be an informal document which merely states that the defendant claims no interest in either the property or the award. A defendant wishing to make only a partial disclaimer may do so by filing an answer describing only the limited interest claimed by him. See Section 502(a).

Subsection (b) permits a disclaimer to be filed "at any time," even after an answer has been filed, or after the disclaiming defendant's right to respond has been terminated by his default. See Section 504 (3). The disclaimer supersedes any earlier response.

The disclaimer, in effect, removes the disclaiming defendant from the action, and may result in a dismissal as to him. See Subsections (c) and (d). The power to implement a disclaimer, as provided in Subsection (d), is intended to assure that the court has full authority to enter a dismissal, with award of costs and litigation expenses (see Section 1303) where appropriate, or to enter other implementing orders calculated to facilitate use of the disclaimer as an aid to settlement. Adequate flexibility in this regard may be particularly useful, for example, in disposing of claims having relatively slight value.

1 Section 504. [Default on Failure to Respond.]

2 A defendant whose [right to respond has been terminated by default]
3 [default has been entered]

4 (1) is entitled to notice of and the right to respond to any amend-
5 ment to or amended complaint filed by the plaintiff, unless the court in
6 the order authorizing the filing of the amendment or amended complaint
7 determines that the rights of the defaulted defendant will not be affected
8 thereby and that notice need not be given;

9 (2) is entitled to notice under Section 1208 of his right to receive
10 a share of the award; and

11 (3) may file at any time a disclaimer under Section 503.

Comment

Section 504 describes the special consequences of a defendant's default, due to failure to file a timely response, in a condemnation

action. While like matters are presumably covered by procedural provisions relating to civil actions generally, the unique procedural features of condemnation procedure make it advisable to provide explicitly for these consequences of default. For example, a defaulting defendant in a condemnation action is entitled to share in the award of just compensation in the action, and thus should receive notices appropriate to the protection of that interest.

When the defendant's right to respond has been terminated by entry of default (or other mechanism employed in the adopting state's civil procedure for this purpose), the defendant is deemed to have waived by operation of law all objections and defenses that he could otherwise have asserted. However, the plaintiff must still prove the amount of compensation that should be awarded to the defaulting defendant.

Unlike other civil actions, however, a defendant in default is still a party to the condemnation action for certain purposes. First, he is entitled to notice of, and to file a response (e. g., an answer or statement of appearance) to, any amendments to the complaint, unless the court specifically orders to the contrary because the amendment does not affect his rights. For example, a defendant might elect to default if the complaint sought only to take a small portion of his property for a highway easement; but an amendment that changed the scope of the "take" to a major portion of the premises, to be taken in fee, for excavating or stockpiling of highway sand and gravel could reasonably provoke an entirely different response. An opportunity to respond to amended pleadings of this kind is essential to ensure fairness to a defendant in default. Second, a defendant in default is entitled to notice of his right to receive his proportionate share of the compensation awarded. Third, he may still file a disclaimer under Section 503. Since disclaimers remove the defendant from the action for all purposes, they are encouraged by the Code in the interest of reducing litigation and simplifying the issues.

1 [Section 505. [Additional Pleadings.]

2 (a) Except as provided in Subsections (b) and (c), the plaintiff may
3 not file a reply or other pleading responsive to an answer. New matter al-
4 leged in an answer is deemed denied by operation of law.

5 (b) The defendant shall assert by way of [counterclaim] [cross-

6 complaint] all claims he has against the plaintiff relating to the property
7 sought to be taken in the action. Any claim not so pleaded is forever bar-
8 red. The [counterclaim] [cross-complaint] and pleadings responsive there-
9 to shall conform to the [Code] [Rules] of Civil Procedure.

10 (c) The court on noticed motion and for good cause may permit a
11 defendant to assert by way of [cross-claim] [third-party claim] [cross-
12 complaint] any claim which he has against another defendant, or against
13 any person not a party to the action, relating to the property sought to be
14 taken in the action. A pleading so authorized and pleadings responsive
15 thereto shall conform to the [Code] [Rules] of Civil Procedure.]

Comment

Section 505 is bracketed as an optional section for considera-
tion by adopting states. It is intended to prevent a condemnation
action from becoming unduly complex or unnecessarily delayed
through the routine filing of additional pleadings, including non-
compulsory cross-demands.

The need to file a compulsory counterclaim (or cross-complaint,
depending on the proper terminology in the adopting state) under Sub-
section (b), should not arise very often, since the normal issues of
just compensation and conflicting property claims can be effectively
litigated without additional pleadings. On the other hand, a compul-
sory counterclaim may in some circumstances be entirely appropriate.
For example, a counterclaim for damages caused by the condemnor's
entry for suitability studies (see Section 305) may, in some cases, be
appropriate.

Third-party pleadings, which may be filed under Subsection (c)
only with leave of court, may sometimes be appropriate to assert
claims for relief relating to the subject property but based on facts
extrinsic to the condemnation action. For example, a defendant
property-owner might have a claim for damages for trespass against
a third person, or a claim against a co-defendant based on circum-
stances that affect the value or use of the subject property.

It is further assumed that a determination of all objections properly pleaded in the answer may constitutionally be made by the court without a jury. If this assumption is unwarranted under the law of the adopting state, the bracketed words should be deleted.

1 Section 507. [Burden of Proof at Hearing on Objections.]

2 [(a) Except as provided in Section 311 and Subsection (b), the plain-
3 tiff has the burden of proof on all issues of fact raised in connection with a
4 preliminary objection.]

5 [(b)] If a defendant alleges fraud, corruption, bad faith, or gross abuse
6 of discretion on the part of the plaintiff or any of its officers, agents, or
7 employees in support of a preliminary objection, the defendant has the bur-
8 den of proving by clear and convincing evidence the facts relating to that
9 particular allegation.

Comment

Section 507 specifies the allocation of the burden of proof on issues of fact arising in connection with the determination of defendant's preliminary objections. While the defendant has the obligation and burden to raise these objections by appropriate pleading (see Section 502(c) providing for waiver of objections not pleaded), evidence relevant to the factual issues thus asserted is likely to be more readily available to the plaintiff. Moreover, as the party that initiated the litigation seeking to take the defendant's property without his consent, it seems reasonable to require the plaintiff to bear the burden of convincing the trier of fact that it should be permitted to maintain the action. This burden, of course, is ordinarily aided to a large degree by the conclusive effect of the condemnor's recitals of public use and necessity in its condemnation authorization. See Section 311(a). Subsection (a) is bracketed as an optional provision that may be deleted if existing procedural law in the adopting state adequately covers the matter.

The exceptions set out in Subsection (b) are based upon collateral policies that would be subverted by placing the burden

of proof upon the condemnor. For example, fraud, bad faith, corruption and abuse of discretion may be alleged in connection with an objection asserting plaintiff's failure to engage in "good faith" negotiations to purchase, as required by Section 306(a), or when a condemnation authorization is attacked as void under Section 311(b). The disfavored nature of these allegations is reflected by placing upon the defendant the burden of proving them by clear and convincing evidence. See Subsection (b). The burden is shifted, however, only as to the specified issues; thus if the defendant successfully impeaches the condemnation authorization, the burden of proving public use and necessity remains upon the plaintiff.

Legal issues raised by objections asserted by the defendant are not affected by this section. Issues of law--such as whether the plaintiff is legally authorized to condemn the particular property for the stated public purpose, or whether that purpose is a public one--have no particular burdens allocated, and are subject to the same rules of persuasion which apply to legal issues in civil litigation generally. Whether an issue is one of law or fact for the purpose of this section will necessarily be determined by the court on the basis of applicable judicial decisions and constitutional or statutory provisions.

1 Section 508 . [Disposition of Defendant's Objections.]

2 [(a) If the court determines that a preliminary objection is meritorious,
3 the court shall make an appropriate order including,

4 (1) dismissal of the action, in whole or in part, if the plaintiff
5 is not authorized to take the property, or some part thereof, or if the
6 acts or omissions constituting the basis for the objection will neces-
7 sarily inflict irreparable injury upon the defendant;

8 (2) conditional dismissal, in whole or in part, unless, within
9 a specified period, the plaintiff takes corrective or remedial action
10 prescribed in the order, including, where appropriate, the adoption
11 of a new or amended condemnation authorization; or

12 (3) any other disposition required by the circumstances of
13 the case.]

14 [(b)] In addition to other requirements of an order sustaining
15 a preliminary objection, or determining that the failure or omission
16 constituting the basis of the objection was reasonably excusable, the
17 court in the interest of justice may require the plaintiff to pay to the
18 defendant all or part of his litigation expenses incurred because of the
19 plaintiff's failure or omission constituting the basis of the objection.
20 An award of litigation expenses shall be included in the order if the
21 court finds that the plaintiff acted or failed to act without justification.

Comment

Section 508(a) is an optional provision that expressly authorizes a flexible range of disposition that can be ordered by the court upon sustaining objections pleaded by the defendant. While it is probably true that the court, in most states, would have power under existing rules or codes of civil procedure to make most, if not all, of the orders here described, it may be appropriate to spell out the authority of the court in order to avoid pre-emptive or restrictive interpretation. Pleading defects, for example, would ordinarily call for a disposition similar to that in other civil actions. An objection that the plaintiff had failed to adopt a condemnation authorization (as required by Section 309) or had failed to engage in preliminary negotiations for acquisition of the property by purchase (as required by Section 306) might call for a different disposition. Under circumstances showing extreme prejudice, for example, a dismissal under Subsection (a) (1) would be possible; more often, a corrective order under Subsection (a)(2) requiring the omitted step to be taken within a specified period of time on pain of dismissal for failure to do so, would be indicated. In still other cases, the court might conclude that the omission was excusable under Subsection (a)(3). The choice of disposition, under this section, is left to the court's sound discretion in light of all of the circumstances of the case.

Subsection (b) authorizes the court to award the defendant all or a part of his litigation expenses in conjunction with an order ruling upon an objection, where justice requires. The award is mandatory, however, if the court finds that the plaintiff acted, or failed to act, "without justification." Accordingly, the plaintiff may avoid such an award by showing that it acted reasonably and in good faith in failing to take the action in question. For example, the plaintiff

may have concluded, on the basis of information available to it, that a preliminary purchase offer was not required because the case appeared to be within the provisions of Section 308.

The term "litigation expenses" as used in Subsection (b) includes reasonable costs and expenses, including attorney's fees and appraisal or engineering fees, necessarily incurred by the defendant. See the definition of this term in Section 103(13).

ARTICLE VI

[Deposit and Possession Prior to Judgment]

Prefatory Comment

Article VI provides for three important aspects of pre-judgment condemnation practice:

(1) Early taking of possession. Condemnors frequently have substantial need to take possession of the subject property at an early stage in the proceedings. Orderly programming and financing of improvements, with maximum savings of funds, may often be facilitated if definite schedules can be established for taking actual possession of the needed property. Undue delays can complicate both financing and contracting arrangements, and may force the condemning authority to pay more than fair market value for property in order to accelerate possession; as a result, the condemnor may pay more than necessary for the improvement, and the affected property owners may be treated unequally.

Many of these problems could be minimized if there were relative certainty as to the date on which possession can be taken; yet if actual possession must be postponed until after judgment, such certainty is unlikely to be realized. Due to the dynamics of the litigation process, it is practically impossible to predict when an action to condemn will result in a final judgment as to all of the parcels that may be required for a particular project. Accordingly, this Article provides a general procedure, applicable to all condemnation actions, by which possession prior to judgment may be taken in an orderly manner by the condemnor with full protection for the rights of property owners.

(2) Deposit of compensation before judgment. The deposit of estimated compensation by the condemnor is made a mandatory condition precedent to taking possession; this deposit is essential (and often constitutionally mandated) to protect the property owner's rights. But, in certain situations, a condemnor may find it desirable and expedient to make a deposit of the probable amount of compensation even when a taking of immediate possession is not contemplated.

For example, by making a deposit and obtaining a judicial settlement of any objections to its sufficiency before possession is required, the condemnor may expedite the actual taking of possession at a later date. In some situations, it may be advantageous to both the condemnor and the property owner to defer taking possession as long as possible, provided possession can be quickly secured when needed. In other

circumstances, the condemnor may find it desirable to make a deposit and enter into early possession for the purpose of fixing the date of valuation (see Section 1003), or to induce the property owner, by withdrawal of the deposited funds, to relinquish his defenses to the taking of the property. See Section 607. Accordingly, this Article authorizes a deposit to be made at the condemnor's option prior to judgment, whether or not a taking of possession is immediately contemplated.

In the interest of fairness, however, the making of a deposit should not be entirely at the condemnor's option. In appropriate cases, on motion of the property owner, the condemnor should be required to make a deposit before judgment if necessary to prevent hardship. The property owner, following the commencement of the condemnation action, sometimes finds himself in a difficult financial position. As a result of the action, he will have lost significant incidents of ownership, being unable to either sell or finance the property, and sometimes finding its profitability greatly impaired. At the same time, he often is under a practical compulsion to locate and acquire substitute property, arrange to move his home or business there, and incur the costs of defending the condemnation action. While relocation assistance benefits may be of some help, they are not always equal to the fiscal need. See Article XIV. Unless the property owner can obtain funds from some source, the condemnor may be able to exert unfair bargaining leverage to induce a settlement at a figure substantially below that which the owner would receive by defending the condemnation action. Accordingly, this Article authorizes the court, on a proper showing, to compel the condemnor to make a deposit, thereby creating a fund available for withdrawal by the property owner with which the latter may meet his legal expenses and undertake to deal with the other problems resulting from the condemnation of his property.

(3) Withdrawal of compensation prior to judgment. This Article also provides a procedure by which the property owner may withdraw all or any part of the funds on deposit prior to judgment, so that they can be used for immediate fiscal needs, without prejudicing the right of the parties to litigate the question of the actual amount to be awarded for the taking. A withdrawal of funds, however, terminates the property owner's right to interest on that portion of the ultimate award (see Section 1202) and can be done only by waiving all defenses to the action except a claim to greater compensation. See Section 607. In order to provide protection for the rights of other possible claimants to the funds on deposit, withdrawal may only be accomplished by securing leave of court, and is subject to judicial control. See Sections 604-606.

1 Section 601. [Deposit of Appraised Value of Property.]

2 (a) At any time before judgment, the plaintiff may deposit with the
3 court the full amount indicated by an appraisal which the condemnor
4 believes to be just compensation for all or a specified part of the property
5 sought to be taken in the action. The deposit may be made whether or not
6 the plaintiff applies for an order of possession or intends to do so.

7 (b) If within [30] days after the commencement of the action the
8 plaintiff does not make a deposit or makes a deposit covering less than
9 all properties sought to be taken in the action, the court after hearing on
10 noticed motion and for good cause may order the plaintiff to make a
11 deposit of the full amount of compensation for the property in which the
12 moving defendant claims an interest, based upon an appraisal in
13 accordance with Subsection (a).

14 (c) If the plaintiff fails to comply substantially with the order for
15 deposit within the time allowed by the order, the defendant may move
16 to dismiss the action under Section 1301.

17 (d) If a deposit has previously been made under this section, the
18 court may require an additional deposit to be made as a condition to the
19 allowance of leave to amend the complaint to increase the amount or
20 change the nature of the interest in the property sought to be taken.

21 (e) On noticed motion, or, in an emergency, upon ex parte applica-
22 tion, the court may permit the plaintiff to make a deposit if the plaintiff
23 presents facts by affidavit showing that (1) good cause exists for per-
24 mitting an immediate deposit to be made, (2) an adequate appraisal has
25 not been completed and cannot reasonably be prepared before making the

26 deposit, and (3) the amount of the deposit proposed to be made is not
27 less than the full amount of compensation that the plaintiff, in good faith,
28 estimates will be payable for the property. In its order permitting a
29 deposit under this subsection, the court shall require a copy or written
30 summary of the required appraisal to be served within a reasonable
31 time, accompanied by the deposit of any additional amount of compensation
32 shown by the appraisal.

Comment

Section 601(a) permits the plaintiff to make a voluntary deposit, without court authorization, of just compensation for all or part of the property sought to be taken. The approved appraisal upon which the voluntary deposit must be based may but need not be the same appraisal used to support the condemnor's preliminary purchase offer under Section 306(b). See also, Sections 202, 203. In some cases, a preliminary purchase offer is not required (see Section 308) and no previously approved appraisal may have been identified, in other instances, due to a change of circumstances, or to re-appraisal of the property, a new or different appraisal may be considered more accurate and may be given the plaintiff's approval. The plaintiff may select for itself the appraisal which it regards as "approved" for the purpose of this section. In making that choice, of course, the plaintiff must keep in mind the fact that the valuation data relied upon must be made available to the property owner under Section 602 and that the amount deposited is subject to court review under Section 603.

Subsection (b) authorizes the court, on defendant's motion, to order the condemnor to make a deposit if "good cause" is shown. The quoted term is addressed to the sound discretion of the court, recognizing that under certain circumstances a mandatory deposit may be essential to prevent serious hardship or prejudice to the defendant, or to avoid the risk that the condemnor may ultimately be unable to pay the compensation awarded. As in other cases, the amount deposited pursuant to court order is available for immediate withdrawal under Section 604, subject to the waiver of defendant's objections to the right to take the property or to maintain the action. See Section 607.

Subsection (c) prescribes the consequences of the plaintiff's failure to make a deposit as directed by the court. The defendant may seek a dismissal under Section 1301, with recovery of his litigation expenses and rental losses, if any, or may continue to defend, and obtain interest on the ultimate award. See Section 1202.

Subsection (d), authorizing the court to require an additional deposit as a condition to granting leave for the plaintiff to amend the complaint, makes it unnecessary for the defendant to incur the expense of a separate motion under Section 603 to require an increase.

Subsection (e) is included to permit a departure from the normal deposit procedure in situations, such as an emergency caused by fire, flood, or other calamity, where a "quick-take" is essential to the public welfare and there is insufficient time to complete a full appraisal.

1 Section 602. [Notice of Deposit.]

2 On making a deposit under Section 601, the plaintiff shall immediately
3 serve on all parties who have appeared in the action a notice that the
4 deposit has been made, accompanied by a copy of the appraisal or summary
5 of the appraisal upon which the amount of the deposit was based, or by a
6 copy of all affidavits upon which an order for deposit under Section 601(e)
7 was based.

Comment

The plaintiff is required by Section 602 to serve notice of the deposit and supporting documents upon all parties who have appeared in the action, thereby giving them an opportunity to challenge the amount of the deposit by motion under Section 603, as well as to withdraw the funds on deposit pursuant to Section 604.

1 Section 603. [Motion to Increase or Reduce Amount Deposited.]

2 (a) Upon noticed motion of the plaintiff or a defendant with an
3 interest in the property for which the deposit was made, the court shall

4 determine or redetermine whether the amount deposited is the reasonably
5 estimated compensation for the taking that property.

6 (b) If the court determines that the estimated compensation for
7 the property of the defendant making the motion exceeds the amount
8 deposited and that the plaintiff has not taken possession of the property,
9 it may enter an order requiring the plaintiff to increase the deposit, or
10 denying the plaintiff the right to take possession of the subject property
11 before judgment until the amount on deposit has first been increased to
12 not less than the estimated compensation specified in the order.

13 (c) If the court determines that the estimated compensation for
14 the property of the defendant making the motion exceeds the amount
15 deposited and that the plaintiff has taken possession of the property
16 pursuant to an order of possession, it shall require the plaintiff to
17 increase the amount on deposit to not less than the estimated compen-
18 sation specified in the order.

19 (d) If the plaintiff fails to increase the deposit by the amount
20 and within the time allowed by the court in an order under Subsection (b)
21 or (c), the defendant who obtained the order may move to dismiss the
22 action under Section 1301.

23 (e) If the court determines that the amount deposited exceeds
24 the estimated compensation for the property for which the deposit was
25 made, it may permit the plaintiff to withdraw the excessive portion of
26 the deposit if it has not been withdrawn by the defendant.

Comment

Section 603 provides for judicial determination, on motion by any party, as to whether the amount deposited by the plaintiff equals the estimated compensation for the property for which the deposit was made.

Subsection (a) contemplates that the hearing on the motion will conform to local practice requirements as to the nature and form of evidence received, with the moving party assuming the burden of proof. It is assumed that in many cases this hearing, while technically addressed to the issue of "estimated" compensation, may as a practical matter be treated by the parties as the trial, thereby obviating the need for further litigation as to the amount to be awarded.

If the plaintiff has not yet taken possession of the defendant's property, whether or not an order for possession has been entered, Subsection (b) authorizes the court to order an increased deposit or to defer actual possession until the insufficient deposit is increased by the required amount. Whether an order of the latter character is appropriate is left to the court's discretion; but, in some states at least, the taking of possession without prior deposit of the full amount of estimated compensation would violate constitutional requirements. A mandatory order requiring an increased deposit is subject to the sanctions of dismissal under Subsection (d). Compare Section 601.

On the other hand, if the plaintiff has taken possession of the property under an order of court, Subsection (c) requires the court to increase the deposit to an amount at least equal to the estimated just compensation. The plaintiff's failure to comply may be treated as an abandonment of the action, resulting in a dismissal of the action. This result is not automatic, but is left to defendant's motion, since in some cases it may be to his interest to proceed with the action, accepting interest on the additional amount of the award (see Section 1203) in lieu of the right to an additional deposit. Moreover, the court is not required to order a dismissal and, subject to state constitutional requirements, might deny the motion under appropriate circumstances.

Subsection (c) only applies where the plaintiff has taken possession pursuant to an order of possession. If possession was taken pursuant to agreement of the parties, the defendant may properly be deemed to have waived his right to object to the amount of the deposit. On the other hand, if the defendant is willing to stipulate to a taking of possession, but wishes to preserve his right to challenge the amount on deposit, the stipulation may require that an order of possession be entered, thereby obviating any inference of waiver.

Nothing in this section permits a plaintiff to move for a determination that the amount on deposit is excessive, nor does this section authorize the plaintiff to obtain a refund or any part of the deposited funds, whether or not they have been withdrawn by the defendant, which are in excess of the estimated compensation. Since the amount of a deposit made by the plaintiff, absent challenge by the defendant, is determined by the plaintiff's own appraisal data, the question whether that amount is too high should be deferred until the evidence has been evaluated at trial and the determination reduced to judgment. The plaintiff will ultimately be entitled to receive back any part of its deposit, not withdrawn, which exceeds the amount awarded by the judgment, and to obtain a judgment against the defendant for any amount withdrawn that exceeds the amount awarded the defendant. See Section 1207(b).

1 Section 604. [Motion for Withdrawal of Deposited Funds Before
2 Judgment.]

3 (a) By motion before entry of judgment, the defendant may apply
4 to the court for leave to withdraw all or any portion of the amount deposit.
5 The motion shall set forth the applicant's interest in the property for
6 which the deposit was made, request leave to withdraw a stated amount
7 from the funds on deposit, and be verified by the applicant or his attorney.

8 (b) The defendant shall give notice of the motion, and of the time
9 and place of the hearing thereon, the plaintiff who made the deposit and
10 to all other parties who have appeared in the action. Before the hearing,
11 the plaintiff may serve any other person with notice of the time and place
12 for the hearing, together with a statement that his failure to object at or
13 before the hearing will be deemed a waiver of any objections he may
14 have to the proposed withdrawal.

15 (c) This section does not prevent the court from authorizing a
16 defendant to withdraw deposited funds without notice or hearing if the
17 plaintiff consents thereto in writing.

Comment

Section 604 establishes a procedural framework by which a defendant may move for withdrawal of deposited funds. While the defendant making the motion is required to give notice of the motion, and of the hearing thereon, to the plaintiff and all other parties who have appeared in the action, the plaintiff may also give notice to any other person, such as a defendant who has not yet been served with process. By giving such notice, the plaintiff can protect itself against liability to such persons under Section 605(c). Any objection that could properly be asserted by a party with notice (e. g., that the amount proposed to be withdrawn exceeds the probable amount of compensation to be awarded to the applicant) is deemed waived if not timely asserted.

1 Section 605. [Determination of Application for Withdrawal; Waiver
2 of Objections.]

3 (a) A party who receives notice of hearing under Section 604
4 waives all objections to the proposed withdrawal that are not timely
5 asserted, and has no claim against the plaintiff for compensation to the
6 extent of any amount withdrawn pursuant to the order of the court. The
7 plaintiff remains liable for compensation that may be awarded to any
8 party who did not receive notice, and to any other owner of record, but
9 if the liability is enforced plaintiff may recover from a defendant to the
10 extent he has been overpaid.

11 (b) An order permitting withdrawal may impose terms and con-
12 ditions which justice may require, including where appropriate a
13 requirement that the defendant provide security, in an amount and manner

14 approved by the court, to guarantee repayment of any amount he with-
15 draws in excess of the total amount to which he is entitled as finally
16 determined by the judgment in the action.

Comment

In permitting a withdrawal, under Section 605 the court may impose reasonable terms and conditions, including a requirement that the applicant provide security to guarantee repayment if the amount withdrawn proves to be excessive in relation to the judgment. The condemnor, of course, may waive this security if it deems it appropriate to do so, and may consent to a withdrawal without notice or hearing.

1 Section 606. [Effect of Withdrawal.]

2 A defendant who withdraws money under this Article waives all
3 objections and defenses to the action and to the taking of his property,
4 except for any claim to greater compensation.

Comment

Under this section, a withdrawal of funds on deposit operates as a waiver of all objections and defenses, whether pleaded or not, by the withdrawing party. If the amount withdrawn proves excessive, the judgment must provide for repayment of the difference to the plaintiff or other person entitled to it. See Section 1207.

In addition to the other consequences provided by this section, the withdrawal of funds on deposit may entitle the plaintiff to an order for possession of the property for which the deposit was made. See Section 609.

1 Section 607. [Deposit and Withdrawal Inadmissible in Evidence.]

2 The amount deposited or withdrawn under this Article is not ad-
3 missible in evidence and may not be referred to at the trial.

Comment

Under this section, a withdrawal of funds on deposit operates as a waiver of all objections and defenses, whether pleaded or not, by the withdrawing party. If the amount withdrawn proves excessive, the judgment must provide for repayment of the difference to the plaintiff or other person entitled to it. See Section 1207.

In addition to the other consequences provided by this section, the withdrawal of funds on deposit may entitle the plaintiff to an order for possession of the property for which the deposit was made. See Section 610.

1 Section 608. [Deposit and Withdrawal Inadmissible in Evidence]

2 Neither the amount deposited nor any amount withdrawn under this
3 Article is admissible in evidence and may not be referred to upon the trial
4 of the issue of compensation.

Comment

The purpose of Section 608 is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited to withdrawn from being used in evidence against the plaintiff. It recognizes that the amount of the deposit, to a considerable degree, is within the control of the plaintiff, since it is based in the first instance upon the approved appraisal and supporting appraisal data selected by the plaintiff. See Sections 601-602.

Only the amounts deposited and withdrawn are excluded from evidence by this section; the fact that a deposit and withdrawal took place, if otherwise admissible, is not required to be excluded. Moreover, this section does not prevent the defense from using plaintiff's expert appraiser or his appraisal data for impeachment or other permissible evidentiary purposes. Nor does it preclude pretrial or post-trial reference to the amounts deposited and withdrawn for the purpose of crediting the amount withdrawn against the award and to implement the provisions of Section 1207.

1 Section 609. [Deposit at Interest]

2 Upon motion of a party at any time after a deposit has been made
3 under this article, the court may order that the money on deposit and
4 not withdrawn be invested in investments lawful for fiduciaries, sub-
5 ject to such reasonable terms and conditions as the court may require.
6 Interest earned or other increments derived from the investment shall
7 be allocated, credited, and disbursed between the parties ad directed
8 by the court. As between the parties to the action, the money invested
9 remains at the risk of the party who made the motion.

Comment

Section 609 authorizes a procedure by which money on deposit may, on motion by any party, be invested at interest. In adopting states which have general statutory provisions already prescribing and regulating the investment of funds deposited with the court, this section may be modified to require compliance with those statutes.

In some cases, substantial amounts may be earned by interim investment as permitted by this section, especially if the amount of money is large and the time consumed in litigating is prolonged. The fact that the plaintiff may have made a deposit does not, of course, mean that the defendant will always apply for a withdrawal of the funds deposited. A defendant who seeks to press defenses other than those relating to valuation, for example, would not seek a withdrawal, since that would constitute a waiver of his defenses. See Section 607.

1 Section 610. [Order of Possession]

2 (a) At any time before entry of judgment, upon motion by the
3 plaintiff after due notice to all other parties and to persons in actual physi-
4 cal occupancy of the property, the court shall make an order authorizing the
5 plaintiff to take possession of all or a designated part of the property on or
6 after a date specified in the order, and on such terms and conditions as
7 justice may require, if the court determines,

8 (1) that all objections to plaintiff's right to take the property
9 have been waived or resolved in favor of plaintiff, or are insubstan-
10 tial on their merits;

11 (2) that the plaintiff has deposited the estimated amount of
12 just compensation, or before the date of taking possession will have
13 done so, in accordance with Sections 601-603; and

14 (3) that all legal requirements for the taking of possession
15 of the property by plaintiff have been waived or satisfied, or will be
16 satisfied before the time possession is to be taken.

17 (b) In determining the date of possession and any terms and condi-
18 tions to be specified in the order, the court shall consider, in addition to the
19 matters required by Subsection (a), all relevant facts presented at the hear-
20 ing, including:

21 (1) the extent to which the plaintiff has a compelling need to
22 take possession at a particular time, in view of its construction
23 schedule or plan of operation for the property and the situation and
24 other circumstances of the property with respect to the schedule or
25 plan;

26 (2) the extent to which the property owner or person in actual

27 physical occupancy of the property would sustain substantial hard-
28 ship if possession were taken on the date requested by the plaintiff;
29 and

30 (3) the extent to which any additional cost or loss which the
31 plaintiff would sustain by reason of a postponement of possession, or
32 any additional hardship which the defendant or occupant would sustain
33 by reason of a taking of possession on the date requested by plaintiff,
34 may be minimized by the imposition of reasonable conditions or limi-
35 tations upon the plaintiff's possession or may be mitigated through
36 reasonable efforts by the respective parties.

Comment

Section 610 authorizes the court, on noticed motion, to make an order of possession prior to judgment if specified conditions are found to exist.

Paragraph (1) of Subsection (a), permitting possession to be taken only if the issue of the plaintiff's right to take has been settled, must be construed together with the rule that defendant's objection to plaintiff's right to take may be waived by failure to plead it in the answer (see Section 504); and the rule that withdrawal of deposited funds constitutes a waiver of all objections. See Section 607. If the issue of right to take has not been waived or previously resolved, and is not deemed wholly unmeritorious, the court may rule on the objection pursuant to Section 509 before acting on the application for an order of possession.

Similarly, Subsection (b)(2) assumes that all proceedings to require an increase in the amount of the plaintiff's deposit have been concluded and the sufficiency of the deposit determined. If the amount of a required increase has not yet been deposited, the order of possession must be conditioned upon actual deposit of the additional amount. See Section 603(b).

Subsection (a)(3) requires satisfaction or waiver of all other legal conditions precedent to taking of possession, including any applicable statutory requirements not included in the Uniform Eminent

Domain Code. In some states, depending on local law, these non-Code conditions might include the securing of prior zoning approval or the filing of a required environmental impact statement. Requirements imposed by the Code, on the other hand, include assurance of adequate provisions for relocation assistance and availability of relocation housing (see Article XIV, based upon the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 (1971), §§ 201-221), and the statutory requirement, set forth in Section 205, that the occupant of the property must receive not less than 90 days written notice of the date on which he will be required to vacate the premises.

Subsection (b) provides guidelines for assessing the claimed need of the plaintiff to take possession upon a specified date as against the claimed hardship to the defendant or occupier if possession is not deferred. This subsection is designed only to focus the attention of court and counsel upon the elements deemed relevant to a sound exercise of judicial discretion in fixing the date of possession and imposing limitations or conditions. It does not purport to declare any firm substantive standards that might restrict the intended flexibility with which the court may resolve individual problems.

1 Section 611. [Contents of Order of Possession]

2 The order of possession shall:

3 (1) describe specifically the property possession of which plaintiff
4 is authorized to take;

5 (2) state the date after which the plaintiff is authorized to take pos-
6 session of the property; and

7 (3) state any additional terms and conditions, or limitations, upon
8 the plaintiff's possession.

Comment

Section 611 prescribes the minimum contents of an order of possession, consistent with the broad discretion conferred on the court by Section 610. The requirement in paragraph (1) that the "property" be specifically described, when read in conjunction with the definition of "property" in Section 103, contemplates that the court may permit the plaintiff to enter into possession of any portion of or interest in the

property sought to be taken in the action.

Paragraph (3) requires the court to define with particularity any conditions or limitations imposed, in the interest of justice, upon the plaintiff's right of possession pending the completion of the litigation. In some instances, for example, the court might authorize the plaintiff to share possession with the defendant, or limit the areas of use permitted to each, or authorize joint use for compatible purposes. Intermediate relief of this sort, falling between the extremes of no possession and unlimited possession, may sometimes be required by a reasonable balancing of equities, and is expressly authorized by Section 610.

1 Section 612. [Notice of Order of Possession]

2 Promptly after the making of the order, and not later than the time
3 possession is actually taken, the plaintiff shall give notice of the order for
4 possession to all parties who have appeared in the action and to any persons
5 in actual physical occupancy of the property described in the order.

Comment

Notice of the order of possession must be given promptly under this section, and in any event before possession is actually taken. The notice is necessary not only in the interest of fairness, but also to start the running of time for the making of any post-decision challenges to the order (e. g., a motion to vacate the order; petition to a higher court for relief by way of extraordinary writ, etc.) which may be available under state law.

The notice required by this section must also be considered in conjunction with the requirement of Section 205 that at least 90 days written notice be given before a person dwelling on the property or engaged in a business or farm operation can be ousted of his possession of the property. In cases to which Section 205 applies, the time for giving notice of the order must be at least 90 days in advance of the taking of possession, unless the 90 day period has previously been satisfied by giving of an earlier notice of plaintiff's intent to take possession, or has been waived by agreement under Section 213. (The court, of course, must take these factors into account in fixing the date of possession. See Section 610.) Even though the 90 day rule of Section 205 has been satisfied, however, the plaintiff must still give the notice required by this section.

1 Section 613. [Enforcement of Order of Possession]

2 The court on application by the plaintiff, may enforce its order for
3 possession and the limitations or conditions included therein by any appro-
4 priate writs or other remedies authorized by the [Code] [Rules] of Civil
5 Procedure.

Comment

Section 613 confirms the power of the court to employ any available judicial means to make the order of possession effective. Local law will determine whether the appropriate device is a writ of possession, writ of assistance, or other form of process. Similarly, local law will determine the proper form of procedure (e. g., petition for mandamus) to enforce conditions and limitations upon the plaintiff's possession which are set forth in the order.

D

ARTICLE VII

[Proceedings Before Trial]

1 Section 701. [Application of Article.]

2 Discovery and pretrial conferences in condemnation actions are
3 governed by the [Rules] [Code] of Civil Procedure, except as otherwise
4 provided in this Article.

Comment

Article VII liberalizes conventional discovery practice as applied in eminent domain actions, and includes optional provisions confirming the court's power to conduct pretrial conferences.

1 Section 702. [Discovery Scope.]

2 Without leave of court, and without showing any need for the
3 information sought, or of hardship or prejudice if discovery is withheld,
4 a party to a condemnation action may:

5 (1) [By request for production] require any other party to produce
6 for inspection and copying, or to furnish a copy, of any written appraisals,
7 reports, maps, diagrams, charts, tables, or other documents in his
8 possession or under his control that contain engineering, economic, valu-
9 ation, comparable sales, or other data pertaining to the issue of compen-
10 sation.

11 (2) By written interrogatory require any other party to disclose
12 the identity and location of each person whom the other party expects to
13 call as a witness at the trial on any question relating to the issue of
14 compensation to state the substance of the facts and opinions to which the
15 witness is expected to testify, and to summarize the grounds for each opinion

16 (3) By written interrogatory or deposition require any other
17 party to disclose the identity and location of every person, including an
18 employee or agent, whom he has caused to examine the property sought
19 to be taken, or whom has has consulted or employed to provide information
20 or to express an opinion relating thereto, in order to assist in determining
21 the amount of compensation, whether or not the person so identified is
22 expected to be called as a witness at the trial.

23 (4) By deposition examine any person whose identity is discoverable
24 under paragraphs (2) and (3), and whom the other party expects to call as
25 a witness at the trial, with respect to his findings and opinions on any
26 question relating to the issue of compensation.

Comment

Section 702 provides a liberal rule of discovery with respect to valuation issues that goes beyond the purview of conventional discovery in other civil actions. For example:

(1) Section 702(1) permits discovery as a matter of right and without prior court approval of documentary data relating to valuation issues which may be in the possession of the other party, whether or not prepared by a prospective trial witness. See, e.g., State v. Leach, 516 P.2d 1383 (Alaska 1973) (accord). Absent specific authorization, data of this kind would often be discoverable in other civil actions only upon a showing of special need or potential prejudice. Compare FRCP, Rule 26(b)(3), relating to discovery of "trial preparation materials." The bracketed phrase "by request for production" should be adapted to conform to the usual discovery technique used in the adopting state to obtain documentary inspection (e.g., motion for inspection; subpoena duces tecum; etc.).

(2) Section 702(2) authorizes a party by interrogatories to require disclosure of the identity and a summary of the testimony of the valuation witnesses expected to be called by any other party. If the party from whom the information is sought has not determined the choice of valuation witnesses he intends to call to testify at the trial, he must so respond, and later supplement his answer under Section 706 or the equivalent supplementation provision of state

discovery practice. A failure to do so, unless relief is secured by a protective order under Section 703, exposes the noncomplying party to sanctions. See Section 707.

(3) Section 702(3) authorizes discovery, as of right, of the identity and address of valuation personnel employed by another party, whether they are engaged solely as advisors or are expected to be called to testify at the trial. Compare FRCP, Rule 26(b)(4)(limiting discovery as to experts not expected to be called to testify). Identification of all such persons will facilitate investigation and trial preparation both by informal means (e. g., interview) and by formal discovery (i. e., deposition) to the extent permitted by law. Moreover, knowledge of the identity of consultants used by another party will assist counsel in seeking to employ other experts to help prepare his client's cause, and may provide clues as to the opponent's theory of value.

(4) Section 702(4) authorizes the taking of the deposition of an expert or other valuation witness of another party, provided he is expected to testify at the trial, without the necessity for obtaining leave of court by motion in advance. Compare FRCP, Rule 26(b)(4)(A) and (B). Nothing in paragraph (4) prevents the making of objections to questions asked during the deposition, if otherwise permissible under state discovery practice. But see Section 703.

Section 702 is predicated upon the view that condemnation actions represent a unique form of litigation principally concerned with the determination of the single issue of the amount of just compensation to be paid. Because of their exceptional character, such actions can be expedited and tried with greater efficiency and less expense if the fullest possible pretrial disclosure of valuation data and testimony is authorized. As with other discoverable matter, of course, discoverability does not necessarily imply admissibility in evidence at the trial, and the rules here set forth are subject to the court's power under Section 703 to grant protective orders.

1 Section 703. [Protective Orders.]

2 (a) Discovery under Section 702 is subject to the power of the
3 court to make orders which justice requires to protect a party from
4 annoyance, embarrassment, oppression, or undue burden or expense,
5 but discovery authorized by Section 702 may not be denied or limited
6 solely for the reason that the documents, information, facts, opinions,

7 or other matters sought either were or were not prepared, obtained, or
8 procured in anticipation of litigation or in preparation for trial in the
9 particular action.

10 (b) The party taking the deposition of an independent expert witness
11 shall pay the expert a reasonable fee for time spent in preparing for and
12 in giving his deposition.

Comment

Section 703 limits the court's authority to restrict the liberal discovery contemplated by Section 702. While the general power to make protective orders is expressly confirmed in Subsection (a) (compare FRCP, Rule 26(c), as to the general scope of protective orders), two significant limitations not ordinarily applicable in other civil actions are established:

(1) The court may not curtail discovery solely because the material sought was prepared, obtained, or procured in anticipation of litigation or trial in the action. Compare FRCP, Rule 26(b)(3), limiting discovery of anticipatory "trial preparation materials."

(2) The fact that the material was not prepared or obtained for use in the present case is not, standing alone, grounds for denying discovery. In the absence of this qualification, a protective order could be granted on the theory that the material sought (e.g., an appraisal prepared for some purpose unrelated to the present action) was not relevant to the subject matter. See Maryland Rules of Procedure, Rule U12(b), expressly authorizing discovery "whether or not [the matter sought] was obtained in anticipation of litigation or in preparation for trial."

The expert witness fees required by Subsection (b) may be ordered paid by the court if agreement cannot be reached between the parties.

Section 704. [Offer to Compromise.]

1 (a) Not less than [10] days before the trial on the issue of the
2 amount of compensation, the defendant may file and serve on the plaintiff
3 [, and the plaintiff may file and serve on the defendant,] a final offer of
4

5 settlement stating that it is made under this Section 704, and specifying
6 the amount, exclusive of interest and costs, which the party serving
7 the offer is willing to agree constitutes just compensation for the pro-
8 perty sought to be taken. The offer supersedes by operation of law any
9 offer previously made under this section by the same party.

10 (b) A final offer of settlement shall be deemed to be rejected unless
11 it is accepted in writing, filed and served on the party making the offer
12 before the commencement of the trial of the question of the amount of
13 compensation.

14 (c) If the offer is rejected, it may not be referred to for any
15 purpose at the trial, but shall be considered solely for the purpose of
16 awarding costs and litigation expenses under Section 1205.

17 (d) This section does not limit or restrict the right of a defendant
18 to payment of any amounts authorized by law in addition to compensation
19 for the property taken from him.

Comment

Section 704 establishes a procedure by which a party to a condemnation action may make a formal offer to settle.

The condemnor's decision to accept or reject an offer by the defendant will be influenced by the prospect that the condemnee will be entitled to an award of his litigation expenses under Section 1205 if the amount awarded by the trier of fact exceeds the amount of the rejected settlement offer. Conversely, a defendant's decision to accept or reject such an offer from the plaintiff will be affected by the realization that if the award is less than the offer, the defendant will be denied recovery of his costs of suit.

Since a withholding of normally recoverable costs from the defendant in an eminent domain action may be unconstitutional in some jurisdictions, the reference to the making of a final offer by the plaintiff in Subsection (a) is bracketed to indicate that it should be omitted if appropriate under the law of the adopting state.

1 [Section 707. [Effect of Discovery Proceedings Upon Trial Evidence.]

2 (a) Except as provided in Subsection (b),

3 (1) a party required to produce documentary data under
4 this Article may not, over objection by a party who was entitled
5 to production thereof, call a witness to testify at the trial on any
6 question relating to valuation or compensation unless copies of all
7 appraisals, reports, maps, diagrams, charts, tables, or other
8 documents prepared by or under the direction of the witness, or
9 upon which his testimony is based in whole or in part, were supplied
10 in substantial compliance with this Article; and

11 (2) a party who was requested to disclose the identity of a
12 person by discovery proceedings under this Article may not
13 examine a witness at the trial, over objection by the party seeking
14 the disclosure, with respect to any issue relating to valuation or
15 compensation, unless the witness was identified and all additional
16 properly requested information relating to the witness or his
17 testimony was supplied in substantial compliance with this Article.

18 (b) Upon such conditions as are just, the court may permit a
19 party to call, or elicit an opinion or other testimony from, a witness
20 whose testimony is barred under Subsection (a), if the court determines
21 that the failure to respond to discovery was due to excusable mistake,
22 inadvertence, or surprise, and did not materially impair the ability of
23 the objecting party fairly to present the merits of his case.]

Comment

Section 707 is an optional provision designed to confirm the court's power to impose appropriate sanctions in the form of orders

excluding evidence where pertinent pretrial discovery thereof was withheld. By reference to discovery under "this Article," this section makes it clear that the same consequence may be attached to a failure to properly supplement a prior discovery response. See Section 706.

Subsection (b) gives the court power to excuse noncompliance upon a proper showing of good cause and lack of prejudice. The court, however, may impose reasonable conditions, such as a short continuance of the trial or the payment of additional cost or expense of preparation to meet the unexpected evidence.

1 [Section 708. [Pretrial Order.]

2 The court [may hold a pretrial conference and] may include in its
3 pretrial order, in addition to other matters, terms and conditions reason-
4 ably necessary to enforce any agreement between the parties respecting
5 the scope or design of the project, the location or relocation of improve-
6 ments, or the performance of work by the plaintiff, and in connection
7 therewith may define the scope of the issues and order of presentation
8 of evidence at the trial.]

Comment

Section 708 is an optional provision intended to assure that the court is vested with flexible authority, at the pretrial stage of the action, to facilitate stipulations providing for the terms and conditions of acquisition of the subject property. For example, to the extent authorized by agreement of the parties, the court, at a pretrial conference, may prescribe and thereafter supervise "physical solutions," and may redefine the issues and order of presentation of evidence as needed in connection therewith.

ARTICLE VIII

[Informal Procedure for Disputes Involving Limited Amounts]

Prefatory Comment

This Article provides an informal procedure by which claims for compensation involving limited amounts, or involving claims with a relatively limited "spread" between the condemnor's highest offer and the property owner's lowest demand, may be determined in an inexpensive and expeditious manner. Because legal and appraisal fees often amount to a substantial proportion of the ultimate award, claims of this kind often cannot be litigated economically under normal trial procedures. As a result, either the property owner is forced to settle on the condemnor's terms or the condemnor is compelled to settle upon the basis of the "nuisance value" of the litigation. This Article provides a simplified procedure by which either party may obtain a fair hearing and determination on this kind of claim by an independent tribunal within practical fiscal limits. See also, Article XV (Arbitration).

1 Section 801. [Informal Claims Procedure Authorized.]

2 This Article applies when only the amount of compensation is in
3 dispute and (1) the total compensation demanded by all defendants is less
4 than [\$20,000], excluding interest and costs, or (2) the difference between
5 the latest offer of the condemnor and the latest demand by all defendants
6 is less than [\$5,000]. [The Supreme Court may adopt rules governing
7 proceedings under this Article.]

Comment

The scope of the limited claims to which this Article applies may be adjusted by the adopting state to conform to local circumstances. The suggested alternate test (total demand of less than \$20,000 or "spread" of less than \$5,000) reflect a preliminary judgment that the need for informal procedure is most pressing as to compensation claims in these ranges. The dollar criteria are determined by reference to the plaintiff's "latest offer" (which may or may not be the highest one) and the defendant's current demand as of the date when the application seeking invocation of the informal procedure is filed. See Section 802. See also the definition of "compensation" in Section 103(7).

The last sentence is bracketed as an optional authorization for adopting of implementing court rules in states where existing authority to do so may be lacking.

1 Section 802. [Request for Informal Procedure.]

2 A party may file with the court a written request that the issue of
3 compensation be determined under this Article, identifying the property,
4 and setting forth the amount of the plaintiff's latest offer and the defendant's
5 latest demand for compensation.

Comment

 Under Section 802, a party may request use of the informal procedure by simply filing a request with the court. If a defendant claims an interest in more than one parcel of property involved in the action, he may request informal consideration as to any one of them independently of the others. No time limit for filing the request is specified; presumably, the court would deny such a request if not timely presented well before the date of trial on the issue of compensation for the property.

 The simplicity of the request is intended to facilitate requests for use of this informal procedure by property owners acting in propria persona. Its contents are sufficient if they include relevant identification data and a recital of the basic fiscal facts, i. e., the compensation presently demanded by the defendant for the property and the amount of the latest offer by the condemnor. The offer and demand need not be written, since preliminary purchase negotiations, as well as settlement discussions after the action has begun, will often be oral in nature. In any event, the request itself will be, in effect, the latest offer or demand by the party submitting the request, and the opposing party may assert his latest position in response to the request, if he is unable to agree to the figure asserted.

1 Section 803. [Hearing.]

2 (a) If the court determines that the request should be granted, it
3 shall hold a hearing upon reasonable notice to the parties to determine
4 compensation.

5 (b) The court shall proceed without a jury and in an informal
6 manner. The parties may present oral and documentary proof and may
7 argue in support of their respective positions, but the rules of evidence
8 need not be followed. Neither party is required to offer the opinion of
9 an expert or to be represented by an attorney. Unless demanded by a
10 party and at his own expense, a record of oral evidence received at the
11 hearing need not be kept.

12 (c) Costs shall be claimed and taxed as in other condemnation
13 actions. Upon entry of judgment, the clerk shall serve upon the parties
14 a copy of the judgment with notice of its entry, together with instructions
15 as to the procedure for demanding a retrial.

Comment

The limited claims procedure is intended to be informal; accordingly, the rules of evidence may be dispensed with. The participation of attorneys and the testimony of expert witnesses is not precluded, but is not required. The conduct of the hearing may be subject to more detailed court rules adopted under Section 801.

1 Section 804. [Demand for Retrial.]

2 (a) Either party, within 30 days after entry of the judgment,
3 may reject the judgment and file a written demand for trial under
4 Article IX. The action shall thereupon be restored to the docket of the
5 court as though proceedings under this Article had not occurred.

6 (b) If the condemnor files a demand under Subsection (a) and
7 ultimately obtains a judgment no more favorable to him, the court may
8 require him to pay, in addition to costs, the defendant's litigation

expenses incurred after the demand was filed.

Comment

Under Section 804, either party may reject the judgment in a limited claim proceeding and demand a trial de novo under normal plenary procedure. If a timely demand is filed, the case is restored to the court's docket, with the same status as when the request for informal proceedings was filed under Section 802. Thus, for example, the issue of the amount of compensation will be triable by jury, upon the retrial, on the same terms as in other condemnation actions. While this approach may necessitate a duplication of effort in some cases, experience in jurisdictions having a similar procedure reportedly indicates that few actual retrials are sought. See New York State Commission on Eminent Domain, 1971 Report, p. 36.

Subsection (b) authorizes the court to require the condemnor to pay the litigation expenses subsequently incurred by the defendant if the condemnor demands a retrial and fails to secure a more favorable determination of the issue of compensation. The possibility that the court may impose this sanction is intended to deter the condemnor from filing a demand for retrial except in cases in which the judgment appears to be grossly erroneous. The term, "litigation expenses," includes reasonable attorney, appraisal, and engineering fees. See Section 103(17).

ARTICLE IX

[Procedure for Determining Just Compensation]

1 Section 901. [Setting For Trial.]

2 (a) To the extent practicable, actions under this [Code] shall be
3 heard and tried in advance of other civil actions.

4 (b) The court may require any severable nonjury issue to be
5 tried separately in advance of the trial on the issue of the amount of
6 compensation.

Comment

While the procedures for setting an eminent domain action for trial are left by the Code to local calendaring practice, Subsection (a) establishes a general policy that condemnation actions should be tried at the earliest feasible date, and for that purpose are entitled to precedence over other civil actions. Preferential trial setting requirements for condemnation actions are not uncommon in the United States (see e. g., Calif. Code Civ. Proc. § 1264; Haw. Rev. Stats. § 101-9), and tend to promote several policy objectives: (1) reduction of economic and psychic loss to the property owner, whose ability to plan and reorganize his affairs, in light of the compulsory taking of his property, may be adversely affected by uncertainty as to the amount of compensation that will be awarded; (2) promotion of the social values implicit in the public use for which the property is to be taken, by reducing the time in which uncertainty as to the amount of compensation may inhibit the condemnor from proceeding with the project; and (3) reduction of costs to the public caused by unnecessary delay, especially in periods of generally rising property values and project costs.

Under Subsection (b), the court may require a preliminary trial of nonjury issues, including issues affecting the determination of compensation (e. g., whether there has been a partial taking whether access has been impaired, etc.). Resolution of collateral issues of this kind prior to trial should expedite the determination of the amount of compensation. See also, Section 510 (preliminary objections to be determined before issue of compensation is tried).

1 Section 902. [Trial By Jury; Waiver.]

2 [Alternative A]

3 [(a) The amount of compensation [and any additional issue for
4 which the right to trial by jury is secured by the Constitution] shall be
5 determined by a jury only if a party entitled to participate in the trial of
6 the issue [expressly] demands trial by jury. The court shall determine
7 all other issues without a jury.]

8 [Alternative B]

9 [(a) The amount of compensation [and any additional issue for
10 which the right to trial by jury is secured by the constitution] shall be
11 determined by a jury unless, and to the extent that, the parties entitled
12 to participate in the trial of the issue [expressly] waive the right to trial
13 by jury. The court shall determine all other issues without a jury.]

14 [(b) The number of jurors, method used for impanelling and select-
15 ing jurors, number and method for exercising challenges, form of oath to
16 be administered, number of jurors required to return a verdict, and all
17 other procedures relating to trial by jury, to the extent practicable, shall
18 conform to the requirements applicable in civil actions under the [Code]
19 [Rules] of Civil Procedure.]

Comment

 Alternative A of Section 902(a) requires the court without a jury to determine the amount of compensation, unless a jury trial is properly demanded. Alternative B is an alternative version of this section, designed for use in those states in which a jury is routinely convened unless waived.

 Upon enactment, the wording of this section should be adapted both to local practice and state constitutional requirements. While

it is clear that there is no federal constitutional requirement for a jury trial in eminent domain actions, some states extend a right to a jury trial on issues other than the amount of compensation. See "Eminent Domain," 27 Am. Jur. 2d § 407 (1966). The bracketed phrase in lines 2-3 of Subsection (a) suggests a means for conforming to such constitutional guarantees. The bracketed term "expressly" is also suggested for optional use where, under existing state practice, it would be appropriate.

The term "compensation," as used in Subsection (a), is defined by Section 103(7) to include only the amount of just compensation required to be paid for condemned property. Disputed questions on other matters, such as the scope of compensable elements, additional financial increments (e. g., costs) that may be included in the award, or the allocation of the award as between conflicting claimants, are deemed to be "additional issues" within the meaning of Subsection (a).

In condemnation actions involving several parcels of property under different ownership (e. g., a consolidated action under Section 406(b), supra), Subsection (a) could result in a jury trial to ascertain compensation for some parcels but not for others. Whether a jury should be convened is left to the parties "entitled to participate in the trial" of the issue of compensation to be paid for the particular property taken. As to who is entitled to participate in the trial, see Sections 501-509.

Subsection (b) is bracketed as an optional provision for adoption by states in which, absent this language, there might be doubt as to whether normal jury trial procedures are applicable. Compare Section 401. In addition, it is recommended that each adopting state consider carefully whether additional modifications in jury trial procedures should be made, either in other statutes or procedural rules, or as an exception added to Subsection (b) in view of the unique nature of eminent domain actions. For example, there seems to be no persuasive policy reason why a condemnee who desires a jury trial should be required to deposit jury fees (as is the case in some states with respect to other civil actions). Regardless of the outcome of the condemnation action, any such deposit will ordinarily be recovered by the condemnee as costs. See Section 1206. In this and other respects, eminent domain actions necessarily differ from the usual practice in other cases. Since the extent to which modifications of this kind may be necessary will vary from state to state, no attempt is made here to provide detailed statutory proposals.

1 Section 903. [Right to Open and Close; Order of Presentation of Evidence.]

2 (a) The defendant shall make the first opening statement, proceed

3 first in the presentation of evidence on the issue of the amount of compen-
4 sation, and make the final closing argument.

5 (b) The court may designate the order in which multiple parties
6 make their respective opening statements and closing arguments, and
7 the order in which they present evidence.

Comment

In eminent domain actions the normal position of the parties is reversed (i. e., the property owner who is seeking an affirmative award of money appears as a defendant), and the issues are generally tried in a different order than other civil actions, thus warranting special treatment of these matters in the Uniform Code.

Subsection (a) is consistent with the majority view in the United States that the property owner, in an eminent domain action, has the right to open and close, and may proceed first with the presentation of evidence on the issue of the amount of compensation. See 5 P. Nichols, Eminent Domain § 18.5[2] (3d rev. ed. 1969). In addition, due to the possibility that there may be multiple defendants, some with similar and others with conflicting interests, Subsection (b) provides clear authority for the court to control the order of the respective presentations. See also, Section 907 (power of court to limit participation, where justice may require).

Under Subsection (a), the property owner is required to proceed first; however, nothing in the section precludes him from waiving an opening statement if he deems it tactically appropriate. Absent a waiver, however, the defendant must proceed first on all three aspects--opening statement, evidentiary presentation, and closing argument as well as to conclude it; Subsection (a) is not intended to restrict the defendant's rights in this regard.

1 Section 904. [Burden of Proof.]

2 No party has the burden of proof on the issue of the amount of
3 compensation.

Comment

Section 904 changes the rule, apparently recognized in a majority of jurisdictions, which places the burden of proof (i. e.,

risk of nonpersuasion on the issue of compensation upon the defendant property owner. See 5 Nichols, Law of Eminent Domain § 18.5(3d rev. ed. 1969).

It seems difficult to assign an intelligible meaning to the concept of "burden of proof" in the eminent domain context, since the pleadings are not required to allege or deny the amount of compensation claimed, and the ultimate standard of decision is the constitutional rule of "just compensation." Moreover, the amount of compensation that is "just" is essentially an objective market-established fact, although the practical difficulties or marshalling persuasive evidence of that fact are often formidable. From a realistic view, the trier of fact ordinarily is presented with varying and inconsistent opinions as to value, together with disparate supporting data; the ultimate determination necessarily reflects the weight and degree of credibility accorded to these conflicting estimates. Under these circumstances, no rational policy basis exists for assigning presumptive validity to the amount specified either in the condemnor's offer or in the property owner's demand, thereby requiring the adverse party to assume the burden of controverting that figure.

By declaring that neither party has the burden of proof on the compensation issue, this section in effect requires the trier of fact to make its determination upon the basis of all relevant evidence presented on the issue, without regard to its source, and without assuming that either party has a greater burden of persuasion than the other. See, in accord: Ore. Rev. Stat. § 35.305(2); proposed Calif. Eminent Domain Law, § 1260.210 (1974); State v. 45.621 Square Feet of Land (Alaska 1970) 475 P.2d 553; Martin v. City of Columbus (1920) 101 Ohio St. 1, 127 N.E. 11 (1920).

This section is intended to eliminate any formal burden of proof on all issues directly relating to the amount of compensation, including subsidiary issues affecting valuation and damages. The burden of producing evidence, as distinguished from the risk of nonpersuasion, is not affected, but remains upon the proponent of a particular issue. For example, a defendant who claimed that there was a probability of imminent rezoning of his property for a higher and more valuable use, or that substantial damage had accrued to the remainder of his property in a partial taking case, would have the obligation to adduce evidence supporting his position on those issues. Absent such production, the trier of fact would necessarily reach its conclusions from the other party's evidence alone. Conversely, if the condemnor contended that recent increases in property value were in fact caused by public knowledge of the project for which the property is being taken, and should thus be excluded from consideration, it would have the duty initially to produce relevant evidence in order to have that contention properly submitted to the trier of fact.

to his property interest. Similarly, a defendant may present in the second stage of the trial any appropriate evidence as to the nature, value, or extent of his interest in the property, even though he presented no evidence on these matters in the first stage.

1 Section 906. [Separate Determination of Facts.]

2 If there is a partial taking, the court may determine, or may
3 direct the jury in its verdict to determine separately:

4 (1) the fair market value of the property being taken;

5 (2) the fair market value of the entire property before the taking
6 and the fair market value of the remainder after the taking; and

7 (3) the amount representing loss of good will, compensable under

8 Section 1016.

Comment

Section 906 authorizes the court to require the elements of compensation to be made the subject of specific findings in partial taking cases. While this section may not be necessary in some states, it is deemed appropriate to remove any doubt as to the court's power to require the jury to answer special interrogatories in eminent domain cases. Specificity, as contrasted with a lump sum general verdict, may encourage more responsible consideration of the evidence by jurors, and facilitate informed appellate review.

1 [Section 907. [Power of Court to Control Scope of Trial Participation.]

2 The court in the interest of justice may limit the scope of trial
3 participation by any party on the issue of the amount of compensation,
4 and may require that the presentation of evidence, examination of wit-
5 nesses, and statements or argument to the trier of fact by a party be
6 restricted to matters germane to the amount of compensation for the
7 particular property that party seeks to acquire or in which he claims an
8 interest.]

Comment

With respect to parties who are entitled to participate in the trial (see Section 507), this section confirms the court's power to limit the scope of participation where justice so requires. Judicial control is expected to be of particular utility if multiple parties or properties are involved in a single trial on compensation issues, or if a defendant whose sole interest in the property is for security purposes (e. g., mortgages, lienholders, etc.) seeks without justification to participate in the trial to an undue degree even though his interest is fully and adequately protected by other defendants before the court.

Since this section may be merely a statement of existing law in some states, it is bracketed as an optional provision.

ARTICLE X

[Compensation]

1 Section 1001. [Compensation Standards.]

2 (a) An owner of property acquired by eminent domain is entitled
3 to compensation determined under the standards prescribed in this
4 Article.

5 (b) Unless otherwise provided by law, the right to compensation
6 accrues upon the date of filing of the complaint.

7 (c) This Article does not affect compensation, damages, or other
8 relief to which a person is otherwise entitled under law, but does not
9 permit duplication of payment.

Comment

This Article establishes general standards applicable to the determination of the amount of compensation to which the property owner is entitled for the taking of his property. While it is not intended by the Uniform Code to attempt to formulate rules governing every possible factor that may affect the amount of compensation the features of eminent domain law chiefly responsible for disparities of results, with attendant inequities for both condemners and condemnees, relate to compensation standards. The purpose of this Article is to formulate uniform principles governing the major elements of just compensation.

Subsection (a) makes it clear that a property owner is entitled to the compensation provided by this Article, even though it may exceed what would be payable under applicable judicial construction of the "just compensation" clause. While the compensation awarded for a taking of property cannot be less than the "just compensation" guaranteed by the Constitution, the legislature may enlarge compensability standards beyond the constitutional minimum. See Eminent Domain § 151, 26 Am. Jur. 2d 813, 814 (1966).

Subsection (b) establishes the filing of the complaint as the date upon which the right to compensation accrues. This rule is consistent with the principle that the court acquires jurisdiction

of the property upon the filing of the complaint. See Section 402. The date on which the right to compensation accrues is not the same as the date of valuation (see Section 1003), but is the date upon which the legal condition of the various ownership interests in the property, and its physical features, are deemed fixed for the purpose of determining the right to compensation. The rule, however, is only intended to affect the "accrual" of the "right" to compensation; payment of the award is made according to the respective interests of the parties, or their successors, as shown by the evidence. Moreover, this rule is subject to exceptions recognized by statutory or decisional law. For example, under Section 410, subsequent encumbrancers are charged with constrictive notice of the action only from the date of recordation of a notice of lis pendens. See also, Section 1011 (right to harvest crops planted after commencement of action); Section 1012 (right to compensation for improvements placed on property after commencement of action). The commencement of the action may also have an effect upon pre-existing interests in the property (e. g., may operate to extinguish an existing lease or other interest, pursuant to agreement between the parties). See, e. g., Eminent Domain §250, 27 Am. Jur. 2d p. 21 (1966). Cf. Section 1013.

Subsection (c) clarifies the relationship between this Article and other provisions of law authorizing payment of additional amounts under specified circumstances. See, e. g., Article XIV (Relocation Assistance). Under this subsection, the property owner is entitled to the compensation authorized by this Article and also, but without duplication, any additional amounts authorized by law. The term "law" includes constitutional provisions and judicial decisions. See Section 103(15).

1 Section 1002. [Compensation for Taking.]

2 (a) Except as provided in Subsection (b), the measure of compen-
3 sation for a taking of property is its fair market value determined under
4 Section 1004 as of the date of valuation.

5 (b) If there is a partial taking of property, the measure of compen-
6 sation is the greater of (1) the value of the property taken as determined
7 under Subsection (a), or (2) the amount by which the fair market value of
8 the entire property immediately before the taking exceeds the fair market
9 value of the remainder immediately after the taking.

Comment

Subsection (a) states the basic rule that the measure of just compensation under the Uniform Code is the market value of the "take." Where there is a partial taking, Subsection (b) qualifies the basic rule by authorizing a greater (but not a smaller) recovery, if greater compensation is warranted under a comparison of the respective market values of what the condemnee possessed before the taking and what he had left afterwards.

The "before and after" approach to compensation is followed in federal condemnation practice and has been adopted in several states in recent years, including Hawaii, Kansas, New Mexico, Pennsylvania and Wisconsin. The principal difference between the rule expressed in Subsection (b) and the conventional "before and after" approach is that the latter can sometimes result in a zero award (if the remainder after the taking is more valuable than the entire property before the taking), while under the present section, the award cannot be less than the value of the "take."

A different approach, something referred to as the "value plus damage" rule, appears to be followed in one of several variant formulations in a majority of states. Under this rule, briefly stated, compensation in partial taking cases generally consists of the sum of the value of the property taken and of any net damages to the remainder after offsetting benefits. Text writers and commentators, however, are in substantial agreement that the "before and after" rule is preferable to the "value plus damage" approach, since it avoids confusing artificialities inherent in the latter approach, is more consistent with realistic market valuation and appraisal techniques, and reduces the risk of inequitable windfall recoveries by property owners that may unnecessarily increase the cost of public improvements. See 4A P. Nichols, Eminent Domain §14.232[1] (3d rev. ed. 1971); 1 Orgel, Valuation Under the Law of Eminent Domain §65 (2d ed. 1953); Conner, Valuation of Partial Taking in Condemnation: A Need for Legislative Review, 2 Pac. L. J. 116 (1971); Haar & Hering, The Determination of Benefits in Land Acquisition, 51 Calif. L. Rev. 833 (1963). See also, Palmore, Damages Recoverable in a Partial Taking, 21 Southwestern L. Rev. 740 (1967).

The two basic rules generally reach substantially identical results in partial taking cases in which resulting damages outweigh any special benefits to the remainder caused by the taking or of the proposed public use. Divergent results are obtained principally in cases where net special benefits are realized by the remainder. Under the "before and after" rule, such benefits are, in effect, offset against the compensation payable for the property taken, while under the

"value plus damage" approach, they are offset only against damages to the remainder. The present section takes an intermediate position between these two views, requiring the compensation to be measured by the "before and after" rule, except that the award cannot be less than the value of the "take." On the other hand, if applicable statutory rules or constitutional interpretations require additional amounts to be awarded, this section does not preclude that result. See Section 1001(c).

The term "property" is defined in Section 103(22) to mean any interest in real and personal property, and includes compensable structures or improvements located upon real property. See Sections 1012, 1013. Accordingly, the "before" and "after" values would necessarily reflect these elements, but only so far as they are affected by the taking. For example, a partial taking could include either a physical portion of a large parcel or item of property, leaving a tangible remainder, or may consist of the taking of an interest (e. g., an easement, air rights, etc.) that leaves the property owner with no diminution in physical area. The rule here stated would apply in either of these cases.

Section 1002 must be construed in conjunction with other sections of the present article. "Date of valuation" is governed by Section 1003. The concept of "fair market value" is defined in Section 1004. The rule requiring the "before" value to be determined without regard for changes in value due to the imminence of the condemnation action is set out in Section 1005. On the other hand, the determination of the "after" value must take into account the impact of the project as planned. See Section 1006. See also, Section 1007 ("entire property").

1 Section 1003. [Date of Valuation.]

2 (a) Except as provided in Subsection (b), the date of valuation is
3 the earlier of (1) the date upon which the plaintiff first makes a deposit
4 under Article VI, or (2) the date upon which the trial of the issue of the
5 amount of compensation commences.

6 (b) On motion of the defendant made not later than [60] days before
7 the date of trial of the issue of the amount of compensation:

8 (1) If the amount first deposited by the plaintiff is determined

9 to be insufficient under Section 603 and the plaintiff does not
10 deposit the additional amount required by the court's order within
11 [thirty (30) days] after the order is made, the court may designate
12 as the date of valuation the earlier of (i) the date on which the plain-
13 tiff thereafter deposits the required additional amount or (ii) the
14 date upon which the trial of the issue of the amount of compensa-
15 tion begins.

16 (2) If the court determines that the date of valuation required
17 by Subsection (a) is more than [one year] after the commencement
18 of the action and that the defendant did not cause the delay, the
19 court shall designate as the date of valuation the date on which the
20 action was commenced.

21 (3) If the court determines that the plaintiff entered into pos-
22 session of the defendant's property without the consent of the de-
23 fendant, and not under the authority of an order for possession,
24 the court may designate as the date of valuation the date on which
25 the plaintiff entered into possession.

26 (c) At a retrial of the issue of compensation, the date of valuation
27 is the date determined to be applicable under this section for the purpose
28 of the original trial.

Comment

This section fixes the date as of which fair market value is required to be determined. See Section 1002(a). It must be distinguished from the date of accrual of the right to compensation. See Section 1001(b). Current practice as to the date of valuation varies considerably from state to state, with the applicable rule

often prescribed by decisional rather than statutory law. Clear specification of a date of valuation is deemed preferable to use of potentially ambiguous language, such as "date of taking" or "date of condemnation," found in some statutes.

Under Subsection (a), the condemnor may obtain a measure of protection in periods of generally rising market values, since it may deposit the amount of estimated compensation with the court and thereby fix an early valuation date. See Sections 601-613. The property owner, on the other hand, will receive the benefit of general increases in property values by use of the trial date for valuation purposes, if the condemnor does not make a deposit at an earlier date. Moreover, if a deposit is made, the property owner may withdraw the amount deposited (see Sections 604-606) and receive interest on any deficiency below the amount of the ultimate award. See Section 1202. On the other hand, if the normal valuation date is deemed unsatisfactory to the defendant, and the special circumstances specified in Subsection (b) obtain, the defendant may seek a judicial change in that date by motion under Subsection (b).

Subsection (b)(1) is intended to discourage the condemnor from seeking to establish an early date of valuation, in a period of rising property values, by making a deposit that is insufficient. The date of the original deposit, in such a case, is not necessarily the date of valuation if, on defendant's motion, the court finds that the plaintiff did not increase the deposit within [thirty days] after the determination that it was insufficient. See Section 603. In this event the court may designate as the date of valuation the date, if any, on which the amount on deposit is increased in conformity with the court's order, or the date of trial, if that occurs first. These rules obtain whether or not the plaintiff has entered into possession or has obtained an order for possession.

In a period of generally declining property values, absent an early deposit by the condemnor, the property owner may require protection against undue delay in bringing the compensation issue to trial, since delay is likely to reduce the amount of the award. Accordingly, Subsection (b)(2) requires the court, on application by a property owner, who has not deliberately caused the delay, to designate the date of filing of the complaint as the valuation date, if the actual trial date or date of deposit by the plaintiff is more than one year after filing. In effect, Subsection (b)(2) embodies a policy judgment that, as between the condemnor and an innocent property owner, the risk of a diminished award due to declining market values during prolonged delay in getting the case to trial, whether due to crowded dockets and court congestion or to deliberate stalling by the plaintiff, ordinarily should not be charged to the property owner. The remedy prescribed is only available on motion by the property owner and thus presumably will be sought only if the latter deems a change in the valuation date to be advantageous to his interests.

Under Subsection (b)(3), the court, on defendant's motion, may designate as the date of valuation the date on which the plaintiff, without either defendant's consent or the authority of an order of possession, entered into possession of the property. The possibility of a shift in the valuation date under this provision may discourage an unauthorized taking of possession either before or after commencement of the action.

Subsection (c) makes the date of valuation at a retrial the same as that which is "determined to be applicable" for the purpose of the original trial. This may not always be the same valuation date as that used at the original trial; for example, if the new trial was ordered by an appellate court because the trial court used an erroneous valuation date for the original trial, the correct valuation date "determined to be applicable" under the appellate decision would govern the new trial. The rule of Subsection (c) would govern even if there were several successive new trials. Delay in ascertaining and obtaining payment of the amount ultimately awarded is taken into account by adding interest to the award. See Section 1203.

1 Section 1004. [Fair Market Value Defined.]

2 (a) Except as provided in Subsection (b), (1) fair market value is
3 the price which would be agreed to by an informed seller who is willing
4 but not obligated to buy; and (2) the fair market value of property for
5 which there is no relevant market for purchase or sale is its value as
6 determined by any method of valuation that is just and equitable.

7 (b) The fair market value of property owned by a public entity or
8 other person organized and operated upon a nonprofit basis is deemed
9 to be not less than the reasonable cost of functional replacement if the
10 following conditions exist: (1) the property is devoted to and is needed
11 by the owner in order to continue in good faith its actual use to perform
12 a public function, or to render nonprofit educational, religious, charit-
13 able, or eleemosynary services, and (2) the facilities or services are
14 available to the general public.

15 (c) The cost of functional replacement under Subsection (b)
16 includes (1) the cost of a functionally equivalent site, (2) the cost of
17 relocating and rehabilitating improvements taken, or if relocation and
18 rehabilitation is impracticable, the cost of providing improvements of
19 substantially comparable character and of the same or equal utility, and
20 (3) the cost of betterments and enlargements required by law or by current
21 construction and utilization standards for similar facilities.

Comment

Section 1004 defines the meaning of "fair market value" in terms which correspond with widely approved judicial and statutory definitions. The Uniform Eminent Domain Code rejects the "value-to-the-taker" and "loss-to-the-owner" approaches to compensation, and adopts the majority "market value" test as the soundest and fairest measure. The term "price" in Subsection (a) means the amount that would be paid to the seller by the buyer if agreement on a sale were reached. The term "informed" refers to buyers and sellers who have reasonably complete knowledge of all uses and purposes for which the property is reasonably adaptable and available. Moreover, it is not enough that the parties are not legally "obligated" to buy or sell; this term also includes practical urgency or necessity. On the other hand, if no relevant market for the property exists, any just and equitable method of determining fair market value may be employed.

Subsection (b) recognizes that special purpose properties (e. g., public fire stations, nonprofit schools, churches, parks, cemeteries) for which no realistic market exists, may require a special rule for determining "fair market value" in order to assure just compensation. Thus, under Subsections (b) and (c), compensation in such cases cannot be less (but may be more) than "functional replacement" cost. While this approach requires a showing that relocation and rehabilitation or replacement are needed in good faith to continue the purpose for which the building taken is presently being used, it does not require any offset for accrued depreciation. This approach, however, is limited to (1) public entities and private owners organized and operated for nonprofit purposes, and (2) properties actually used for public or nonprofit educational, religious, or eleemosynary purposes. Property operated by producer or consumer cooperatives, for example, would not qualify under this dual requirement.

1 Section 1005. [Effect of Condemnation Action on Value.]

2 (a) The fair market value of the property taken, or of the entire
3 property if there is a partial taking, does not include an increase or
4 decrease in value before the date of valuation that is caused by (1) the
5 proposed improvement or project for which the property is taken; (2) the
6 reasonable likelihood that the property would be acquired for that improve-
7 ment or project; or (3) the condemnation action in which the property is
8 taken.

9 (b) If, before completion of the project as originally adopted, the
10 project is expanded or changed to require the taking of additional pro-
11 perty, the fair market value of the additional property does not include a
12 decrease in value before the date of valuation, but does include an increase
13 in value before the date on which it became reasonably likely that the
14 expansion or change in the scope of the project would occur, if the
15 decrease or increase is caused by any of the factors described in Sub-
16 section (a).

17 (c) Notwithstanding Subsections (a) and (b), a decrease in value
18 before the date of valuation which is caused by physical deterioration of
19 the property within the reasonable control of the property owner, and by
20 his unjustified neglect, may be considered in determining fair market
21 value.

Comment

 Section 1005 requires changes in value (i. e., "blight" or
"enhancement") caused by the project or by the imminence or
pendency of the condemnation action to be excluded from consider-
ation for purposes of establishing the fair market value of the

property taken. See United States v. Miller (1943) 317 U.S. 369. The term "condemnation action" in Subsection (a) includes steps preparatory to the filing of the complaint. See Section 103(4).

This section applies to the determination of the "amount of compensation" for the property taken. It thus affects not only the market value of the property taken, but also the determination of the "before" value of the entire property in partial taking cases. See Section 1002(b). While compensation is intended to reflect the impact of the project or improvement upon market estimates of the value of the remainder in partial taking cases (see Section 1006), the base value of the original parcel, with which the "after" value of the remainder is to be compared, should be unaffected by condemnation-caused blight or enhancement.

General knowledge of officially announced public improvement plans that involve a probability of condemnation of the property, as well as preparatory steps such as route studies and area surveys, land suitability studies, site selection proceedings, and preliminary purchase negotiations may affect the market value of the property taken even before the complaint in the condemnation action has been filed. The pendency of the action itself may also exert an influence upon value during the period prior to the date of valuation (see Section 1003). Under the present section, these condemnation-induced changes in value, whether upwards or downwards, are excluded from consideration so that neither party will be adversely affected by market abnormalities caused by the prospect of the condemnation action. Compare Section 203(b), relating to the required basis for a purchase offer. This section does not identify a specific point of time to govern the exclusion of the indicated changes in value, but leaves the application of the rule to be determined as one of factual causation.

Changes in value that are not shown by the evidence to be the result of the factors described in Subsection (a), however, are properly to be included in market value. For example, market changes caused by a different project from that for which the property is taken, even though the two projects may be related, are not governed by Subsection (a).

The rule of Subsection (a) is subject to stated exceptions. Subsection (b), for example, permits inclusion of increases in value occurring prior to the time at which it became likely that there would be an expansion of the project to include the subject property. This rule is intended to assure that changes in the scope of the project will not prejudice persons acting in reliance on the original proposal. On the other hand, in order to prevent manipulation by a condemnor of the scope of the project to artificially depress the value of adjacent property that is later included in the scope of the take, Subsection (b) excludes project-caused decreases that occur before

the valuation date. In addition, under Subsection (c), preventable deterioration caused by the owner's unjustified neglect may be included as an element of market value depreciation so that it is not charged to the condemnor.

1 Section 1006. [Compensation to Reflect Project as Planned.]

2 (a) If there is a partial taking of property, the fair market value
3 of the remainder on the valuation date shall include increases or decreases
4 in value caused by the proposed project including any work to be performed
5 under an agreement between the parties.

6 (b) The fair market value of the remainder, as of the date of
7 valuation, shall reflect the time when the damage or benefit caused by
8 the proposed improvement or project will be actually realized.

Comment

Section 1006 makes it clear that in partial taking cases the "after" value must reflect changes in value caused by the project as planned, including any work to be done pursuant to pretrial order or agreement of the parties. The term "work" is defined by Section 103(26) to include construction, alteration, repair, remodeling, excavation, demolition, rehabilitation, relocation, and landscaping.

The rule set out in Subsection (a) is intended to provide an inducement to condemnors to develop project designs that will mitigate damages to or confer benefits upon remainder properties so far as possible, and to work out by agreement or at the pretrial conference mutually satisfactory "physical solutions" to sources of damage from the project. If the condemnor has no specific proposal for the design and construction of the project, the court may properly assess the "after" value of the remainder on the basis of the most injurious plan that is reasonably probable. See People v. Schultz Co. (1954) 123 Cal. App.2d 925, 268 P.2d 117.

Agreements of the kind contemplated by this section may be an essential step in settlement of the action, as well as in reducing the amount of compensation that would otherwise be awarded. Thus, the kind of work that may be included is broadly expressed in order to allow maximum flexibility for negotiation. For example, the

plaintiff might agree to engage in land grading or fill operations; landscape planting to screen a highway; soundproofing of a building near an airport runway; construction of retaining walls or driveways; or relocation of underground drainage and utility facilities. Since this work may often be phased into and performed concurrently with project construction, and by the same construction personnel and equipment, its performance by the condemnor may be less costly than the additional damages to the remainder that might be included in the award if it were not done at all.

Under Subsection (b), the determination of fair market value of the remainder is not based on the often unrealistic view that the improvement has already been completed on the valuation date, but must be computed in a manner that will take into account any anticipated delay before the benefit or damage to the remainder is actually realized. If a subsequent change of plans causes additional damage, the property owner may obtain relief in a proceeding after judgment. See Section 1207.

1 Section 1007. ["Entire Property."]

2 For the purpose of determining compensation under this Article,
3 all parcels of real property, whether contiguous or noncontiguous, that
4 are in substantially identical ownership and are being used, or are
5 reasonably suitable and available for use in the reasonably foreseeable
6 future, for their highest and best use as an integrated economic unit
7 shall be treated as if the entire property constitutes a single parcel.
8 Any issue arising under this section shall be decided by the court[trier
9 of fact].

Comment

 This section prescribes the rule for determining compensation for a taking, either total or partial, of two or more parcels of real property under single ownership that are used or capable of use as an integrated economic unit. While some cases require three elements (i. e., unity of title, unity of use, and contiguity) to be concurrently present before the multiple parcels may be treated as one, this section rejects any mandatory requirement of contiguity. See 4A, Nichols, Law of Eminent Domain § 14.31[1] (rev. 3d ed. 1971).

However, evidence as to contiguity or separation may still be relevant for its bearing on the principal criterion, unity of use. The term "real property," as here used, is defined by Section 103(24) to include improvements as well as land.

The approach here taken is of practical importance in determining whether there is a partial taking, leaving a remainder which realized benefits or sustained damages from the project. See Section 1002(b). The second sentence makes it clear that any issue of fact under this section is regarded as a preliminary or foundational question of fact to be decided by the court. The bracketed term "trier of fact" is suggested for use in jurisdictions where the constitutional right to a jury trial extends to this issue.

1 Section 1008. [Special Assessment Proceedings Excluded.]

2 If there is a partial taking of property, and special assessments or
3 charges are imposed upon the remainder to pay for all or part of the
4 project, the increase in value of the remainder caused by the project
5 shall be considered in determining its value after the partial taking only
6 to the extent the increase exceeds the amount of the special assessments
7 or charges.

Comment

Section 1008 is intended to prevent a property owner from being specially assessed for benefits inuring to his property because of the improvement, and then being denied the value of those benefits in the condemnation action by having them set off against severance damages. If this were permitted to happen, the property owner would, in effect, pay twice for the benefits. See City of Tucson v. Rickles, 15 Ariz. App. 244, 488 P.2d 180; Oro Loma Sanitary Dist. v. Valley, 86 Cal. App.2d 875, 195 P.2d 913; 3 P. Nichols, Law of Eminent Domain, § 8.6209, p. 102 (rev. 3d ed. 1971).

1 Section 1009. [Use by Defendant; Risk of Loss.]

2 (a) Unless the court otherwise directs, the defendant may use the
3 property sought to be taken for any lawful purpose before the date on

4 which the plaintiff is authorized to take possession. Thereafter, the
5 defendant may use the property only with the consent of, and subject
6 to any limitations required by, the plaintiff. The uses authorized by
7 this subsection include any work on the property and the planting, culti-
8 vation, and removal of crops. The compensation awarded the defendant
9 shall include an amount sufficient to compensate for loss caused by any
10 restriction or limitation imposed by the court upon his right to use the
11 property.

12 (b) As between the plaintiff and defendant, the defendant has the
13 risk of loss due to damage, destruction, or unauthorized removal of
14 improvements or crops situated upon the property until the earlier of
15 (1) the date after which, by order of the court, the defendant's right to
16 use the property is substantially limited or forbidden, (2) the date upon
17 which the plaintiff is authorized to take possession, or (3) the date upon
18 which title is transferred to the plaintiff.

Comment

Under Section 1009, the condemnee ordinarily may continue to use his property in a normal manner until the condemnor takes possession, including the performance of "work" (see the definition in Section 103(26), above) and the planting, cultivation and harvesting of crops. The mere fact that the condemnation action is pending ordinarily should not interfere with the property owner's right to continue to derive earnings from the property until he is divested of possession. The condemnor may protect any interest if may have in preserving the property in an undisturbed state by making a deposit and taking immediate possession. See Article VI. Moreover, if necessary to prevent waste or frustration of the purpose of the taking, the court may impose specific limitations on the use of the property before possession is taken, but the property owner is entitled to compensation for the resulting losses.

Subsection (b) expressly places the risk of loss or destruction of improvements or crops upon the property owner up to the date on which the plaintiff, pursuant to an order for possession, may take possession of the property, the date upon which any substantial judicial limitations on the owner's right of use are imposed, or the date of passage of title, whichever is earlier. The rules governing the determination of compensation for crops and improvements, as set out in Section 1010, are consistent with this allocation of responsibility. In effect, the risk of loss follows the right to use.

1 Section 1010. [Compensation for Growing Crops and Improvements.]

2 (a) The compensation for crops growing on the property on the
3 date of valuation is the higher of (1) the current fair market value of
4 the crops in place, assuming the right to bring them to maturity and to
5 harvest them, or (2) the amount by which the existence of the crops
6 enhances the fair market value of the property.

7 (b) The compensation for an interest in improvements required
8 to be taken under Section 209 is the higher of (1) the fair market value
9 of the improvements, assuming their immediate removal from the
10 property, or (2) the amount by which the existence of the improvements
11 enhances the fair market value of the property.

12 (c) If crops or improvements are destroyed, removed or damaged
13 by defendant after the date of valuation, the amount of compensation shall
14 be adjusted to reflect the extent to which the fair market value of the
15 property has thereby been reduced.

16 (d) Crops or improvements that are first placed upon the property
17 after the date of valuation, shall be excluded from consideration in deter-
18 mining the amount of the award, except that the award shall be adjusted
19 to include the reasonable and necessary cost of providing (1) improvements

20 required by law, and (2) improvements, other than ordinary and routine
21 maintenance, made for the primary purpose of protecting persons and
22 property from a risk of injury caused by the condition of a damaged or
23 partially completed structure, or for the purpose of protecting partially
24 installed machinery or equipment from damage, deterioration, or vandalism.

Comment

Section 1010 provides general rules for determining the extent to which crops and improvements, including those placed on the property after the commencement of the action, may properly be taken into account in determining the amount of compensation to be awarded. Compare Section 1009, dealing with the property owner's right to use the property and the resulting risk of loss.

"Crops," as here used, include any form of vegetation, such as grass, flowers, fruits, vegetables, trees, vines, grasses, and nursery stock, intended to be used or sold for commercial purposes. See Section 103(10). "Improvements" include buildings, structures, machinery, and equipment that cannot be removed from the property on which they are located without substantial economic loss or damage. See Section 103(14).

While improvements placed on the property after the valuation date are ordinarily deemed not compensable, Subsection (f) creates two exceptions regarded as justified by practical or equitable considerations. The parties, of course, may also agree to arrangements contrary to the general statutory rule.

1 Section 1011. [Improvements Partially Located on Land Not Taken.]

2 If a compensable improvement is located in part upon the property
3 sought to be taken and in part on property that is not sought to be taken,
4 the court, upon motion by either party and upon a determination that
5 justice and equity so requires, may direct the plaintiff to acquire the
6 entire improvement, including that portion of it located upon the pro-
7 perty not sought to be taken, together with any easement or other interest

8 that may be reasonably necessary for use of the improvement or for the
9 purpose of its demolition, removal, or relocation.

Comment

Section 1011 assures that the owner of otherwise compensable improvements, which are located only partially on the land sought to be taken, may have the entire improvement taken and appropriate compensation paid. While the damages occasioned by a partial taking will, in most cases, presumably be assimilated into the determination of the "after" value of the remainder which is left in the condemnee's possession, this may not always be the case. For example, the improvement may be owned by a tenant, and the compensation payable under Section 1010 may not fully take into account the need for reorientation or rehabilitation of the portion not taken, or the fact that the taking may have made it unusable except for demolition purposes. In cases where the improvement is owned by the owner of the land and substantial special benefits accrue to the remainder (e. g., a shift in the highest and best use resulting from the public improvements), the compensation awarded may not reflect the cost of rehabilitation of the improvement even though, in a practical sense, that cost must be immediately assumed by the property owner. Furthermore, the need for rehabilitation, which may include immediate shoring and sealing, often involves substantial safety considerations in which the condemnor may be vitally interested.

This section leaves the determination of the most just and equitable treatment of the problem of an "improvement remainder" to the sound discretion of the court, upon application by any party.

1 Section 1012. [Compensation for Divided Interests.]

2 The amount of compensation for the taking of property in which
3 divided interests exist is based upon the fair market value of the pro-
4 perty considered as a whole, giving appropriate consideration to the
5 effect upon market value of the terms and circumstances under which
6 the separate interests are held.

Comment

Section 1012 provides the guiding rule for determining compensation for a taking of property in which the ownership interests are

divided between two or more parties. In such cases, absent contractual provisions governing the rights of the parties if the property is taken by eminent domain, the award must be apportioned between them in accordance with their respective interests. Difficulties have arisen, however, because the value of the property considered as a whole and without regard for the several divided interests, may not be equal to the aggregate of the values of each of the several interests, considered separately. The former approach--sometimes referred to as the "undivided fee" rule--is adhered to in a majority of American jurisdictions, while the latter--often described as the "aggregate of interests" rule--also has significant support in the case law. See 4 P. Nichols, Law of Eminent Domain, § 12.36 (rev. 3d ed. 1971). However, some courts have indicated that in exceptional cases where strict adherence to the undivided fee rule will fail to provide adequate compensation for all interests taken, it may be unconstitutional to apply it strictly. Nichols, op. cit. § 12.36[2].

Section 1012 avoids the difficulties inherent in the two conventional rules just described, by requiring that in the first phase of the trial on the issue of compensation, the total amount of compensation to be paid for the property taken must reflect the fact that the property is held in divided interests. In effect, under this section, the trier of fact must take into account the mode of ownership of the property being taken, to the extent that the market would do so as between a willing buyer and seller. The property is not required to be valued as an unencumbered whole when, in fact, it is not held as an unencumbered whole. Accord: People v. Lynbar, Inc. (1967) 253 Cal. App.2d 870, 62 Cal. Rptr. 320. See also, Boston Chamber of Commerce v. City of Boston (1910) 217 U.S. 189 (Holmes, J.); New York State Commission on Eminent Domain, Annual Report 92-95 (1972).

1 Section 1013. [Taking of Leasehold Interest.]

2 (a) If all or part of the property taken includes a leasehold interest,
3 the effect of the condemnation action upon the rights and obligations of the
4 parties to the lease is governed (1) by the provisions of the lease, and
5 (2) in the absence of applicable provisions in the lease, by this section.

6 (b) If there is a partial taking and the part of the property taken
7 includes a leasehold interest that extends to the remainder, the court
8 may determine that (1) the lease terminates as to the part of the property

9 taken but remains in force as to the remainder and the rent reserved
10 in the lease is extinguished to the extent it is affected by the taking; or
11 (2) the lease terminates as to both the part taken and the remainder,
12 if the part taken is essential to the purposes of the lease, or the remainder
13 is no longer suitable for the purposes of the lease.

14 (c) The termination or partial termination of a lease under this
15 section shall occur at the earlier of (1) the date on which, under an order
16 of the court, the plaintiff is authorized to take possession of the property,
17 or (2) the date on which title to the property is transferred to the plaintiff.

18 (d) This section does not affect or impair a lessee's right to
19 compensation if his leasehold interest is taken in whole or in part.

Comment

Section 1013 changes the rule followed in many states under which the lessee of property that is the subject of a partial taking must continue to pay the full amount of the agreed rent for the balance of the term, but is entitled to receive out of the award the present value of the future rent allocable to the part of the premises taken. This rule is widely criticized as unfair to both parties. See Horgan & Edgar, Leasehold Valuation Problems in Eminent Domain, 4 Univ. San Francisco L. Rev. 1 (1969), and authorities cited. See also, New York Commission on Eminent Domain, Annual Report 93 (1972). Section 1013 substitutes a rule of equitable partial abatement (Subsection (b)) or termination by judicial action (Subsection (c)). Compare West Va. Code § 37-6-29. Under Subsection (a), however, these statutory dispositions are subject to any agreement between the parties set forth in the lease.

1 Section 1014. [Acquisition of Property Subject to Lien.]

2 Notwithstanding the provisions of an agreement, if any, relating
3 to a lien encumbering the property:

4 (1) if there is a partial taking, the lienholder may share in the

5 amount of compensation awarded only to the extent determined by the
6 court to be necessary to prevent an impairment of his security, and the
7 lien shall continue upon the part of the property not taken as security
8 for the unpaid portion of the indebtedness until it is paid; and

9 (2) neither the plaintiff nor defendant is liable to the lienholder for
10 any penalty for prepayment of the lien, and the amount awarded by the
11 judgment to the lienholder shall not include any penalty therefor.

Comment

Section 1014 must be construed in light of the general rule that lienholders are entitled to satisfy their debts out of the condemnation award in the order of their respective priorities. Subsection (1) provides an equitable approach to apportionment of liens in the event of a partial taking. It would change the existing law in some states under which a lienholder, upon a partial taking, is entitled to a full discharge of his lien from the award, even though his security has not been substantially impaired. See "Eminent Domain," 27 Am. Jur. 2d § 257 (1966).

Subsection (2) makes unenforceable, in the condemnation context, any agreement or statutory requirement for a penalty to be paid in the event of prepayment of a lien. It seems inequitable to impose liability for such penalties upon the property owner, when the decision to take his property and thus discharge the encumbrance prematurely was not voluntary on his part. On the other hand, it also seems contrary to the public interest to increase project costs by transferring liability for the penalty to the condemnor.

Section 1015. [Property Subject to Life Tenancy.]

2 If the property taken is subject to a life tenancy, the court may
3 include in the judgment a requirement that:

4 (1) the award must be apportioned and distributed on the basis of
5 the respective values of the interests of the life tenant and remainderman;

6 (2) the compensation must be used to purchase comparable pro-
7 perty to be held subject to the life tenancy;

- 8 (3) the compensation must be held in trust and administered
9 subject to the terms of the instrument that created the life tenancy; or
10 (4) any other arrangement that is equitable under the circumstances.

Comment

Section 1015 provides the court with express statutory authority to devise an equitable solution where property subject to a life tenancy is taken and an outright division of the award would not result in substantial justice under the circumstances of the particular case. See Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961) (trust imposed on proceeds).

1 Section 1016. [Loss of Goodwill.]

2 (a) In addition to fair market value determined under Section 1004,
3 the owner of a business conducted on the property taken, or on the remain-
4 der if there is a partial taking, shall be compensated for loss of goodwill
5 only if the owner proves that the loss (1) is caused by the taking of the
6 property or the injury to the remainder, (2) cannot reasonably be pre-
7 vented by a relocation of the business or by taking steps and adopting
8 procedures that a reasonably prudent person would take and adopt in
9 preserving the goodwill; (3) will not be included in relocation payments
10 under Article XV, and (4) will not be duplicated in the compensation
11 awarded to the owner.

12 (b) Within the meaning of this section, "goodwill" consists of the
13 benefits that accrue to a business as a result of its location, reputation
14 for dependability, skill or quality, and any other circumstances resulting
15 in probable retention of old or acquisition of new patronage.

Comment

Section 1016 is intended to reverse the general rule but widely criticized rule under which compensation for loss of business goodwill is

not allowed in eminent domain. See Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority (Colo. 1974) 517 P. 2d 845; Aloi and Goldberg, A Reexamination of Value, Goodwill, and Business Losses in Eminent Domain, 53 Cornell L. Q. 604 (1968). It provides compensation for loss of goodwill in both a whole or a partial taking; but such loss is recoverable only to the extent it cannot reasonably be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill will be governed by the rules of evidence generally applicable to such a determination and not by the special rules of evidence relating to valuation in eminent domain contained in Article XI. For example, the provisions of Section 1110 restricting admissibility of income from a business located on the property taken would not limit the evidence admissible to prove loss of goodwill.

This section compensates for goodwill loss only to the extent such loss is not compensated under the relocation provisions of Article XIV (moving expenses and moving losses for relocated business or farm operations; in-lieu payments for business or farm operation that cannot be relocated without a substantial loss of patronage), or as part of the compensation awarded to the owner. See Section 1001(c) (no double recovery).

ARTICLE XI

[Evidence in Condemnation Actions]

1 Section 1101. [Scope of Article.]

2 (a) The rules of evidence applied in other civil actions are supple-
3 mented by this Article.

4 (b) This Article does not create or diminish any right to compen-
5 sation or damages, and does not affect the meaning of "just compensation"
6 under the law of this State.

Comment

In condemnation actions, the principal issue to be tried relates to the amount of compensation to be awarded for the property taken. Since the "market value" approach to "just compensation" (see Section 1002) involves debatable judgmental factors, efforts to achieve comparability of testimony of valuation witnesses necessarily center upon the applicable rules of evidence. This Article establishes special rules of evidence adapted to the peculiar circumstances of condemnation, which are to be applied together with the general evidence law of the adopting state. The rules here set out, however, govern in the event of conflict. See Section 102(b).

1 Section 1102. [View of Property Taken.]

2 (a) Upon motion of a party or the court's own motion, the court
3 may direct the jury to be placed in charge of an officer of the court and
4 taken personally to view the property sought to be taken. Upon like
5 motion, if the case is tried before the court without a jury, the judge
6 presiding at the trial may view the property. The transportation and
7 other expense necessarily incurred in obtaining the view of the property
8 shall be treated as recoverable costs of the action. The court may

9 prescribe additional terms and conditions consistent with this section.

10 (b) During a view of the property by the jury, the judge presiding
11 at the trial shall be present and shall supervise the proceedings. The
12 parties, their attorneys, engineers, and other representatives may be
13 present during a view by the jury or judge.

14 (c) If a view is taken by a jury, only the judge presiding or a
15 person designated by the court may make a statement to the jury during
16 the view relating to the subject matter of the action.

17 (d) The physical characteristics of the property and of surrounding
18 property, and any other matters observed during a view, may be con-
19 sidered by the trier of fact solely for the purpose of understanding and
20 weighing the valuation evidence received at the trial, and do not con-
21 stitute independent evidence on the question of the amount of compensation.

Comment

Section 1102 authorizes, but does not require, the court to order a view of the premises either on its own motion or when any party requests. A view may properly be denied if the premises have changed in appearance or are no longer in substantially the same condition as when the action was commenced, so that the view might be of little or no assistance, or might even be misleading, on the issue of value. Additional factors that may influence the court's discretion in this regard are the availability of other reliable evidence (e.g., maps, photographs, diagrams) and the cost of taking a view.

This section also prescribes basic procedural guidelines for the conduct of a view if one is ordered. The required presence of the presiding judge, and the limitation on persons who may make statements to the jury during the view, are intended to protect the impartiality of the proceedings outside of the courtroom.

The evidentiary consequences of a view are defined in Subsection (d), which adheres to what appears to be the majority approach among the several states. See Massey, Rules of Compensability and Valuation Evidence for Highway Land

Acquisition 20-21 (Highway Research Board, Report No. 104, 1970). Under this rule, the view does not have independent evidentiary effect, but is intended only to assist the jury in understanding the valuation testimony. Thus, for example, an award that is outside the range of the valuation testimony of record could not be sustained on appeal merely on the conjecture that it was supported by observations made by the jury during a view.

1 Section 1103. [Evidence Competent to Prove Value.]

2 (a) Upon proper foundation, evidence as to the value of property
3 shall be given solely in the form of an opinion by one or more of the fol-
4 lowing persons:

5 (1) a witness qualified by knowledge, skill, experience,
6 training, or education to express an opinion as to the value of
7 the property;

8 (2) an owner of the property; or

9 (3) a shareholder, officer, or regular employee designated
10 to testify on behalf of an owner of the property, if the owner is
11 not a natural person.

12 (b) This section does not exclude other admissible evidence offered
13 for the limited purpose of explaining and enabling the trier of fact to
14 understand and weigh opinion testimony given under Subsection (a).

15 [(c) The court, for good cause, in the interest of expediting the
16 trial, may limit the number of witnesses permitted to give testimony
17 for any party in the form of an opinion with respect to issues of compen-
18 sation.]

Comment

Under Section 1103, direct evidence of property value must consist solely of opinion testimony, but such testimony may be given at

the trial not only by qualified valuation experts, but also by persons who own a compensable interest in the property. A corporate owner, for example, is not limited to the employment of an expert witness, but may designate a stockholder, officer, or regular employee (i.e., a person who has not been employed solely to give testimony in the case) to testify in its behalf. A proper foundation for the opinion testimony must first be offered, however; the elements of such a foundation are determined by the law of the adopting state. For example, an adequate foundation for an owner's testimony would ordinarily be provided by mere proof of his ownership; no special requirements of familiarity with the property or knowledge of its value are prescribed for an owner's testimony. Nothing in this section is intended to affect the qualifications required by state law for an "expert."

This section does not prevent the appointment by the court of an impartial expert witness, if such appointment is authorized by the procedural law of the adopting state. Nor does this section preclude the court from giving effect to other rules of law in the adopting state that may require exclusion of the testimony of a witness. For example, an otherwise qualified expert valuation witness may be ineligible to testify in some jurisdictions if it is shown that his fee is contingent upon the magnitude of the award.

Subsection (b) is intended to remove any possible basis for a claim of inconsistency between this section and Sections 1104 to 1112.

Subsection (c) is bracketed as an optional provision for use in states where it is deemed useful to eliminate any doubt as to the authority of the trial court to limit the number of valuation witnesses in the exercise of sound judicial discretion.

1 Section 1104. [Supporting Evidence.]

2 For the purpose of supporting an opinion of property value, evidence
3 may be received relating, but not limited, to the following factors:

4 (1) extent of loss of property and improvements;

5 (2) present use of the property, and the highest and best use

6 for which it is reasonably suitable and available in the reasonably fore-
7 seeable future;

8 (3) extent of loss of a legal nonconforming use;

- 9 (4) extent of damage to crops; and
10 (5) existing zoning or other restrictions upon use, and the rea-
11 sonable probability of a change in those restrictions.

Comment

Section 1104 provides a non-exclusive list of factors that may be the subject of admissible evidence for the purpose of supporting an opinion as to property value. See Section 1103(b). Evidence relating to the items listed, however, is subject to ordinary rules of admissibility under state law; thus, it may ordinarily be admitted, over objection, only if it is competent and neither speculative nor conjectural. Moreover, state law also determines whether supporting evidence under this section must be offered as part of the "foundation" required by Section 1103(a) or may be introduced after the opinion which it seeks to support.

Under the basic approach to determining the amount of compensation (see Section 1002), this section provides a rule of evidence applicable to the question of the value of the property taken as well as to the issue of the value of the remainder in a partial taking case. See also, Section 1105.

1 Section 1105. [Evidence Relating to Remainder Value in Partial Taking.]

2 (a) For the purpose of supporting an opinion as to the market
3 value of a remainder after a partial taking, evidence may be received re-
4 lating but not limited to the following factors:

5 (1) extent of increase or decrease in the productivity and
6 convenience of use of the remainder reasonably attributable to
7 the taking;

8 (2) extent of improvement in or impairment of access to the
9 public highways from the remainder upon completion of the project;

- 10 (3) extent of benefit or detriment caused by the project
11 due to a change in the grade of a right of way abutting the
12 remainder;
- 13 (4) extent of enhancement or loss of appearance, view,
14 or light and air as a consequence of the project;
- 15 (5) extent of benefit or damage resulting from severance of
16 land or improvements;
- 17 (6) extent of benefit or damage resulting from the distance
18 or proximity of the remainder, or improvements on the remainder,
19 to the project in view of its character and probable use, including
20 any increase or decrease in noise, fumes, vibration or other
21 environmental degradation; and
- 22 (7) cost of fencing not provided by the plaintiff and reasonably
23 necessary to separate the land taken from the remainder.
- 24 (b) If there is a partial taking of property, evidence may be re-
25 ceived as to the market value of the part taken considered as part of
26 the whole, based on its contribution to the value of the whole, or as
27 to its market value considered independent from the whole.

Comment

Section 1105(a) provides guidelines as to the admissibility of evidence in a partial taking situation for the purpose of supporting an opinion as to the market value of the remainder under the "before-and-after" phase of the basic rule for determining the amount of compensation. See Section 1002. The approach here adopted does not attempt to distinguish between "special" and "general" benefits or damages, and authorizes the reception of competent evidence relating to all compensable influences upon market value shown to be a consequence of the project. This section is consistent with the rule that the "after" value of the remainder must be determined in light of the project as planned. See Section 1006. But see Section 113(5), excluding evidence of losses caused by police power or other non-compensable factors.

Subsection (b) recognizes that all parts of an entire tract of property do not necessarily have equal value. The fair market value of property which, before the taking, was part of a larger parcel should thus be determined by considering both the value of the entire tract and the relationship of the part taken to the whole. Under some circumstances, the severed part may have a value for its highest and best use which is independent from that of the entire parcel. In other situations, the part taken may be so related to and may so contribute to the value of the entire property that its value for its highest and best use is dependent upon the value of the entire tract. Under Subsection (b), the parties are free to present competent evidence in support of their respective theories of independent or dependent value from a market perspective, so that the property owner may be compensated for the part taken at not less than the fair market value shown by the approach which the trier of fact deems most persuasive. See Section 1002(b) (compensation for partial taking cannot be less than value of part taken).

The terms "taking," "partial taking," and "remainder," as used in this section, are not specifically defined, but are intended to have the meaning ascribed to them under relevant state law. But see Section 1007 (defining "entire parcel").

1 Section 1106. [Matters Upon Which Opinion Testimony May Be Based.]

2 A valuation witness qualified under Section 1103(a) may consider
3 as the basis for his opinion of value any nonconjectural matters ordinarily
4 relied upon by experts in forming opinions as to the fair market value of
5 property, whether or not they are admissible in evidence.

Comment

Section 1106 prescribes the general rule governing the basis for the valuation opinion of a witness qualified under Section 1103(a). Compare Sections 1104 and 1105 (collateral evidence in support of valuation opinion). The date upon which such an opinion is predicated need not be admissible in evidence, provided it is the kind of non-conjectural information upon which experts generally rely in determining property values. This section governs the opinion of any witness offered under Section 1103(a), whether or not the witness is an expert. Market information perceived by or made known to the witness, and verified through normal market sources (e.g., records of sale transactions, published economic indicators, etc.), illustrate the kinds

of data that are clearly permissible to establish a foundation for an opinion of value.

For more specific provisions describing what matters may be considered under the general rule of this section. See Sections 1107 through 1112. But see Section 1113 (inadmissible factors).

1 Section 1107. [Sales of Subject Property.]

2 A valuation witness qualified under Section 1103(a) may consider, as
3 a basis for an opinion of value, the price and other circumstances of any
4 good faith sale or contract to sell all or part of the property sought to be
5 taken, or all or part of any remainder that will be left after a partial taking
6 of the property, whether the sale or contract was entered into before or after
7 the valuation date.

Comment

Under Section 1107, an opinion as to value may be based, in part, upon the purchase price agreed to be paid to purchase all or part of the subject property, in a good faith transaction entered into before or after the valuation date in the condemnation action. See Section 1003 (defining "valuation date"). Previous sales, however, are not admissible as independent evidence of value; they may be considered only as a basis for the opinion of the witness as to value. This limitation is necessary to assure that the trier of fact will evaluate the sales price evidence with the informed assistance of a qualified witness and in light of the witness' analysis and interpretation of that data.

Previous sales data may be used as the basis of opinion testimony under this section only if the transaction was made in good faith. This requirements of "good faith" is believed to be a sufficient safeguard against efforts to manipulate the sales price. The weight to be given to the data, of course, will depend upon whether the particular transaction was fully voluntary, not too remote in time, and was made at a price and under circumstances which make it a useful criterion of market value on the valuation date. For example, if the prior sales price reflected project-caused enhancement or blight, or if physical and economic conditions substantially changed since the date of the sale, the agreed price might not be reasonably indicative of value for purposes of the condemnation action. In many states, factors of this kind

(e.g., remoteness, voluntariness, relevancy to value on valuation date) are treated as conditions to admissibility of the previous sales data; this section takes a more liberal position, deeming their elements going to the weight and persuasiveness of the data rather than to admissibility. See Massey, Rules of Compensability and Valuation Evidence for Highway Land Acquisition 31-34 (Highway Research Program Rept No. 104, 1970).

Nothing in this section precludes the use of previous sales of the subject property as the basis of cross-examination of a valuation witness for the purpose of rebutting his opinion of value.

1 Section 1108. [Comparable Sales.]

2 A valuation witness qualified under Section 1103(a) may consider, as
3 a basis for an opinion of value, the price and other terms and circumstances
4 of any good faith sale or contract to sell and purchase comparable property.
5 A sale or contract is comparable within the meaning of this section if it was
6 made within a reasonable time before or after the valuation date, and the pro-
7 perty is sufficiently similar in the relevant market, with respect to size, situ-
8 ation, usability, improvements, and other characteristics, to warrant a rea-
9 sonable belief that it is comparable to the property being valued.

Comment

Section 1108 provides guidelines for the use of "comparable" sales evidence solely as the basis for an opinion as to value. The limited use of comparable sales authorized by this section is contrary to the majority view, under which such sales data are treated as independent evidence of value. See 5 Nichols, Law of Eminent Domain, §21.3(1) (rev. 3d ed. 1971); Massey, op. cit., 22-31. The position here taken is deemed preferable, since it avoids the danger that condemnation trials could be unduly prolonged by parades of witnesses called to testify as to the terms and conditions of comparable sales transactions. Moreover, the rule of this section provides assurance that the sales data will be interpreted with the aid of analysis and explanation by an informed valuation witness. Finally, since comparable sales may be used only as a basis for an opinion of value, greater attention can be given to their probative significance in relation to that opinion.

Under this section, a sale is "comparable" if it meets the stated specifications. Comparable sales, moreover, may include those made both before and after the commencement of the condemnation action, provided the other prescribed factors are satisfied. The initial determination of admissibility under this section is within the sound discretion of the trial judge; once admitted, the weight to be ascribed to a particular comparable sale is open to challenge by adverse parties. It is intended that this section should be liberally applied, since errors of admission are less likely to be prejudicial to the interest of justice than errors of exclusion. However, this section must be read together with Section 1113(1) and (6), excluding comparable sales to condemnors, and exchanges of comparable properties.

1 Section 1109. [Leases.]

2 A valuation witness qualified under Section 1103(a) may consider, as
3 a basis for an opinion of value, the terms and circumstances of any lease
4 made in good faith that included all or part of the property being valued or
5 of comparable property whether the lease was made before or after the valuation date.

Comment

 Section 1109 provides guidelines for the consideration, as the basis of a valuation opinion, of leases of the property being valued and of comparable property. The approach incorporated in this section parallels that used in Sections 1107 (sales of the subject property) and 1108 (sales of comparable property).

1 Section 1110. [Capitalization of Rental Income.]

2 A valuation witness qualified under Section 1103(a) may consider, as
3 a basis for an opinion of value, the actual or reasonable net rental income
4 attributable to the property when used for its highest and best use, capitalized
5 at a fair and reasonable interest rate.

Comment

 Under Section 1110, a valuation witness may employ an income

approach to valuation, subject to the general rules declared in Section 1106. For example, the witness may consider either the capitalized actual or reasonable net rental income from the property for its highest and best use, if the property is of a kind which is bought and sold on that basis in the relevant market. However, he may not calculate a capitalized value from the income or profits of a business conducted on the property, since this would introduce unduly speculative and uncertain elements depending upon managerial skills or other factors that are remote from the issue of property value.

This section does not preclude admission of evidence that a business being conducted on the property is in fact profitable, if under the circumstances prospective purchasers would consider this as a measure of its suitability for business purposes. See Section 1106. It does, however, authorize the court to deny use of an income valuation approach that assumes unrealistic or highly speculative capitalization rates.

1 Section 1111. [Reproduction or Replacement Cost.]

2 A valuation witness qualified under Section 1103(a) may consider, as
3 a basis for an opinion of value, the cost of reproducing or replacing existing
4 improvements on the property sought to be taken which enhance its value
5 for its highest and best use, less any depreciation resulting from physical
6 deterioration or from functional or economic obsolescence.

Comment

Section 1111 authorizes use of reproduction or replacement cost data as one factor supporting opinion evidence as to the value of improved property. Compare Section 1004(c). The cost of "reproduction" refers to the cost of duplication with the same or similar materials and appearance, and is not necessarily the same as the cost of "replacement" (i.e., providing a substitute facility of equal functional utility).

Under this section, the evidence may be used only for the purpose of proving the market value of the land with the improvements on it, to the extent they enhance its value for its highest and best use, but not to prove the value of the improvements separate from the land. The section is not applicable, of course, if the improvements are detrimental to the use, and thus diminish the value, of the property for its highest and best use.

15

(6) the influence upon the value of the subject property of

16

an exercise of the police power or other noncompensable damage.

Comment

Section 1113 provides a non-exclusive list of factors which are inadmissible as the basis for an opinion as to the value of property, either because the designated items are speculative and unreliable, or because their admission would be contrary to basic policies underlying the substantive law. This section does not preclude cross-examination of a valuation witness on matters that are inadmissible into evidence for the purpose of determining whether the witness' opinion was based upon matter which this section defines as not a proper basis for such an opinion.

Under paragraph (1), only acquisitions of comparable property by condemnors are excluded, consistent with the prevailing view that such transactions are not sufficiently voluntary, but tend to exhibit the characteristics of a forced sale or to involve elements of compromise that impair true comparability. Previous sales of the subject property to a condemnor, however, are not excluded; in most instances, these sales will presumably be to the present defendant in the instant condemnation action, and it is deemed unduly harsh to refuse to permit the defendant to show what it has in fact paid for the property in a recent acquisition, if the defendant deems that factor to be helpful. On the other hand, if the prior sale to the defendant condemnor is used by the plaintiff, the defendant is in an advantageous position to explain its terms and circumstances in the most favorable light.

Under paragraph (2), options, offers, and listings which were not accepted are inadmissible to support a valuation opinion. This rule is consistent with the majority view in the United States, which regards such evidence as inherently unreliable, easily susceptible to abusive manipulation, and at best merely a representation of the opinion of one party to a hypothetical transaction that was never confirmed by the opinion of another. See Massey, op. cit., pp. 34-37; 5 Nichols, Law of Eminent Domain § 21.4(1) (rev. 3d ed. 1971).

Paragraph (3) excludes assessed valuation, since local taxing officers' standards for determining assessed valuation for tax purposes are regarded as an unreliable basis of market value, since they are generally applied with an eye to equalization of tax loads rather than an ascertainment of market value, and are seldom determined in a consistent and systematic manner. See 5 Nichols, op. cit., §22.1.

While Paragraph (4) seeks to exclude the expansion of the trial into largely irrelevant and remote issues distant from that of the value of the subject property, it does not preclude admission of comparable sales data, nor prevent a valuation witness from testifying to adjustments made in such data in the course of forming his opinion.

Trades and exchanges of property are impermissible under paragraph (5) in view of the fact that these transactions are often motivated by factors quite independent from market value elements, including significant tax consequences arising from the terms and circumstances of the exchange. Moreover, to translate the circumstances of a trade or exchange into dollar terms for use in arriving at an opinion of market value, the witness would be required, in most instances, to formulate an opinion as to the value of the properties exchanged, contrary to paragraph (4). This process would introduce elements of a complicated nature that would be largely irrelevant to the issues in the condemnation trial, without significant improvement in the credibility of the valuation opinion regarding the subject property.

Paragraph (6) seeks to exclude from consideration any elements of loss of value that are legally noncompensable under the law of the adopting state. The principal elements made unacceptable by this paragraph are those caused by "an exercise of the police power." The Uniform Code is concerned primarily with procedural matters and closely related concerns, while the boundary line between police power and eminent domain is largely a matter of substantive decisional law in the several states. Moreover, existing differences in the law in this regard are, to some extent, a reflection of the fact that some, but not all, state constitutions require compensation for both "taking" and "damaging" of private property. Accordingly, the content of this exclusionary provision is left for judicial determination under the applicable law of the adopting state.

ARTICLE XII

[Postjudgment Procedure]

1 Section 1201. [Contents of Judgment.]

2 (a) The judgment may, and in the case of a partial taking shall,
3 describe the proposed project in relation to the property taken, and shall:

4 (1) describe the property condemned and declare the right of
5 the plaintiff to take it by eminent domain;

6 (2) recite the verdict or decision and declare that title to the
7 property will be transferred to the plaintiff after the plaintiff has
8 paid to the defendant, or to the court for the benefit of the defendant,
9 the amount of compensation awarded and any additional amounts
10 allowed;

11 (3) describe the interest of each defendant in the property con-
12 demned, and state the amount of the award to which each defendant
13 is entitled; and

14 (4) determine all other questions arising from the taking,
15 including questions relating to taxes, encumbrances, liens, rentals,
16 insurance, or other charges.

17 (b) If the court determines that any issue under paragraph (3) or
18 (4) of Subsection (a) cannot be tried expeditiously and that no party will be
19 prejudiced by reserving it for later determination, the court may enter
20 a preliminary judgment that includes the recitals required by paragraphs
21 (1) and (2) of Subsection (a), directs the plaintiff to deposit in court the
22 amount of compensation awarded, and describes any issue reserved. A

23 preliminary judgment so entered is appealable as to all matters and
24 issues actually determined therein and not reserved. A supplementary
25 judgment of apportionment determining any reserved issue shall be
26 entered after that issue has been resolved.

Comment

Section 1201 contemplates that the judgment in the action may be entered in two consecutive phases, corresponding with the two phases of the trial contemplated by Section 905, if the apportionment issues cannot be resolved without undue delay. The court may first enter a judgment determining the plaintiff's right to take the property, and specifying the total amount of compensation to be paid. A supplementary judgment disposing of the reserved apportionment issues is entered later, after those issues have been separately determined. Transfer of title is accomplished by a "transfer order" after the judgment has been paid. See Section 1209.

Subsection (a) provides for the contents of the judgment in terms designed to supplement existing state practice as to the form of judgments. The subsequent transfer order may be a short and succinct instrument incorporating this judgment by reference. See Section 1209. Thus, all operative terms of the adjudication disposing of the condemnation action ordinarily should be included in the judgment described in the present section.

Subsection (b) authorizes the court to enter a preliminary judgment that is appealable, without disposing of apportionment issues the resolution of which will require a delay. The condemnor, for example, could appeal from a judgment under this subsection without having to wait for the court to apportion the total award as between two or more defendants asserting conflicting claims. In addition, under Section 1208(b), the condemnor may satisfy the judgment entered under Subsection (b) by paying the total amount into court for the defendants, and then obtain a transfer order under Section 1209, even though apportionment issues remain to be tried and resolved by a supplemental judgment of apportionment.

1 Section 1202. [Interest on Compensation Awarded.]

2 (a) Except as provided in Subsection (b), the judgment shall include
3 interest at the [legal rate] [rate of % per year] upon the unpaid portion

4 of the compensation awarded. The interest shall (1) commence to accrue
5 upon the earlier of the date of valuation or date on which the plaintiff
6 takes physical possession of the defendant's property, and (2) be calculated
7 to the earlier of the date of payment or date of [entry] [filing] of the judg-
8 ment.

9 (b) The judgment may not include interest upon the amount re-
10 presented by funds deposited by the plaintiff for the period after the
11 date on which the deposited funds were available for withdrawal by the
12 defendant.

Comment

Section 1202 prescribes standards for determining the amount of pre-judgment interest to be added to the compensation awarded in the action. Post-judgment interest is governed by Section 1203.

While most states expressly provide for an award of pre-judgment interest, the statutes contain many variations with respect to the terms and conditions of the award. It is, however, generally recognized in both statutory and decisional law that an allowance of interest is a reasonable method for reimbursing the property owner for constitutionally compensable losses he may sustain by reason of unavoidable delay between the date of taking of his property and the actual receipt by him of the just compensation to which he is entitled. See 3 Nichols, *The Law of Eminent Domain* § 8.63 (rev. 3d ed. 1965). Some state statutes, however, call for interest to run from the date of taking (sometimes even from the date of commencement of the action) to the date on which the award of compensation is paid to the defendant. The present draft rejects this approach, and treats pre-judgment interest as part of the compensation attributable to the taking that should be included in the amount awarded by the judgment.

The rate of interest is a matter for sound legislative judgment in the adopting state, limited only by the constitutional requirement that it be fair compensation. See Nichols, *supra*, § 8.63[3]. Six percent is specified in many state statutes.

Subsection (a) specifies the time at which interest begins to accrue. The date of valuation is the primary point of reference for this purpose, since compensable losses sustained by the property owner prior to

that date will ordinarily be assimilated into the amount of compensation awarded, while interest will provide compensation for losses that accrue thereafter and prior to judgment. If the condemnor takes or is authorized to take possession of the property before the date of valuation, interest accrues from the earlier point of time. Compare Section 1003 (date of valuation).

Subsection (b) precludes interest upon amounts deposited by the plaintiff for the period after the funds deposited are available for withdrawal by the defendant. Thus, by making a deposit under Section 601, the condemnor ordinarily may stop the running of interest on the ultimate award, whether or not the defendant actually withdraws the amount deposited. On the other hand, if the court concludes that funds deposited but not withdrawn were not available for withdrawal (i.e., that a motion to withdraw under Section 604 either was made and properly denied, or if made would have been denied), subsection (b) does not apply and interest continues to run.

This section provides only for an award of pre-judgment interest upon that part of the compensation awarded to the defendant which is unpaid at the time judgment is entered.

1 Section 1203. [Interest on Judgment.]

2 The unpaid portion of the amount awarded by the judgment shall
3 bear interest at the [legal rate] [rate of % per year] computed from the
4 date of [entry] [filing] of the judgment to the date of payment. "Judgment,"
5 within the meaning of this section, means a judgment under Section 1201(a) or
6 a preliminary judgment under Section 1201(b).

Comment

Section 1203 provides a special rule for awarding interest upon the amount of the judgment. The subject of pre-judgment interest upon the amount of compensation awarded is covered in Section 1202.

Present practice among the states as to post-judgment interest appears to vary, with some states providing for interest on the award of compensation from the date of taking to the date of payment, and others authorizing interest on the award to the date of judgment and thereafter on the judgment to the date of payment. The latter approach, which is adopted by this section, involves a partial compounding of interest, since the judgment already includes interest on the awarded compensation. This result, however, is supported by persuasive authority, on the ground that "once final judgment has been entered,

the condemnee posses[es] a clear, unqualified right to the full amount set forth in that judgment. Thus any postponing of payment in full satisfaction thereof should be compensated for by the imposition of interest thereon." Atlantic Refining Co. v. Director of Public Works (1968) 104 R.L. 436, 244 A.2d 853, 856-57, cited in 3 Nichols, Law of Eminent Domain § 8. 63[5] (1972 Cum. Supp.). The rate of interest allowed is left to sound legislative discretion.

This section authorizes post-judgment interest to be allowed with respect to the portion of the judgment which is "unpaid." Section 1208 provides that payment may be made by a delivery of money directly to the defendant, or by a deposit of money into court in satisfaction of the judgment. Under the latter option, the condemnor may stop the running of interest on the award made by a preliminary judgment under Section 1201(b), even though the award has not yet been apportioned as between the defendants. If the judgment is in favor of the plaintiff for recovery of funds withdrawn from deposit, in excess of the amount awarded, interest runs under this section in favor of the plaintiff. See Section 1206(b).

1 Section 1204. [Adjustment of Taxes.]

2 (a) The judgment shall require the plaintiff to pay to the defendant,
3 in addition to any other amount awarded, the prorated portion of taxes
4 paid by the defendant to any public agency properly allocable to the tax
5 period following the earlier of (1) the date upon which the plaintiff took
6 possession of the property condemned, or (2) the date of [entry] [filing]
7 of the judgment.

8 (b) If the current taxes payable on the property being condemned
9 have not been paid before [entry] [filing] of the judgment, the court shall
10 deduct from the award in favor of the defendant the prorated portion of the
11 unpaid taxes properly allocable to the part of the tax period preceding the
12 earlier of (1) the date upon which the plaintiff took possession of the pro-
13 perty condemned, or (2) the date of [entry] [filing] of the judgment.

14 (c) After the earlier of (1) the date upon which the plaintiff took

15 possession of the property condemned, or (2) the date of [entry] [filing]
16 of the judgment, neither the defendant nor any property of the defendant
17 not taken in the action is liable for payment of taxes upon, and the plain-
18 tiff is exclusively liable to the appropriate taxing authorities for all
19 unpaid taxes relating to, the property taken, subject to any exemption,
20 cancellation, or rebate provided by law.

21 (d) The adjustment of taxes required by this section shall be deter-
22 mined by the court upon such notice and proof as the court may prescribe.
23 Upon motion of a party or the court's own motion, the court may give
24 reasonable notice to the appropriate taxing authorities and an opportunity
25 for them to be heard with respect to the adjustment of the taxes. If the
26 notice and opportunity to be heard are given, the court's determination is
27 conclusive as to the respective tax liabilities of the plaintiff and defendant.

28 (e) The term "taxes," as used in this section, includes ad valorem
29 property taxes, ad valorem special assessment taxes, and water, sewer,
30 or other service charges which are collected together with, or in sub-
31 stantially the same manner as, ad valorem taxes. It does not refer to
32 special assessments upon benefited property that are secured by a
33 specific lien on that property.

Comment

Section 1204 provides the basic rules governing the proration of property taxes and similar charges (but not benefit assessments for special improvements) in the judgment entered under Section 1201. The owner of the property being taken for public use is only liable for the share of the current taxes payable which are properly allocable to the part of the year which precedes the taking of possession by the condemnor, or the date of judgment, whichever is earlier. In some states, absent this proration provision, the property owner might be charged for the entire amount of the taxes on the theory that the record owner at the beginning of the taxin-

year is liable for the whole year's taxes. The rule of proration here provided is consistent with Section 303 of the Federal Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 (1971) and the similar provision in Section 211(a) of this Uniform Code.

Under this section, the court's determination with respect to the adjustment of tax liabilities is conclusive as between the parties and the taxing agencies if notice and an opportunity to be heard has been given to the latter. Because the determination of the amounts to be prorated is often a matter on which the parties can readily agree, nothing in this section requires a formal hearing; the court has discretion to determine the matter on such notice and proof as it deems appropriate in the circumstances of the case.

1 Section 1205. [Recoverable Costs.]

2 (a) If the judgment determines that the plaintiff has the right to
3 take all or part of the defendant's property, the costs incurred by the
4 defendant shall be claimed, taxed and awarded to the defendant by the
5 same procedure as in other civil actions, except as otherwise provided
6 in this section.

7 (b) If the amount of compensation awarded to the defendant by the
8 judgment, exclusive of interest and costs, is greater than the amount
9 specified in a final offer of settlement made by the defendant under Section
10 704, the court shall allow to the defendant, in addition to costs allowed
11 under Subsection (a), his litigation expenses incurred after the date of
12 service of the offer, but not more than [one thousand dollars] or [25%]
13 of the amount by which the compensation awarded exceeds the amount of
14 the defendant's final offer of settlement, whichever is smaller.

15 [(c) If the amount of compensation awarded to the defendant by
16 the judgment, exclusive of interest and costs, does not exceed the amount

17 specified in a final offer of settlement made by the plaintiff under Section
18 704, the defendant shall not be entitled to his costs incurred after the
19 date of service of the offer.]

Comment

Section 1205 provides the basic rules governing the award and allocation of costs. For the definition of "costs," see Section 103(8).

The general principle underlying this section, and expressed in Subsection (a), is that when the condemnor is determined to have the right to take the property in question, the recoverable costs of litigation should ordinarily be awarded to the defendant property owner. This rule appears to be generally accepted among American courts, and in some states is regarded as constitutionally required. See Levey, Condemnation in U.S.A. §47, pp. 463-64 (1969).

Subsections (b) and (c) are designed to correlate with the provisions of Section 704, under which either party may tender a final offer of settlement prior to trial. If such an offer by the defendant is not accepted, an award of litigation expenses is made to the defendant if he obtains an award more favorable than his final settlement offer. Subsection (b). Non-acceptance of a final offer of settlement by the plaintiff may result in a denial of costs to the defendant under Subsection (c), if the plaintiff obtains a result equal to or more favorable than the offer. Subsection (c), however, is in brackets to indicate that it should be omitted if a withholding of costs in the adopting state would violate state constitutional requirements.

1 Section 1206. [Crediting Amounts Paid Or Withdrawn From Deposited
2 Funds.]

3 (a) The judgment shall credit against the total amount awarded to
4 the defendant any payments made prior to the date of [entry] [filing] of
5 the judgment by plaintiff to the defendant as compensation for the property
6 taken, plus any funds which the defendant withdrew from money deposited
7 by the plaintiff.

8 (b) If the amount entitled to be credited against the award under

9 Subsection (a) exceeds the total amount awarded, the judgment shall
10 require the defendant to pay the excess to the plaintiff or other person
11 entitled thereto.

Comment

Section 1206 is intended to protect the rights of the plaintiff by requiring the judgment to credit against the amount of the award any payments to the defendant, and any withdrawal by the defendant of sums on deposit, prior to entry of the judgment. In the event of an excess of previous payments and withdrawals over the amount awarded, the court is required to enter judgment against the defendant for the excess. As to interest on the amount awarded, see Section 1202.

1 Section 1207. [Performance of Work to Reduce Amount of Award.]

2 (a) If the court finds that the plaintiff and defendant have entered
3 into an agreement under which the plaintiff has completed, or has under-
4 taken to perform, described work, or if a pretrial order required
5 the performance of work by the plaintiff, the court may include in
6 the judgment a determination that the plaintiff has satisfied, or may
7 satisfy, the judgment in whole or in part by performing the work as
8 described.

9 (b) The provisions included in the judgment under Subsection (a)
10 shall describe or incorporate the terms and conditions of the agreement
11 or pretrial order, and to the extent the agreement or order fails to provide
12 therefor shall include requirements relating to

13 (1) the location and nature of the work, and the time for its
14 commencement and completion; and

15 (2) the amount of compensation awarded which is, or will be,
16 deemed satisfied by performance of the work by the plaintiff, rather

17 than by payment in money, together with any proper adjustments
18 in the amount of interest allowable on the amount awarded.

19 (c) For good cause, the court may require the plaintiff to deposit
20 funds with the court, or to execute and file with the clerk a bond with
21 sureties approved by the court, in an amount not less than the estimated
22 cost of the work, to guarantee its faithful and timely performance; and
23 may impose other reasonable terms and conditions including a reserva-
24 tion of continuing jurisdiction to assure that the work will be properly
25 performed in accordance with the judgment.

Comment

Section 1207 provides authority for judicial implementation of an agreement between the parties, or a pretrial order, for the condemnor to perform described work in partial satisfaction of the award. For the definition of "work," see Section 103(19). This section, for example, may encourage the plaintiff to try to satisfy the judgment, in whole or in part, by providing an agreed "physical solution" designed to mitigate all or some of the severance damages that would otherwise be included in the amount of compensation to be paid. The amount credited against the judgment need not be the actual or estimated cost of the specified work; in some circumstances, a relatively inexpensive "physical solution" may avoid a very large amount of damage to the remainder.

The court is authorized under Subsection (c) to include appropriate provisions to enforce the work requirement, including a retention of continuing jurisdiction to enforce an agreement which is to be performed after the date of trial. For example, an agreement or pretrial order might call for the construction by the condemnor of a retaining wall, or of new drainage facilities, in a pretrial taking case, in order to mitigate damage to the remainder. But the reduced cash award that results would necessarily be premised upon the expectation that the plaintiff will fully and promptly discharge its obligation to construct the promised physical improvements after the trial. Retention of continuing jurisdiction in the trial court to enforce this obligation may facilitate compliance without the necessity of newly initiated litigation in the event of a dispute.

1 Section 1208. [Payment of Judgment by Plaintiff.]

2 (a) Within [30] days after [entry] [filing] of the judgment, or within
3 [10] days after the judgment has become final, whichever is later, the
4 plaintiff shall pay the full amount required by the judgment after credit-
5 ing all amounts withdrawn by the defendant after judgment from funds on
6 deposit. For good cause shown, the court may extend the time within
7 which payment must be made for an additional period not exceeding [90]
8 days.

9 (b) Payment may be made by the plaintiff by paying money person-
10 ally to the defendant, or to the legal representative of the defendant, taking
11 a receipt therefor and filing a copy with the court; or by depositing the
12 amount of the award with the court for the defendant. By making a
13 deposit under this section, the plaintiff does not waive its right to review.

14 (c) Within [10] days after a deposit of the award under Subsection
15 (b), the plaintiff shall give written notice thereof to each defendant for
16 whom a disclaimer is not on file and who has not received personal pay-
17 ment in full. If the plaintiff fails to give the prescribed notice to a de-
18 fendant entitled thereto, interest shall be added to that defendant's
19 undistributed share of any funds on deposit with the court for the purpose
20 of payment, at the [legal rate] [rate of % per year], from the date of
21 deposit of the award under Subsection (b) to the date on which the written
22 notice is served, or to the date on which the defendant actually receives
23 from the clerk of court the amount to which he is entitled under the
24 judgment, whichever is earlier. The court may make any proper orders
25 reasonably necessary to enforce the plaintiff's obligation to pay interest

Comment

Section 1208 requires payment of the judgment entered under Section 1201(a) or 1201(b) within a specified period of time after its effective date, or after it has become final, whichever is later. The judgment is not regarded as final, for this purpose, during the time an appeal is pending or a post-trial motion is pending. If the condemnor wishes to enter into actual possession of the property pending completion of post-judgment proceedings, it may do so by paying the amount of the award to the court, subject to the property owner's right of withdrawal. See Section 1211.

In some circumstances, e. g., when the condemnor must complete necessary procedures, such as bond election, in order to obtain the funds necessary to satisfy the judgment, the court may extend the period for payment. The Code provides that any such delay in payment is compensated by an award of interest upon the unpaid portion of the award. See Section 1203.

When payment has been completed, a transfer order may be entered pursuant to Section 1209. On the other hand, if payment in full is not timely made, the property owner may elect to regard the action as abandoned or seek to enforce it. See Section 1210.

1 Section 1209. [Order Transferring Title.]

2 (a) Upon proof that the plaintiff has fully satisfied the judgment,
3 the court shall make an order transferring to and vesting in the plaintiff
4 the title to property taken.

5 (b) The transfer order shall:

6 (1) describe the property taken, recite or incorporate
7 by reference the provisions of the judgment, and set forth the
8 court's determination that it has been satisfied; and

9 (2) declare that title to the defendant's property as described
10 therein is transferred to and vested in the plaintiff upon the effec-
11 tive date of the order.

12 (c) The party obtaining the transfer order shall promptly serve
13 a copy of the order upon each party [and may file a copy for record in
14 the place and manner provided by law for the recordation or registra-
15 tion of deeds and conveyances].

Comment

Under Section 1209, the title to the property taken is vested in the condemnor by a transfer order when the court is satisfied that the judgment has been satisfied in full by the plaintiff. For the methods of payment allowed, see Section 1208. If, due to an excessive withdrawal of deposited funds by the defendant, the judgment requires the defendant to make reimbursement, the transfer order need not be postponed pending payment by the defendant; this section requires that only the plaintiff must have fully satisfied the judgment.

Subsection (c) includes a mandatory requirement for service and an optional provision for recordation of the transfer order. The bracketed words in this subsection may be omitted if these matters are already appropriately covered by applicable statutes in the adopting state. Prompt service of the transfer order, however, is essential so that all parties will have notice of passage of title--an event that may have legal significance for various purposes.

It should be noted, however, that this section does not purport to deal with problems of tort or contractual liability that may arise if the condemnor fails to take immediate possession, or fails to serve notice of transfer of title, or if the property owner remains in possession, after passage of title.

1 Section 1210. [Failure to Pay Judgment; Effect Of.]

2 (a) If the plaintiff fails to make full payment of the judgment, or
3 of the full amount awarded for any separate item or parcel of property
4 described therein, within the time allowed under Section 1208, the
5 defendant:

6 (1) may treat the failure to make payment as an abandon-

7 ment of the condemnation action with respect to the property for
8 which payment has not been made, and may move to vacate the
9 judgment and for a dismissal under Section 1301; or

10 (2) may apply to the court for enforcement of the judgment
11 by any appropriate enforcement process authorized by law, [includ-
12 ing levy of execution, foreclosure of a vendor's lien on the property
13 taken, or issuance of a mandatory injunction or writ of mandamus
14 to compel payment].

15 (b) In determining questions arising under Subsection (a), the
16 court may make appropriate orders to adjust the rights of the parties,
17 including orders with respect to the possession and use of the property
18 and the performance of any work thereon, and may award damages,
19 interest, and costs to the defendant as justice requires.

Comment

Section 1210 provides alternative remedies to the property owner if the condemnor fails to pay the amount awarded within the time allowed by Section 1208. The property owner may elect either to treat the failure to pay as an abandonment, and invoke the provisions of Section 1301, or he may apply to the court for enforcement of the judgment by appropriate process. The selection of the appropriate enforcement process is left to the sound discretion of the court, depending upon local law and the relevant circumstances of the case.

The court is given broad discretion under Subsection (b) to adjust the rights of the parties and to make orders in enforcement proceedings under Subsection (a) as justice may require. For example, if the court were to issue a writ of execution or a mandatory injunction to compel payment of the judgment, it could restrain the condemnor from taking or remaining in possession, or from commencing or proceeding with improvement work on the property until the judgment has been satisfied.

25 without interest.

26 (e) If the defendant fails to pay any amount required by the judg-
27 ment within [30] days after the judgment becomes final, the court on
28 motion may enforce payment out of the security, if any, provided under
29 Subsection (c), or may issue any appropriate process.

Comment

Section 1211 permits the defendant to apply for and obtain pay-
ment of the unpaid part of the judgment in his favor, from funds
deposited by the plaintiff, whether or not the judgment is final.
Acceptance of payment, however, waives all claims or defenses
except for a claim to greater compensation.

If the defendant obtains payment under this section before the
judgment is final, Subsection (b) provides that the order may be
conditioned upon the filing of security for repayment of the excess
if it is ultimately determined that the defendant is entitled to a
lesser amount. See Subsection (e).

1 Section 1212. [Order for Possession After Judgment.]

2 (a) At any time after judgment, the plaintiff may apply to the court
3 for an order of possession, and the application may be granted whether
4 or not the judgment has been appealed, or a motion for new trial or to
5 vacate or set aside the judgment has been made.

6 (b) The court shall authorize the plaintiff to take possession of
7 the property if:

8 (1) the judgment determines that the plaintiff is entitled to
9 take the property; and

10 (2) the plaintiff has paid the full amount required by the
11 judgment in the manner provided by Section 1208(b).

12 (c) The court shall specify the date after which the plaintiff is

13 authorized to take possession of the property. Unless the defendant
14 consents in writing to an earlier date, possession may not be taken
15 earlier than [10] days after the date on which the order is served, or
16 90 days after notice to terminate occupancy was given under Section 205,
17 if that section is applicable, whichever is later. The court may enforce
18 the order for possession by an appropriate writ or proceeding, including
19 contempt.

20 (d) The plaintiff does not abandon or waive the right to appeal
21 from the judgment, or to move for a new trial or to vacate or set aside
22 the judgment, by making application for or taking possession under this
23 section.

Comment

Section 1212 provides the procedural mechanism by which the plaintiff, following entry of the judgment, may enter into possession of the property being taken.

Taking possession does not constitute a waiver of the plaintiff's right to attack the judgment by appeal or by motion; similarly, the acceptance of payment by the defendant out of funds deposited by the plaintiff does not require a waiver of the defendant's right to attack the judgment and seek greater compensation. See Section 1211(b).

The taking of possession, absent a stipulation between the parties, must be by court order. The order, under Subsection (c), must specify the date on which possession may be taken, but may not authorize possession before 10 days after its date or before the expiration of the 90 days notice required by Section 205.

ARTICLE XIII

[Dismissal and Abandonment]

1 Section 1301. [Involuntary Dismissal.]

2 On motion of the defendant, the court shall dismiss the action in
3 whole or in part, as justice may require, if:

4 (1) upon sustaining a preliminary objection to plaintiff's com-
5 plaint, the court determines that a dismissal is required;

6 (2) the plaintiff, by amending the complaint, so changes the
7 extent, scope, or nature of the property sought to be taken that a dis-
8 missal of the action is required as to the superseded portion of the original
9 action;

10 (3) plaintiff has unjustifiably failed to exercise reasonable dili-
11 gence in prosecuting the action;

12 (4) plaintiff has failed or refused to comply with an order for
13 deposit made under Section 601 or an order to increase the amount on
14 deposit made under Section 603(c); or

15 (5) the plaintiff has failed to pay the full amount required by the
16 judgment within the time allowed.

Comment

Section 1301 catalogs the five principal circumstances under which the court may dismiss the condemnation action on defendant's motion.

Under paragraph (1), an involuntary dismissal is authorized if the court determines that plaintiff does not have the right to take the property, or some part of it, involved in the action. An objection to the right to take, if pleaded in a timely answer, must be determined by the court prior to trial. See Section 508.

Paragraph (2) gives the court power to dismiss, as to superseded portions of the action, if the plaintiff by filing an amended complaint substantially changes the scope of the "take." Ordinarily, this power of dismissal will be used when the amendment substantially decreases the scope of the "take," thereby making much of defendant's preparation for trial unnecessary. In some cases, a change that takes other property, even though of the same or greater size, will warrant a like result. If the scope of the "take" is merely expanded to embrace additional property, while continuing to include the property originally described, however, a dismissal will seldom be required by the interests of justice.

Under paragraph (3), unjustified delay caused by the plaintiff's failure to prosecute the action diligently may be grounds for dismissal. This paragraph carries out the general policy, reflected in Section 901 (priority on trial calendar), that condemnation actions should be expedited as much as possible.

Paragraph (4) implements the provisions of Sections 601 and 603(c), under which the plaintiff's failure to comply with an order to make a deposit of estimated compensation, or to increase the amount on deposit, may be treated by the defendant as an abandonment of the action.

Paragraph (5) implements the rule of Section 1210, under which the plaintiff's failure to pay the judgment in full, within the time allowed to do so, may be treated as an abandonment by the defendant.

Whether an involuntary dismissal under this section should extend to the whole action, or only to a part of it, is left to the court's sound discretion in light of the particular circumstances.

1 Section 1302. [Voluntary Dismissal.]

2 (a) The court may dismiss the action in whole or in part upon
3 motion of the plaintiff at any time prior to payment of the judgment.

4 In its order of dismissal, the court shall impose any conditions, includ-
5 ing a requirement of restitution of property or money, that are just and
6 equitable.

7 (b) Plaintiff's motion to dismiss the action may be denied if the
8 court determines, after noticed hearing, that because of the condemnation

9 action the defendant has substantially changed his position to his detriment.

Comment

Section 1302 authorizes, but does not make mandatory, a dismissal of the action upon plaintiff's motion. Instead of an unqualified dismissal, the court may, in appropriate cases, grant a dismissal upon specified conditions, under Subsection (a). See Section 1304 (restitution and damages). Subsection (b) provides equitable guidelines for the court's determination of the motion, it should ordinarily be granted unless the special circumstances described are shown to exist.

1 Section 1303. [Award of Litigation Expenses.]

2 (a) In addition to any other amounts authorized by law, the court
3 shall award the defendant his litigation expenses if the action is wholly
4 or partly dismissed for any reason.

5 (b) If there is a partial dismissal, a final judgment that the plaintiff
6 cannot take a part of the property originally sought to be taken, or a dis-
7 missal of one or more plaintiffs, the court shall award the defendant the
8 portion of the litigation expenses that would not have been incurred if the
9 remaining property sought to be taken, following the partial dismissal or
10 judgment, had been the property originally sought to be taken.

11 (c) Costs and litigation expenses authorized by this section may
12 be claimed, taxed, and awarded under the same procedures that apply
13 to costs in other civil actions.

Comment

Section 1303 provides for the payment by the plaintiff of the defendant's litigation expenses in the event of a dismissal of the action, in whole or in part, or a determination that the plaintiff did not have the right to take the subject property. For the meaning of "litigation expenses," see Section 103(13). This section conforms to the requirement of Section 304 of the Federal Acquisition Policies

Act, Public Law No. 91-646, 84 Stat. 1894 (1971), requiring payment of litigation expenses under the described circumstances in connection with federally funded state or local government projects. Compare Article II.

For examples of "other amounts authorized by law," referred to in the introductory clause, see Sections 601(c) and 1304.

1 Section 1304. [Restitution of Property and Damages.]

2 If the action is dismissed for any reason, and the defendant has
3 vacated the property under an order of possession or in reasonable con-
4 templation of its taking by the plaintiff, the court, upon demand of the
5 defendant, shall order the plaintiff to (1) deliver possession of the pro-
6 perty to the defendant or other person entitled to it, and (2) pay damages
7 to the defendant, as justice may require, for any damage to or impair-
8 ment of the value of the property not within the reasonable control of the
9 defendant.

Comment

Section 1304 authorizes an order for restoration of possession and an award of damages in conjunction with a dismissal in cases where the plaintiff took possession before the dismissal was ordered or it was adjudged that plaintiff had no right to take. The damages may include lossess sustained as a result of either the taking of possession or the contemplation of it (i. e., vandalism, loss of rentals, etc.). Recovery under this section is in addition to the litigation expenses awarded under Section 1303.

ARTICLE XIV

[Relocation Assistance]

Preliminary Comment

Article XIV has been included in the Uniform Eminent Domain Code as a model article designed to satisfy the provisions of Title II of the Federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 (P.L. 91-646). Under Section 210 of the Federal Act, conformity with the requirements of the Federal Act is necessary in order to assure eligibility of state or local agencies for federal financial assistance with respect to "all or part of the cost of any program or project which will result in the displacement of any person."

While the Federal Act is limited in scope to federally assisted projects and programs, this Article is intended to extend the same benefits and requirements to all projects or programs conducted or directed by both public and private condemnors, whether or not federal financial assistance is being provided. This broader approach is believed not only to be more consonant with an equitable and even-handed state policy, but should eliminate potential special legislation and equal protection problems under the state and federal constitutions that could attend a statutory scheme of more selective scope.

1 Section 1401. [Declaration of Policy.]

2 The purpose of this Article is to establish a uniform policy for the fair
3 and equitable treatment of persons displaced by public and private condemnors
4 in order that they will not suffer disproportionate injuries as a result of pro-
5 grams designed for the benefit of the public as a whole. All costs under this
6 Article are part of the costs and expenses of the project or improvement which
7 caused the displacement.

Comment

This section establishes a statutory basis for administrative and judicial interpretation of Article XIV. It is based on Section 201 of the Federal Uniform Relocation Assistance, etc. Act. Two important principles are declared: (1) Relocation assistance is to be administered uniformly and in a manner which is fair and equitable to displaced persons.

(2) Article XIV applies to displacements caused by both public and private condemnors, without reference to the availability of federal funding. In this respect, Article XIV goes beyond the Federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, which extends only to federally assisted public projects.

The reference to "condemnors" does not imply that Article XIV pertains only to dislocations caused by an exercise of the power of eminent domain. On the contrary, as Section 1402(1) makes clear, this Article applies with respect to any acquisition of real property, whether by eminent domain or by negotiated purchase. The term "condemnors" is used to limit the Article to public entities and to private agencies that are generally authorized to exercise the power of eminent domain. See Section 103(7). However, nothing in this Article limits its application solely to displacements caused by a project for which the power of eminent domain is or could be used. Acquisitions for which eminent domain is not available or, if available, is not used, are also covered.

1 Section 1402. [Definitions.]

2 As used in this Article;

3 (1) "Displaced person" means a person who moves from real property,
4 or who moves his personal property from real property.

5 (i) as a result of the acquisition of the real property in whole
6 or in part by a condemnor,

7 (ii) as a result of a written order by the acquiring condemnor
8 to vacate the real property for a program or project undertaken by
9 it, or

10 (iii) solely for the purposes of Sections 1403(a) and (b) and Sec-
11 tion 1406, as a result of the acquisition of, or as the result of the
12 written order of the acquiring condemnor to vacate other real pro-
13 perty, on which the person conducts a business or farm operation,
14 for such program or project.

15 (2) "Business" means any lawful activity, except a farm operation,

16 conducted primarily:

17 (i) for the purchase, sale, lease or rental of personal and real
18 property, and for the manufacture, processing, or marketing of pro-
19 ducts, commodities, or any other personal property,

20 (ii) for the sale of services to the public,

21 (iii) by a nonprofit organization, or

22 (iv) solely for the purposes of Section 1403(a) for assisting in
23 the purchase, sale, resale, manufacture, processing, or marketing of
24 products, commodities, personal property, or services by the erection
25 and maintenance of an outdoor advertising display or displays, whether
26 or not such display or displays are located on the premises on which
27 any of above activities are conducted.

28 (3) "Farm operation" means any activity conducted solely or primarily
29 for the production of one or more agricultural products or commodities, includ-
30 ing timber, for sale or home use, and customarily producing such products or
31 commodities in sufficient quantity to be capable of contributing materially to
32 the operator's support.

33 (4) "Mortgage" includes any form of lien or security interest given to
34 secure advances on or the unpaid purchase price of, real property, together
35 with the credit instruments, if any, secured thereby.

Comment

The definitions in Section 1402 are based upon those contained in Section 101 of the Uniform Relocation Assistance etc. Act.

The wording has been modified where necessary to conform to the expanded scope of this Article to make it applicable to both public en-

titles and private agencies that are authorized to exercise the power of eminent domain. As the definition of "displaced person" makes clear, however, this Article applies to any acquisition by a public or private condemnor "for a program or project" it is undertaking, whether or not the acquisition is within its authorized power of eminent domain.

1 Section 1403. [Moving and Related Expenses.]

2 (a) Whenever the acquisition of real property for public use
3 by a condemnor results in the displacement of any person, the
4 condemnor shall pay the displaced person as part of the cost of
5 acquisition:

6 (1) his actual reasonable expenses in moving himself, his family,
7 business, farm operation, or other personal property to a new location,
8 but not to exceed the cost of moving a total distance of 50 miles;

9 (2) his actual direct losses of tangible personal property as a
10 result of moving or discontinuing a business or farm operation, not to
11 exceed an amount equal to the reasonable expenses that would have
12 been required to relocate the property within 50 miles; and

13 (3) his actual reasonable expenses in searching for a replace-
14 ment business or farm.

15 (b) The condemnor shall pay to a displaced person eligible
16 for payments under Subsection (a), who moves from a dwelling and
17 who elects to accept the payments authorized by this subsection in lieu of the
18 payments authorized by Subsection (a), a reasonable moving expense allow-
19 ance, but not more than three hundred dollars (\$300), and in addition a dis-
20 location allowance of two hundred dollars (\$200).

21 (c) The condemnor shall pay to a displaced person eligible
22 for payments under Subsection (a), who moves or discontinues his
23 business or farm operation and who elects to accept the payment authorized
24 by this subsection in lieu of the payment authorized by Subsection (a), a fixed
25 relocation payment in an amount equal to the average annual net earnings of
26 the business or farm operation, except that such payment shall be not less than
27 two thousand five hundred dollars (\$2,500) nor more than ten thousand dollars
28 (\$10,000). [In the case of a business, payment shall be made under this sub-
29 section only if the business (1) cannot be relocated without a substantial loss
30 of patronage, and (2) is not a part of a commercial enterprise having at least
31 one other establishment not being acquired which is engaged in the same or
32 similar business.] For purposes of this subsection, "average annual net
33 earnings" means one-half of any net earnings of the business or farm operation,
34 before Federal, State, and local income taxes, during the two taxable years
35 immediately preceding the taxable year in which the business or farm opera-
36 tion moves from the real property being acquired or during such other period as
37 may be more equitable for establishing earnings, and includes any compen-
38 sation paid by the business or farm operation to the owner, his spouse, or
39 his dependents during the two-year or other period.

40 (d) If, as a condition of the eligibility of a condemnor for federal as-
41 sistance of any kind, payments are required by federal law in amounts greater
42 than or under circumstances not authorized by this section, the condemnor
43 shall comply with the requirements of federal law instead of this section.

Comment

Section 1403 is intended to satisfy the requirements of Section 202 of the Uniform Relocation Assistance Act, Public Law 91-646, 84 Stat. 1895 (1971). The language of this section thus follows that of the federal statute, and is intended to convey the same meaning. Uniformity in the application of this section may be promoted by the promulgation of detailed regulations under Section 1408.

The bracketed language in Subsection (c) is suggested for omission in the interest of greater equity. However, this language appears in the federal statute, and its omission may impair eligibility for federal aid in certain projects.

1 Section 1404. [Replacement Housing for Homeowners.]

2 (a) In addition to payments required by Section 1403, the
3 condemnor shall pay an amount not exceeding \$15,000 to a person
4 who is displaced from a dwelling actually owned and occupied by
5 him for not less than 180 days before the initiation of negotiations
6 for acquisition of the property.

7 (b) The additional payment required by Subsection (a) shall include
8 all of the following elements:

9 (1) The amount, if any, which when added to the acquisition
10 cost of the dwelling acquired, equals the reasonable cost of a com-
11 parable replacement dwelling that is a decent, safe, and sanitary
12 dwelling adequate to accommodate the displaced person, reasonably
13 accessible to public services and places of employment and avail-
14 able on the private market.

15 (2) The amount, if any, that will compensate the displaced owner
16 for any increased interest costs he is required to pay for financing the

17 acquisition of a comparable replacement dwelling. This amount shall
18 be paid only if the dwelling acquired was encumbered by a bona fide
19 mortgage which was a valid lien on the dwelling for not less than 180
20 days before initiation of negotiations for acquisition of the dwelling.
21 The amount shall be equal to the excess in the aggregate interest and
22 other debt service costs of that amount of the principal of the mortgage
23 on the replacement dwelling which is equal to the unpaid balance of the
24 mortgage on the acquired dwelling, reduced to discounted present value.
25 The discount rate shall be the prevailing interest rate paid on savings
26 deposits by commercial banks in the community in which the replace-
27 ment dwelling is located.

28 (3) Reasonable expenses incurred by the displaced person for evi-
29 dence of title, recording fees, and other closing costs incident to the
30 purchase of the replacement dwelling, but not including prepaid ex-
31 penses.

32 (c) The additional payment authorized by this section shall be made
33 only to a displaced owner who purchases, or enters into a contract for re-
34 habilitation or construction of a decent, safe, and sanitary replacement dwel-
35 ling, which is to be occupied not later than the end of the one year period be-
36 ginning on the date on which he receives final payment of the award or pro-
37 ceeds of the acquired dwelling, or on the date on which he moves from the
38 acquired dwelling, whichever is later.

Comment

Section 1404 follows the requirements of Section 203 of the Uniform

Relocation Assistance Act. Thus, for example, the \$15,000 figure under Subsection (a) is identical to the federal requirement, in order not to jeopardize eligibility for federal assistance. Similarly, the 180 day previous ownership rule of this section adheres to the federal rule, and is designed to avoid speculative buying with knowledge of the project.

A displaced person who is not eligible for payments under this section may qualify for benefits under Section 1405.

1 Section 1405. [Replacement Housing for Tenants and Certain Others.]

2 (a) In addition to payments required by Section 1403, the con-
3 demnor, as part of the cost of acquisition of real property improved
4 with a dwelling, shall make a payment to or for any displaced person
5 not eligible to receive a payment under Section 1404 who is displaced
6 from any dwelling which was actually and lawfully occupied by the dis-
7 placed person for not less than 90 days before the initiation of negotiations
8 for acquisition of the property.

9 (b) The payment shall be either:

10 (1) the amount reasonably necessary to enable the displaced
11 person to lease or rent, for a period not to exceed four years, a
12 decent, safe and sanitary dwelling adequate to accommodate him
13 in areas not generally less desirable in regard to public utilities and
14 public, commercial and farming facilities, and reasonably accessible
15 to his place of employment, but not exceeding \$4,000; or

16 (2) the amount necessary to enable the displaced person to make
17 a down payment, including incidental expenses described in Section
18 1404(b)(3), on the purchase of a decent, safe, and sanitary dwelling

19 adequate to accommodate him in areas not generally less desirable
20 in regard to public utilities, and public, commercial and farming
21 facilities, but not exceeding \$4,000, except that if the amount ex-
22 ceeds \$2,000, the displaced person must equally match any amount
23 exceeding \$2,000 in making the down payment.

Comment

Section 1405 adheres to the pattern of Section 204 of the Uniform Relocation Assistance Act. The benefits of this section are available only to displaced persons not eligible for payments under Section 1404 of the Code.

1 Section 1406. [Relocation Assistance Advisory Program.]

2 (a) A condemnor shall provide a relocation assistance advisory
3 program to aid any person, business, or farm operation displaced be-
4 cause of its acquisition of real property. If the condemnor determines
5 that any person occupying property immediately adjacent to the real
6 property acquired is caused substantial economic injury because of the
7 acquisition, it may offer that person relocation assistance advisory services
8 under the program.

9 (b) A public entity may establish local relocation assistance offices to
10 assist in obtaining replacement housing and other facilities for persons who
11 find it is necessary to relocate their dwellings, businesses, or farm opera-
12 tions because of the acquisition of real property.

13 (c) Relocation assistance advisory programs shall include measures,
14 facilities or services necessary or appropriate in order to:

- 15 (1) determine the need, if any, of displaced persons for re-
16 location assistance;
- 17 (2) provide current and continuing information on the avail-
18 ability, prices and rentals, of comparable decent, safe and sani-
19 tary sales and rental housing for displaced persons, and of com-
20 parable commercial or farm properties and locations for displaced
21 businesses;
- 22 (3) assure, to the extent that it can be reasonably accomplished,
23 that within a reasonable time before displacement there will be
24 available in areas not generally less desirable in regard to public
25 utilities and public and commercial facilities, and at rents or prices
26 within the financial means of the families and individuals displaced,
27 decent, safe, and sanitary dwellings, equal in number to the number
28 of, and available to, the displaced persons who require such dwell-
29 ings and reasonable accessible to their places of employment;
- 30 (4) assist a displaced from his business or farm operation in
31 obtaining and becoming established in a suitable replacement location;
- 32 (5) supply information concerning Federal, State and local
33 housing programs, disaster loan programs, and other Federal, State or
34 local programs offering assistance to displaced persons;
- 35 (6) provide other advisory services to displaced persons in
36 order to minimize hardships to them in adjusting to relocation; and
- 37 (7) secure, to the greatest extent practicable, the coordin-
38 ation of its relocation assistance program with the project work

8 authorized by this Article will be paid by the condemnor promptly after a
9 move, or, in hardship cases, will be paid in advance; and

10 (3) that any person aggrieved by a determination of a public entity as to
11 eligibility or lack of eligibility for, or as to the amount of, any relocation as-
12 sistance service or payment authorized by this Article, may have his applica-
13 tion reviewed by the [governing body or other head of the public entity] [De-
14 partment of Administration].

Comment

Section 1408 is designed to assure statewide uniformity in the ad-
ministration of the relocation assistance provisions of the Uniform Code.
Its language should be adapted to the form and terminology of state ad-
ministrative procedures.

Under paragraph (3), relocation assistance decisions by private
condemnor are excluded from administrative review. These private
determinations, however, are reviewable under Section 1413.

1 Section 1409. [Fund Availability.]

2 (a) Funds appropriate or otherwise available to a condemnor
3 for the acquisition of property for a particular program or project shall
4 be available to, and the condemnor may, obligate and expend such funds
5 to carry out the provisions of this Article in connection with that program or
6 project. Expenditures under this section are costs of the program or project.

7 (b) If comparable replacement housing is not available and the con-
8 demnor determines that the required housing cannot otherwise be made
9 available, the condemnor may obligate and expend funds authorized for the
10 project for which the property is being acquired to provide the housing.

Comment

Section 1409(a) is intended to eliminate any doubt as to the authority of the condemnor to expend project funds to discharge its relocation assistance obligations. In the absence of this section, such expenditures by a public entity might be challenged as ultra vires. See Section 211(c) of the Uniform Relocation Assistance Act. Section 1409(b) is the counterpart of Section 206(a) of the Uniform Relocation Assistance Act.

1 Section 1410. [Administration.]

2 In order to prevent unnecessary expense and duplication of functions
3 and to promote uniform and effective administration of public relocation as-
4 sistance programs for displaced persons, a condemnor may contract
5 with any public entity, individual, firm, association or corporation
6 for relocation assistance services required by this Article, may carry out its
7 obligations under this Article by providing relocation assistance in whole or
8 in part by its own personnel, or may utilize the services of state or local
9 housing agencies or other agencies having experience in the administration
10 or conduct of similar relocation or housing assistance activities.

Comment

Section 1410 is the counterpart of Section 212 of the Uniform Relocation Assistance Act.

1 Section 1411. [Payments Not Income or Resources.]

2 No payment received by a displaced person under this Article shall
3 be considered as income or resources for the purpose of (1) determining the
4 eligibility or extent of eligibility of, or the amount of aid to be given to, any
5 person for public assistance purposes under any law of this State, or (2) ap-
6 plying any state [or municipal] income tax, corporation tax, or other tax law

Comment

Section 1411 is the counterpart of Section 216 of the Uniform Relocation Assistance Act. The cited federal provisions preclude treating relocation assistance as income for federal income taxes or federal social security and assistance programs. This section extends the same policy to state tax and public assistance programs.

1 Section 1412. [Review of Application of Aggrieved Person.]

2 A determination by a condemnor as to eligibility or lack of eli-
3 gibility for, or as to the extent of, any relocation assistance service
4 or payment authorized by this Article, may be reviewed by a court of com-
5 petent jurisdiction and modified or set aside, if it is found to be arbitrary,
6 unreasonable, or an abuse of discretion. Injunctive relief is not available
7 under this section unless there is clear and convincing evidence that there is
8 no adequate remedy at law.

Comment

Section 1412 does not have a counterpart in the Uniform Relocation Assistance Act. While Section 213(b) of that Act authorizes a form of administrative review of relocation assistance decisions, judicial review is not explicitly authorized. The limited form of judicial review contemplated by the present section is believed to provide a needed measure of protection against arbitrary decisions by condemnors. As to private condemnors, moreover, this section provides the only means of review available in such cases. Compare Section 1408(3) (administrative review limited to decisions by public condemnors).

ARTICLE XV

[Arbitration of Compensation]

Prefatory Comment

This Article authorizes voluntary arbitration of the issue of the amount of compensation for property taken under the power of eminent domain. Arbitration may prove to be a useful technique for resolving issues between condemnor and condemnee with speed and economy in cases where the amount in dispute may not make a court trial economically attractive. By submitting the issue to a disinterested appraiser as arbitrator, for example, the parties could avoid the burden of legal and expert fees that ordinarily arises in litigation. Even in complex cases that involve substantial amounts, arbitration may be a means for reducing the delay and expense of normal court proceedings.

While most states already recognize arbitration proceedings as an alternative to court adjudication of many, if not all, kinds of disputes, the prevalence of special statutory provisions governing eminent domain actions may create doubts as to the authority of condemnors to submit compensation issues to arbitration in the absence of explicit authority.

The provisions of this Article are framed on the assumption that the adopting state has presently in effect a general body of law relating to arbitration of disputes, either in statutory form (e. g., the Uniform Arbitration Act) or as part of the state's common law. It may be necessary, upon adoption, to modify either this Article or the existing state law of arbitration in the interest of consistency.

1 Section 1501. [Arbitration of Compensation Authorized]

2 (a) A condemnor and a condemnee or two or more condemnees
3 may enter into and comply with the terms of an agreement in conformity
4 with this Article for the arbitration of any issue relating to the amount
5 of, or the apportionment of, compensation for the taking of property.

6 (b) An agreement to arbitrate does not constitute, and shall not
7 be construed as, a waiver of or excuse for noncompliance with any

8 requirement of Article II or III relating to the acquisition of property,
9 except to the extent expressly provided in the agreement.

Comment

Subsection (a) provides the basic authority of condemnors and condemnees to submit compensation or apportionment issues to arbitration. Since many public condemnors only possess the powers given to them by statute, an express authorization will avoid any question as to their authority to arbitrate. The term "compensation" is defined to include any amounts that may be awarded in a condemnation action, including the value of the property taken and any severance damages, costs, or fees authorized by law. See Section 103(6).

Subsection (a) includes, within the authority of the parties to the agreement, the power to carry out any of its terms that are "in conformity" with this Article, even though they may be inconsistent with other statutes. See Section 802. Subsection (a), however, does not attempt to specify who should be joined as parties to the arbitration agreement. Since the agreement and award operate solely as a contract between the parties to it, the condemnor will have practical incentive to make sure that the agreement is made with all persons who have an interest in the property it is seeking to acquire. In addition, this section does not attempt to specify the formalities associated with the execution of the agreement to arbitrate, but leaves these matters to existing law.

Under paragraph (a), the agreement to arbitrate could, where appropriate, be simplified by reference to the standard procedures for eminent domain arbitrations promulgated by the American Arbitration Association. These Eminent Domain Arbitration Rules are reprinted in 7 P. Nichols, *Law of Eminent Domain*, Appendix pp. 345-352 (rev. 3d ed. 1972).

Subsection (b) makes it clear that an agreement to arbitrate does not, except as expressly provided therein, preclude the necessity for compliance with other applicable statutory duties or conditions precedent relating to the acquisition of the property. For example, Sections 201 to 214, inclusive, of the Code prescribe the general statutory duties of persons seeking to acquire property for public use (e. g., the duty to make an offer to purchase at not less than the full appraised value of the property), while Sections 306 and 309 respectively require good faith purchase negotiations, and the adoption of a formal authorization, as conditions precedent to the commencement of a condemnation action. Subsection (b) contemplates that a waiver of these and any other applicable statutory requirements (e. g., the duty to prepare an environmental impact

6 possession before judgment, except to the extent expressly provided in
7 the agreement.

Comment

Section 1503 is designed to encourage arbitration of compensation issues without interfering with the adjudication of other issues typical of eminent domain litigation (e. g., right to take) in prior or concurrent court proceedings. Thus, an agreement to arbitrate may be made either before or after a condemnation action has been commenced. Special provisions defining the powers of the court with respect to the arbitration proceeding, when a condemnation action is pending, are set out in Section 1504.

1 Section 1504. [Effect of Pending Condemnation Action]

2 If a condemnation action has been commenced and is pending between
3 the parties to an arbitration agreement under this Article,

4 (1) a petition, motion, or other proceeding thereafter initiated
5 in connection with the arbitration shall be filed in and determined by the
6 court in the condemnation action;

7 (2) the court in the condemnation action may stay the determination
8 of an issue of compensation in the action until arbitration pursuant to the
9 agreement has been concluded; and

10 (3) the total or apportioned amounts of compensation as determined
11 by the arbitration award and confirmed by the court may be included in
12 the judgment of condemnation as the amount of compensation for the pro-
13 perty.

Comment

Section 1504 prescribes the functional relationship between an arbitration proceeding and a pending condemnation action relating to the same property. In general, judicial supervision of the arbitration proceedings and of proceedings relating to the arbitral award

is vested in the court in which the condemnation action is pending, with authority to stay the judicial determination of compensation while arbitration is proceeding.

1 Section 1505. [Absence of Concurrent Condemnation Action]

2 In the absence of a pending condemnation action relating to the
3 same property, a petition, motion, or other proceeding initiated in con-
4 nection with arbitration pursuant to an agreement under this Article shall
5 be filed in and determined by a court that would have both jurisdiction and
6 proper venue of the condemnation action if it had been commenced immedi-
7 ately prior thereto. Unless the agreement for arbitration otherwise pro-
8 vides, the total or apportioned amounts of compensation as determined
9 by the arbitration award and confirmed by the court may be entered as
10 a judgment with the same effect and subject to the same terms and con-
11 ditions as a judgment of condemnation of the subject property.

Comment

Section 1505 applicable when no condemnation action has been commenced, requires that judicial supervision of arbitration proceedings be in the same court in which a condemnation action concerning the same property could be properly filed. Subject to the terms of the agreement, the court is authorized to enforce the award, after it has been confirmed, by entering a judgment based on it that has the same force and effect as a judgment in a condemnation action. As to the powers of the court when a condemnation action is pending, see Section 1504.

1 Section 1506. [Arbitration Procedure]

2 Unless the arbitration agreement provides otherwise, the conduct
3 of the arbitration shall be subject to the following rules:

4 (1) The locale for the arbitration is the county in which the subject
5 property, or the major portion of that property, is located.

6 (2) The law of this State relating to the criteria for ascertaining
7 just compensation and damages, and the elements thereof, shall be
8 applied.

9 (3) The arbitration tribunal shall be the judge of the relevancy
10 and materiality of the evidence offered, and conformity to the legal rules
11 of evidence shall not be required.

12 (4) The amount of compensation determined by the arbitration
13 award must be within the range of the evidence presented by the parties.

14 (5) The condemnor shall pay the compensation of, and all expenses
15 and fees incurred by the arbitrators.

Comment

Section 1506 sets forth general rules of procedure governing the arbitration proceedings. These rules, which are based in part upon the Eminent Domain Arbitration Rules of the American Arbitration Association (in effect June 1, 1968), are controlling only to the extent that the arbitration agreement does not otherwise provide. Under Section 1502, these requirements would prevail over any inconsistent provisions of state law, absent a provision in the arbitration agreement to the contrary.

1 Section 1507. [Abandonment of Acquisition]

2 (a) Subject to the requirements of Subsection (b), an arbitration
3 under this Article may specify the terms and conditions, if any, under
4 which the condemnor may abandon the acquisition of the subject pro-
5 perty.

6 (b) Unless the arbitration agreement expressly waives the pro-
7 perty owner's right to reimbursement, in the event of abandonment of
8 acquisition after an arbitration agreement has been entered into, he is
9 entitled to recover from the condemnor:

10 (1) the same litigation expenses that would be recoverable
11 upon dismissal of an action for the acquisition of the property; and
12 (2) all other expenses, not included in recoverable litigation
13 expenses, reasonably and necessarily incurred by him in prepara-
14 tion for and in participating in the arbitration and in judicial pro-
15 ceedings in connection with the arbitration, including reasonable
16 attorney, appraisal, and engineering fees.

17 (c) If abandonment of acquisition occurs after the rendition of an
18 award in the arbitration proceedings, the amount of the expenses payable
19 under this section shall be determined as an additional issue in the arbi-
20 tration, unless the arbitration agreement expressly provides otherwise.
21 If the abandonment occurs before the rendition of the award, the amount
22 shall be determined by the court in a condemnation action, if one is
23 commenced, or in an independent action brought against the condemnor.

Comment

Section 1507 provides for the consequences of an abandonment of the property acquisition undertaking, in the context of an arbitration agreement. In general, the "condemnee" is entitled to recover litigation expenses (as defined in Section 103(7) of this Act) as well as to recover any non-duplicated expenses incurred in preparing for and participating in the arbitration proceedings.

While Subsection (a) permits the subject of abandonment to be treated in the arbitration agreement (e. g., the agreement may stipulate that the condemnor will not abandon the acquisition, or that abandonment will not be permitted after a specified point in time), these stipulations are declared to be "subject to the requirements of Subsection (b)." Subsection (b) makes it clear, consistent with the policies reflected in Sections 213 and 214, that the condemnor ordinarily must reimburse the property owner for litigation and arbitration expenses incurred by him as the result of the abortive attempt to acquire the property, unless the right to recover is expressly waived by written agreement between the parties. Subsection (c) specifies how the amount of expenses to be reimbursed is determined.

1 Section 1508. [Recordation of Agreement]

2 (a) An agreement under this Article, or a memorandum summariz-
3 ing its terms and describing the subject property, after being executed
4 and acknowledged by the parties, may be recorded, or rerecorded, in
5 the same manner and with the same effect as a conveyance of real pro-
6 perty.

7 (b) The record of the agreement or summary of agreement ceases
8 to be notice to any person for any purpose after two years following the
9 date of recordation of rerecordation under Subsection (a).

Comment

Section 1508 permits an agreement for arbitration, or a sum-
mary thereof, to be recorded for the purpose of providing construc-
tive notice to subsequent lienors and purchasers. This procedure
will make it unnecessary, where arbitration is agreeable to the
parties, for the condemnor to commence a condemnation action
merely for the purpose of obtaining the protection of the filing of
a notice of lis pendens.

ARTICLE XVI

[Effective Date and Repealer]

1 Section 1601. [Time of Taking Effect.]

2 This Code shall take effect [_____].

1 Section 1602. [Application.]

2 (a) Articles II through V of this Code apply only to condemnation
3 actions commenced on or after its effective date.

4 (b) Articles VI through XV of this Code apply to the fullest extent
5 practicable to pending condemnation actions commenced before its
6 effective date with respect to issues on which a judgment has not been
7 entered, and with respect to issues that are retried on or after its
8 effective date pursuant to an order of a trial or appellate court.

9 (c) In any condemnation action in which an appeal or a motion to
10 modify or vacate the verdict or judgment, or to grant a new trial, was
11 pending on the effective date of this Code, the law applicable before the
12 effective date of this Code governs the determination of the appeal or motion.

Comment

Under Subsection (a), the acquisition policies in Article II and the procedural requirements of Articles III, IV, and V of the Uniform Code are applicable to condemnation actions commenced after the effective date of the Code, but not to those earlier initiated or commenced. Every state already has adopted statutory provisions similar, although in most cases less sweeping in purview, to Article II, and all states have existing condemnation procedures that will have been invoked in previously commenced actions. Thus, no compelling public policy appears to require a retrospective application of these Articles.

6 Code are severable.

1 Section 1605. [Repealer.]

2 The following acts and all other acts and parts of acts inconsistent
3 with this Code are hereby repealed: [Here should follow the acts to be
4 specifically repealed, including any acts regulating the procedure for
5 condemnation actions.]