

Memorandum 72-48

Subject: Study 36.750 - Condemnation (Uniform Eminent Domain Act)

The committee drafting the Uniform Eminent Domain Code for the Commissioners on Uniform State Laws has prepared a First Tentative Draft of a portion of the Code and is presenting this draft for consideration by the National Conference of Commissioners on Uniform State Laws at its Annual Meeting which will be held in August in San Francisco.

The draft is very tentative, but it does represent the approach that the committee had decided to take on various matters. Because the Uniform Code will be a factor to be taken into consideration in drafting the California statute, the staff believes that the Commission will want to keep up with the developments on the Uniform Act and to draw on the Uniform Act where its provisions are determined to be useful in drafting the California statute. The following is an analysis of the first three articles of the First Tentative Draft of Articles I-III of the Uniform Code. We present for Commission consideration some matters of policy that we believe are presented by the first three articles. We attach a copy of the draft. The basic policy question, discussed below, is whether the Commission wishes to expand the scope of our comprehensive statute to include provisions relating to "acquisition" of property (fair acquisition policies and relocation) to conform to the scope of the Uniform Act.

Article I

The definitions and short title are still under study by the committee. The significant provision in Article I is Section 102 which specifies the scope of the Act. Note that the Act provides the exclusive procedure governing

"real property acquisitions"; the Uniform Act is not strictly limited to eminent domain matters. The Act is given this broad scope because the committee plans to include in the Act an article on "Policies Governing Land Acquisitions"--an article that is based on the provisions of the federal statute, a subject which, in California, has been covered by the 1971 relocation statute which is codified in the Government Code. Also, the committee has tentatively decided to include relocation and removal provisions in the Uniform Act even though those provisions apply to all property acquisitions, not just those involving condemnation.

There is some merit to including the fair acquisition policies provisions in the Uniform Act since many of the policies governing land acquisition apply only where condemnation is involved. The Commission should consider whether our comprehensive statute should include the provisions relating to land acquisition policies and relocation assistance. If the Commission decides to do this, the scope of the statute we are drafting would be the same as the scope of the Uniform Act. If the decision is to include these provisions, we will consider at a later time whether we wish to adopt the substance of the provisions in the tentative draft in Article II which states the policies governing land acquisition.

Article II

Some of the provisions in this article will be unnecessary because the matters covered will be covered in other portions of the comprehensive statute, E.g., Sections 204 (payment or deposit before surrender of possession), 212 (litigation expenses in abortive condemnation actions). The significant provisions to the scheme of the Uniform Act are found in Section 201 (compliance with fair acquisition practices required), Section 213 (waiver or excuse),

and Section 214 (validity of property acquisition not affected and compliance with federal requirements permitted). The Uniform Act would enforce the fair acquisition policies if a condemnation action is brought by permitting a preliminary objection by the condemnee that the policies have not been complied with. The court would then require compliance with the policies or make some other appropriate order. The California statute, on the other hand, provides that the statement of fair acquisition policies gives the property owner or occupant no rights and imposes no duties on the condemnor. For further discussion of the scheme of the Uniform Act, see the discussion in the Comment to Section 201 (pages 10 and 11). If the Commission decides not to include the substance of these provisions in the comprehensive statute, we will bring to your attention any pertinent provisions relating to condemnation when the problem with which they deal is considered. In such case, we will retain the statement of policies now codified in the Government Code to the extent necessary to deal with acquisitions not involving eminent domain and, if the scope of our comprehensive statute is not expanded, we will not be concerned with relocation provisions in our comprehensive statute.

Article III

Article III deals with proceedings before action. Sections 301-305 deal with entry to determine whether the property is suitable for the public use. We have already drafted provisions covering this subject and will bring to your attention any significant deviations in the Uniform Act when we consider comments on the comparable provisions of our comprehensive statute.

Article III in Sections 306-308 deal with a requirement of a good faith effort to purchase. Failure to make a good faith effort to purchase is to be

a ground under the Uniform Act for making a preliminary objection in the condemnation action. If such an objection is made, the court can require the condemnor to negotiate in good faith as a condition for maintaining the action or can make any other appropriate order, such as dispensing with the requirement if it determines that no purpose would be served by requiring the condemnor to make a good faith effort to purchase. If the Law Revision Commission decides to require good faith negotiations in our comprehensive statute, we will prepare a memorandum on this problem.

Sections 309-311 of Article III of the Uniform Act deal with the resolution of necessity. We suggest that consideration of these Uniform Act provisions be deferred because the committee will be doing further work on the provisions since it is aware of a number of problems not adequately dealt with in the tentative draft. For example, as drafted, the uniform provisions would make the resolution of a public entity or any private condemnor conclusive, and the committee also will be considering other problems in connection with these provisions. When these problems have been worked out by the committee, we plan to bring any significant deviations between the Uniform Act and our comprehensive statute to your attention at an appropriate time.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

FOR DISCUSSION ONLY

ARTICLES I, II AND III
UNIFORM EMINENT DOMAIN CODE

NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

MEETING IN ITS EIGHTY-FIRST YEAR

SAN FRANCISCO, CALIFORNIA

August 4 - 11, 1972

First Tentative Draft

(Third Working Draft)

ARTICLES I, II AND III

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.

Uniform Eminent Domain Code
Proposed Organizational Scheme

Article I	[General Provisions and Definitions]
Article II	[Policies Governing Land Acquisition]
Article III	[Proceedings Before Action]
Article IV	[Commencement of Action By Condemnor]
Article V	[Responsive Pleadings by Condemnee]
Article VI	[Possession Prior to Judgment]
Article VII	[Discovery and Pretrial Proceedings]
Article VIII	[Trial Proceedings]
Article IX	[Compensation Standards]
Article X	[Judgment and Allocation of Award]
Article XI	[Post-Judgment Proceedings]
Article XII	[Abandonment and Dismissal]
Article XIII	[Relocation and Removal Assistance]
Article XIV	[Arbitration]
Article XV	[Inverse Condemnation]
Article XVI	[Effective Date and Repealer]

TABLE OF CONTENTS

	<u>Page</u>
ARTICLE I--[General Provisions and Definitions]	1
Section 101. [Short Title.]	1
Section 102. [Scope of Act.]	1
Section 103. [Definitions.]	2
ARTICLE II--[Policies Governing Land Acquisition]	6
Section 201. [Application of Article.]	10, 11
Section 202. [Negotiation and Appraisal]	12
Section 203. [Offer to Purchase at Full Appraised Value].	13
Section 204. [Payment or Deposit Before Surrender of Possession]	15
Section 205. [Notice to Terminate Occupancy]	15
Section 206. [Rental Basis for Continued Occupancy]	16
Section 207. [Coercive Action Forbidden]	17
Section 208. [Offer to Acquire Uneconomic Remnants].	18
Section 209. [Acquisition of Improvements to be Removed].	20
Section 210. [Compensation for Buildings and Structures]	22
Section 211. [Expenses Incidental to Transfer of Title]	24
Section 212. [Litigation Expenses in Abortive Condemnation Actions]	26
Section 213. [Waiver and Excuse	27
Section 214. [Interpretation and Effect of Article]	29

TABLE OF CONTENTS--Page 2

	Page
ARTICLE III--[Proceedings Before Action]	30
Section 301. [Entry for Suitability Studies]	30
Section 302. [Court Order Permitting Entry]	31
Section 303. [Deposit of Probable Compensation]	34
Section 304. [Modification of Court Order]	35
Section 305. [Recovery of Damages, Costs, and Expenses]	37
Section 306. [Preliminary Efforts to Purchase]	40
Section 307. [Scope of Efforts to Purchase]	42
Section 308. [Purchase Efforts Not Required]	44
Section 309. [Condemnation Authorization]	46
Section 310. [Contents of Authorization]	48
Section 311. [Effect of Condemnation Authorization]	51

Article I

[General Provisions and Definitions]

1 Section 101. [Short Title.]

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

2 (a) This act provides the exclusive procedure governing
3 real property acquisitions, condemnation actions, and the
4 determination of compensation for condemned property. All
5 condemnation actions by a person exercising the power of
6 eminent domain shall be conducted in conformity with this
7 act.

8 (b) This act is supplemental to other statutes relating
9 to the acquisition of real property and to the exercise of

10 the power of eminent domain. In the event of any conflict
11 between another statute and this act with respect to any
12 subject governed by a provision of this act, this act
13 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. The assumption of the Code is that those matters are covered by other statutes.

Paragraph (a) makes the procedural provisions of the Code exclusive. 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 statutory provisions 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 therefore avoids possible disputes as to whether a particular provision is properly classifiable as "procedural" (and thus governed exclusively by the Uniform Code) or "substantive" (and thus arguably not subject to the 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) "condemn" means to take [or damage] [injure or
4 destroy] property by authority of law for a public purpose;

5 (2) "condemnation action" includes all acts incident to the
6 process of condemning property both before and after commence-
7 ment of suit;

8 (3) "condemnee" means a person who owns property that is
9 the subject of a prospective or pending condemnation action;

10 (4) "condemnor" means a person exercising or preparing
11 to exercise its power to condemn property;

12 (5) "compensation" means the just compensation required
13 to be paid for condemned property, together with any additional
14 sums required or authorized to be paid for damages, expenses,
15 fees, and costs incurred in connection with a condemnation action;

16 (6) "court" means a [] court of this state, and
17 includes, when the context requires, any [judge] [justice] of such
18 court;

19 (7) "litigation expenses" means the sum of the reasonable
20 costs, disbursements, and expenses, including reasonable attorney,

21 appraisal, and engineering fees, necessarily incurred in
22 preparation for, or as the result of participation in, court
23 proceedings.

24 (8) "owner" means a person who holds one of the following
25 interests in property, or a contract to purchase one of those interests:

26 (a) A fee title

27 (b) A life estate

28 (c) A lease with an expired term of at least 50 years

29 (d) An interest in a cooperative housing project which
30 includes the right to occupy a single-family dwelling unit.

31 (9) "person" includes an individual, partnership, corporation,
32 association, other legal or fiduciary entity, and a public entity;

33 (10) "personal property" means tangible or intangible assets
34 other than real property;

35 (11) "property" means a legally recognized right to or
36 interest in real property or personal property;

37 (12) "real property" means land and real estate, together
38 with buildings and other improvements, fixtures, or appurtenances
39 upon or connected with land; and includes an easement, servitude,
40 or other interest, right, title, estate, or claim in or to such
41 property;

42 (13) "public entity" means the State of [] and a
43 county, city, town, village, [township,] [borough,] special district,
44 or other governmental body, corporation, unit, subdivision, public
45 agency, public authority, or public officer exercising governmental
46 power under or pursuant to the authority of the state.

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, whether brought by public or private condemnors.

Article II

[Policies Governing Land Acquisition]

Comment

This article is intended to provide clear statutory assurances that state law governing land acquisition is in accord with the federal requirements prescribed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law No. 91-646, 84 Stat. 1894 (1971), herein referred to as the "Federal Uniform 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 Uniform 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 the Act will be adhered to.

The pertinent provisions of the Federal Uniform Policies Act are here set forth for reference purposes:

TITLE I—GENERAL PROVISIONS

Sec. 101. As used in this Act—

(1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government (except the National Capital Housing Authority), and wholly owned Government corporation (except the District of Columbia Redevelopment Land Agency), and the Architect of the Capitol, the Federal Reserve banks and branches thereof.

(2) The term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, and any political subdivision thereof.

(3) The term "State agency" means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and any department, agency, or instrumentality of a State or of a political subdivision of a State, or any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States.

(4) The term "Federal financial assistance" means a grant, loan, or contribution provided by the United States, except any Federal guarantee or insurance and any annual payment or capital loan to the District of Columbia. . . .

EFFECT UPON PROPERTY ACQUISITION

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.

(b) Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act.

**TITLE III--UNIFORM REAL PROPERTY ACQUISITION
POLICY****UNIFORM POLICY ON REAL PROPERTY ACQUISITION
PRACTICES**

Sec. 301. 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:

(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.

(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.

(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 appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, 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.

(8) 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.

(9) 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.

BUILDINGS, STRUCTURES, AND IMPROVEMENTS

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 adversely affected by the use to which such real property will be put.

(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 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.

EXPENSES INCIDENTAL TO TRANSFER OF TITLE TO UNITED STATES

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.

LITIGATION EXPENSES

Sec. 304. (a) The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

- (1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or
- (2) the proceeding is abandoned by the United States.

(b) Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was instituted.

(c) 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, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

REQUIREMENTS FOR UNIFORM LAND ACQUISITION POLICIES; PAYMENTS OF EXPENSES INCIDENTAL TO TRANSFER OF REAL PROPERTY TO STATE; PAYMENT OF LITIGATION EXPENSES IN CERTAIN CASES

Sec. 305. Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this title, unless he receives satisfactory assurances from such State agency that—

- (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301 and the provisions of section 302, and
- (2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304.

1 Section 201. [Application of Article]

2 In order to encourage and expedite the acquisition of real
3 property by agreement with owners, to avoid litigation and relieve
4 congestion in the courts, to assure consistent treatment for owners,
5 and to promote public confidence in practices and procedures
6 relating to the acquisition of real property for public use, a public
7 entity or a private person acting in the capacity of a condemnor,
8 when acquiring real property for any purpose, shall comply with applica-
9 ble provisions of sections 202 to 216, inclusive.

Comment

This section is an adaptation of the introductory paragraph to Section 301 of the Federal Uniform Policies Act.

The federal act is applicable only to state and local governmental land acquisitions funded, in whole or in part, by the Federal Government. Federal Uniform Policies Act, § 305. The present section, however, goes beyond the federal requirements, being applicable, whether or not federal financial assistance is available, to (a) all acquisitions of real property, by a public entity, as well as (b) all acquisitions of real property by a private person (e.g., a privately owned utility company) through the exercise of its power of eminent domain. To limit the statutory policies to public acquisitions could conceivably raise questions of possible inconsistency with the Equal Protection Clause, and with special legislation and uniformity requirements of state constitutions.

The phrase "to the greatest extent practicable," which is in the federal statute, has been deleted after the word "shall" on line 8. 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 as a prerequisite to federal funding. It is deemed unnecessary in the Model Code and duplication of the same phrase in the state statute could conceivably create doubts as to whether reliable state assurances of conformity with federal policy guidelines could be given. A limited "escape" provision designed to meet exceptional circumstances is included in the Code, below, as section 215.

The verb in the concluding clause has been changed from "shall be guided by" (which appears in the Federal statute) to "shall comply with." The intent is to make the policies in this article mandatory except to the limited extent departures are permitted under section 215.

Alternative Form

1 Section 201. [Application of Article]

2 A public entity, in acquiring real property in connection with
3 any program or project for which federal financial assistance is or
4 may be available to pay all or part of the cost, shall comply with the
5 provisions of sections 202 to 216 and provide such additional assur-
6 ances as may be required in order to qualify for the federal financial
7 assistance.

Comment

This section is an alternative to the broader version of Section 201, set out above, mandating compliance with the acquisition policies of the present Article. It would assure that public entities are under a duty, and have adequate authority, to conform to the land acquisition policies of this article, to the extent they constitute prerequisites to federal financial assistance as prescribed by the Federal Uniform Policies Act or any other applicable federal legislation. But this section neither authorizes or requires compliance where federal funding is not present, and it imposes no requirements upon private condemners.

1 Section 202. [Negotiation and Appraisal]

2 (a) A public entity [and a private condemnor] shall make
3 every reasonable effort to acquire real property by negotiation with
4 due diligence.

5 (b) Before the initiation of negotiations, the real property
6 shall be appraised for the purpose of determining the amount that
7 would constitute just compensation, and the owner or his designated
8 representative shall be given an opportunity to accompany the
9 appraiser during his inspection of the property.

Comment

This section is an adaptation of Section 301, pars. (1) and (2) of the Federal Uniform Policies Act. The bracketed words in

paragraph (a) should be deleted if the alternative version of Section 201 is incorporated into the Code as enacted.

As defined in Section 103 (12), the "real property," to which this section applies, includes improvements and fixtures thereon, as well as any easements, servitudes, or other interests relating thereto.

The term, "owner," as used in paragraph (b) is restrictively defined by Section 103 (8) to include only the holder or contract purchaser of a fee interest, life estate, long-term leasehold (over 50 years), or possessory interest in a cooperative housing project. This definition is based on the like definition promulgated by the Department of Transportation to implement the Federal Uniform Policies Act. See U.S. Dept. of Transportation Regulations, § 25.3, published in 36 Fed. Reg., No. 98 (May 20, 1971), p. 9178.

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

2 (a) Before the initiation of negotiations for real property,
3 the public entity [or the private condemnor] shall establish an
4 amount which it believes to be just compensation therefor, and
5 shall submit to the owner a prompt offer to acquire the property
6 for the full amount so established. In no event shall the amount
7 be less than the offeror's approved appraisal of just compensation
8 for the property.

9 (b) In establishing the amount believed to be just compen-
10 sation, the public entity [or the private condemnor] shall disregard
11 any decrease or increase in the fair market value of the property,
12 prior to the date of valuation, caused by the improvement for
13 which the property is to be acquired, or by the likelihood that the
14 property would be acquired for such improvement, other than that due
15 to physical deterioration within the reasonable control of the owner.

16 (c) The offeror shall provide the owner of the property to
17 be acquired with a written statement and summary of, or with an
18 appraisal report showing the basis for, the amount it established
19 as just compensation for the property. Where appropriate, the
20 compensation for the real property to be acquired and for the
21 damages to remaining real property shall be separately stated.

Comment

Section 203 is an adaptation of section 301, par. (3) of the Federal Uniform Policies Act. Unlike the federal statute, the section has been divided into lettered paragraphs for ease of reference.

Compliance with the requirements of this section may be waived or excused under the circumstances provided in Section 215.

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

2 An owner shall not be required to surrender possession of
3 property before the public entity [or private condemnor]--

4 (a) pays the agreed purchase price;

5 (b) pays, or deposits for the benefit of the owner in accor-
6 dance with applicable law, an amount not less than its approved
7 appraisal of just compensation or such other amount as the court
8 may require; or

9 (c) pays, or deposits in accordance with applicable law, the
10 full amount of the award of just compensation in the condemnation
11 action.

Comment

Section 204 is an adaptation of section 301, par. (4) of the
Federal Uniform Policies Act. Compliance may be waived or
excused as provided in Section 213.

1 Section 205. [Notice to Terminate Occupancy]

2 The construction or development of an improvement shall
3 be so scheduled that, even though all other legal requirements for

4 doing so are satisfied, no person lawfully occupying property shall
5
6 be required to move from a dwelling or to move his business or
7 farm operation in order to facilitate preparations for or work
8 relating to the improvement, unless he has received from the pur-
9 chaser or condemnor, not less than 90 days prior thereto, written
notice of the date by which such move is required to be completed.

Comment

Section 205 is an adaptation of section 301, par. (5) of the Federal Uniform Policies Act.

"Other legal requirements" refers to any legal conditions precedent to the taking of possession by the purchaser or condemnor (e.g., sufficient and timely deposit under "quick take" procedures; compliance with statutory removal and relocation assistance provisions, etc.).

The phrase "lawfully occupying property" is intended to limit this section to occupants who, in the absence of acquisition of the property for the improvement project, would be lawfully entitled to continue their occupancy beyond the scheduled removal date. Dispossession of an occupant for reasons not related to the improvement project (e.g., the eviction of a tenant for non-payment of rent or other breach of lease) is not affected by this section.

1 Section 206. [Rental Basis for Continued Occupancy]

2 If the public entity [or private condemnor] permits an owner
3 or tenant to occupy all or any part of the real property acquired on

4 a rental basis for a short term, or for a period subject to termina-
5 tion by the public entity on short notice, the amount of rent required
6 shall not exceed the rent, fairly prorated, payable under the terms
7 of the tenant's immediately preceding unexpired lease, if any, or
8 the fair rental value of the property to a short-term occupier,
9 whichever is lower.

Comment

Section 206 is an adaptation of section 301, par. (6) of the Federal Uniform Policies Act. Unlike the federal act, this section expressly provides for continued occupancy of only a part of the property acquired, as well as for occupancy of the entire parcel. It also limits the rental chargeable to a tenant holding over to a fairly prorated amount, based on his prior unexpired lease, where that is lower than the present fair rental value to a short-term occupier (the maximum that can be required from an owner holding over). The condemnor that takes by eminent domain is thus treated the same as when it acquires by purchase; and the tenant incurs no hardship in the form of rents increased above those of his unexpired lease.

1 Section 207. [Coercive Action Forbidden]

2 In no event shall a public entity [or private condemnor]
3 either advance the time of condemnation, or defer negotiations or
4 condemnation and the deposit of funds in court for the use of the

5 owner, or take any other action coercive in nature, in order to
6 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 Uniform Policies Act.

1 Section 208. [Offer to Acquire Uneconomic Remnants]

2 (a) If the acquisition of only part of a property would leave
3 its owner with an uneconomic remnant, the public entity [or pri-
4 vate condemnor] shall offer to concurrently acquire the remnant,
5 and may acquire it by any means expressly consented to by the
6 owner.

7 (b) "Uneconomic remnant" as used in this section means a
8 remainder, following partial acquisition of the parcel of which it is
9 a part, that will be left in such size, shape, or condition as to be
10 of little market value or to give rise to a substantial risk that the
11 public entity [or private condemnor] will be required to pay in com-
12 pensation for the part taken an amount substantially equivalent to the

- 13 amount that would be required to be paid if it and the remainder
14 were taken as an entire parcel.

Comment

Paragraph (a) of section 208 is based upon section 301, par. (9) of the Federal Uniform Policies Act. 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 could be deemed applicable only to acquisitions by agencies which are elsewhere empowered to acquire uneconomic remnants. Under section 102(b), this section 208 would prevail over any statutory provisions inconsistent with it.

Paragraph (b) is not based upon the federal act, but is believed to be consistent with its intent. Paragraph (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 economically 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 acquiring public entity or private 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 requires the acquiring agency to condemn the remnant if the offer is rejected; but it also does not preclude a condemnor, assuming it is legally empowered to do so, from acquiring an "uneconomic" remnant by condemnation action if the owner refuses to consent to the offer. On the other hand, if the owner is willing to dispose of the remnant but is not willing to agree to the amount of compensation stated in the offer, this section authorizes the parties to arrange for its acquisition by "any

5/15/72

means expressly consented to by the owner," including, for example, an agreement that the compensation will be determined by either arbitration or condemnation proceedings.

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 to estimate the relative advantages and corresponding costs and decide in light of the particular circumstances whether to undertake the acquisition.

A separate offer required by paragraph (a) must be made with respect to each remnant that meets the definition of paragraph (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); but the original appraisal relating to just compensation for 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 If a public entity acquires any interest in land, in connection
3 with a program or project under which federal financial assistance
4 is or may be available to pay all or part of the cost, it shall also
5 acquire at least an equal interest in all buildings, structures, or
6 other improvements located upon the land so acquired, which

- 7 (a) the public entity requires to be removed from
C 8 the land, or
9 (b) will be adversely affected by the use to which
10 the land will be put.

Comment

Section 209 is based upon section 302(a) of the Federal Uniform Policies Act. Its primary purpose is to permit public entities to qualify for federal financial assistance, where available. Unlike sections 202-208, therefore, this section does not apply to acquisitions that involve no federal funding, or to acquisitions by private condemnors. Whether the acquisition of improvements is either required or authorized in the excluded situations is governed by other provisions of state law.

C Since this section seeks primarily to satisfy the requirements of section 302(a) of the Federal Uniform Policies Act, its wording conforms generally to that of the federal statute. The substantive content to be accorded to operative terms, such as "at least an equal interest" and "adversely affected", is intended to be consistent with authoritative interpretations of the identical federal terms. See section 214 (b), below.

C 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 land 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 Buildings and Structures]

2 (a) If a building, structure, or other improvement to be
3 acquired by a public entity under section 209 is owned by a tenant, .

4 (1) the building, structure, or other improvement,
5 for the purpose of determining just compensation, shall be
6 deemed to be a part of the land to be acquired notwithstanding
7 the right or obligation of the tenant, as against the owner of
8 any other interest in the land to remove the building, structure,
9 or improvement at the expiration of his term; and

10 (2) the public entity, subject to paragraph (b) of this
11 section, shall pay the tenant the larger of the enhancement
12 to the fair market value of the land which the building, struc-
13 ture, or improvement contributes, or the fair market value
14 of the building, structure, or improvement, assuming its
15 removal from the land.

16 (b) Payment for any building, structure, or other improvemer
17 under paragraph (a) of this section may not be made unless:

18 (1) the owner of the land involved disclaims all
19 interest in the improvements;

20 (2) the tenant, in consideration for the payment,
21 assigns, transfers, and releases to the public entity all
22 his right, title, and interest in and to the improvement; and

23 (3) the payment is not duplicated by any payment
24 otherwise authorized by law.

25 (c) Nothing in this section shall be construed to deprive the
26 tenant of any right to reject payment hereunder and to obtain pay-
27 ment for his interest in the improvements in accordance with any
28 other applicable law.

Comment

Section 210 is based upon section 302(b) of the Federal Uniform Policies Act. Like section 209, with which it is inter-related, section 210 applies only in the case of acquisitions by public entities in connection with federally supported programs and projects. See section 209 and the Comment thereto.

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

2 (a) As soon as practicable after the date of payment of the
3 purchase price, or the date of payment of or deposit in court of
4 funds to satisfy the award of compensation in a condemnation action
5 to acquire real property, whichever is the earlier, the public entity
6 [or private condemnor] shall reimburse the owner for reasonable
7 expenses necessarily incurred by him for--

8 (1) recording fees, transfer taxes, and similar
9 expenses incidental to conveying the real property to the
10 public entity [or private condemnor];

11 (2) penalty costs for prepayment of any preexisting
12 recorded mortgage or other security instrument entered
13 into in good faith encumbering the real property; and

14 (3) the prorated portion of real property taxes paid
15 which are allocable to a period subsequent to the date of
16 vesting of title in, or the effective date of possession of the

17 real property by, the public entity [or private condemnor],

18 whichever date is the earlier,

19 (b) In addition to any amount required to be paid under para-

20 graph (a) of this section, the public entity [or private condemnor]

21 shall pay the owner interest at the annual rate of [%] upon any

22 part of said amount that is not paid within sixty days after the owner

23 has tendered written demand for payment.

Comment

Section 211(a) is based upon section 303 of the Federal Uniform Policies Act. The federal act, however, 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 section 211, thereby making such reimbursement both mandatory and subject to a uniform statutory standard (i. e., that they be "reasonable" and "necessarily incurred"). See section 214 (b), below.

Paragraph (b) is not included in the federal act. It is intended to expedite payments required by paragraph (a), and to clarify the extent of the acquiring agency's duty to pay interest under state law. The statutory interest rate in the adopting state should be inserted within the indicated brackets.

1 Section 212. [Litigation Expenses in Abortive Condemnation Actions]

2 (a) The court with jurisdiction of a condemnation action shall,
3 as part of the judgment therein, award to the owner of real property
4 that was a subject of the action his litigation expenses, if--

5 (1) the final judgment in the action is that the plaintiff
6 cannot acquire the real property, or any interest therein, by
7 condemnation; or

8 (2) the action is abandoned with respect to that real
9 property.

10 (b) Litigation expenses awarded under paragraph (a) of this
11 section are in addition to, but shall not duplicate, compensation for
12 expenses, costs, or disbursements authorized by any other law.

Comment

Section 212 is based upon sections 304(a) and (b) of the Federal Uniform Policies Act. The definition of "litigation expenses" in section 103(7) limits the amount of the required reimbursement to costs and expenses, including attorney, engineering, and appraisal fees, found by the court to be "reasonable" in light of all the circumstances and "necessarily incurred" in preparing for and litigating the action. An award under this section is available only for an "owner," as defined in section 103(8), and not for every defendant named in the action.

Additional provisions relating to the award of costs and expenses upon abandonment or dismissal of the action, and upon abandonment of a project before an action has been commenced, together with procedures for resolving disputes relative thereto, are included in Chapter [] below.

1 Section 213. [Waiver and Excuse]

2 Where not inconsistent with the requirements of an appli-
3 cable federal statute or regulation, a failure to satisfy the require-
4 ments or limitations imposed by any of the provisions of sections 201
5 to 212, inclusive:

6 (a) is waived by the failure of the property owner, in
7 the exercise of reasonable diligence, to object to or seek re-
8 lief based upon the fact of noncompliance;

9 (b) may be waived by valid written agreement between
10 the property owner and a public entity [or private condemnor]
11 seeking to acquire an interest in the property.

Comment

Section 213 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" federal 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," however, 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 201-212 even though, as provided in section 214, 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. Similarly, if a condemnor failed to make an offer to acquire an uneconomic remnant (as required by section 208), or failed to seek to acquire improvements located on the land which were to be removed from it (as required by section 209), the owner could insist that these deficiencies be corrected by appropriate defensive pleadings in the condemnation action. The proper remedy for noncompliance with the provisions of sections 201-212 will necessarily vary with the individual circumstances, and with the nature of the particular noncompliance.

The present section provides an "escape valve" from the general principle requiring full compliance with sections 201-212. Paragraph (a) 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 procedural party had taken appropriate steps to require compliance, and had done so with reasonable diligence. Under paragraph (b), the issue would center around whether there had been a waiver by "valid" written agreement. 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.

Procedural provisions designed to implement the policy underlying this section are included in subsequent parts of the proposed Code. See sections 308-309, and sections [].

1 Section 214. [Interpretation and Effect of Article]

2 (a) A failure to satisfy the requirements or limitations of
3 sections 201 to 212, inclusive, does not affect the validity of any
4 property acquisition by purchase or condemnation.

5 (b) Nothing in the provisions of this Article II limits the
6 power of a public entity, and every public entity is specifically
7 authorized, to act in full compliance with applicable federal statutes,
8 regulations, and policies prescribing conditions precedent to the
9 availability or payment of federal financial assistance for any pro-
10 gram or project in which the public entity is authorized to engage
11 or participate.

Comment

Paragraph (a) of this section is an adaptation of section 102(a) of the Federal Uniform Policies Act. While noncompliance with sections 201-212 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.

Paragraph (b) is intended to provide assurance that public entities 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 lawfully
3 enter upon real property and make surveys, examinations, photo-
4 graphs, tests, soundings, borings, samplings, and technical studies,
5 or engage in other similar activities upon the property, for the pur-
6 pose of determining whether the property is within the power of the
7 condemnor to take, or to determine its suitability, for public use.

8 (b) A lawful entry and suitability studies authorized by this section
9 do not constitute a trespass, but the condemnor's liability, if any, for
10 resulting damage is governed by section 305.

11 (c) An entry under this section is lawful if it (1) is preceded
12 by reasonable efforts to notify the owner, if available, and any other
13 person known to be in actual occupation of the property, as to the
14 planned entry and studies, (2) is undertaken during reasonable
15 daylight hours, (3) is accomplished peaceably and without unnecessary

16 damage, and (4) is not in violation of any other statute.

Comment

Section 301 provides express statutory authority for a condemnor to enter upon land, in advance of formal condemnation proceedings, 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).

Paragraph (a) imposes no time limitation upon entry, although suitability studies will normally precede the initiation of a formal condemnation action. In some cases, however, due to a modification of plans, change of program, or relocation of a project, additional suitability studies may become necessary after an action has been commenced with respect to the property.

Under paragraph (b), an entry and related suitability studies are lawful, and non-trespassory, provided the criteria of paragraph (c) are met. However, the condemnor is liable for damages to the extent provided in section 305.

Under paragraph (c), 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. If some other statute requires the owner's consent, however, the entry would not be lawful in light of clause (4) unless the consent were first obtained. Paragraph (c) leaves the ultimate determination of the "reasonableness" of efforts to notify the owner under clause (1), the "reasonableness" of the time of entry under clause (2), and the "peaceable" nature of the entry under clause (3) to the sound discretion of the court in light of all of the circumstances.

1 Section 302. [Court Order Permitting Entry]

2 (a) If reasonable efforts to accomplish a lawful entry or to
3 perform suitability studies upon real property as authorized by
4 section 301 are obstructed or denied by the owner or any other

person, the condemnor may apply to the court [in the county where the property or any part is located] for an order to show cause why the entry should not be permitted for the purpose of designated suitability studies. Notice of hearing on the order to show cause shall be served upon the persons, in the manner, and within the time designated by the court.

(b) Unless good cause to the contrary is shown at the hearing, the court shall make its order permitting the entry, and describing the nature and scope of the suitability studies which the court determines are reasonably necessary and authorized to be made upon the property. In addition to the provisions required by section 303, the order may include terms and conditions with respect to the time, place, and manner of such entry and studies which, in the judgment of the court, will facilitate the purpose of the order and minimize damage, hardship, or burden.

Comment

Section 302 authorizes, but does not require, the condemnor to seek judicial assistance in obtaining entry upon property for suitability studies. The procedure here described 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 studies is obstructed by the owner or some other person (e.g., a tenant). The existence of a clear judicial remedy of this kind should facilitate lawful entries by reducing any incentives of the owner or occupant to deny permission.

This section contemplates the use 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 present legislative scheme includes compensating the owner for damages caused by the entry, it seems reasonable to require the owner to show cause for not permitting entry, or for limiting the scope and nature of the suitability studies to be made.

Paragraph (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 in the condemnor 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 be regarded as a sufficient equitable ground for denying entry. Again, a showing that certain aspects of the proposed suitability studies were not reasonably necessary to support a rational judgment as to suitability, or that the condemnor proposed to employ study techniques that would unnecessarily interfere with the occupant's use and enjoyment of the premises despite the availability of other less onerous methods, might justify a limiting order restricting the time, place, or manner of the suitability studies. Under paragraph (b), the court has full discretion to condition and otherwise shape the order permitting entry in a manner conducive to the most 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 recovery of damages caused by the entry and suitability 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(b) shall in-
3 clude a determination by the court of the probable amount that will
4 fairly compensate the owner and the person in actual possession and
5 control of the property for any actual injury to the property and sub-
6 stantial interference with its use and possession deemed likely to
7 arise from the entry and suitability studies authorized by the order,
8 and shall require the condemnor to deposit that amount, if any, with
9 the court prior to actual entry.

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

Comment

Section 303 requires the condemnor to post security for probable damage caused by the entry and suitability studies, as a condition to obtaining a court order premitting entry. The statutory terms, "actual 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). Similarly, under some circumstances, the anticipated annoyance and interruption of peaceful use and enjoyment by the occupant may be a probable source of more than merely nominal damages. Because of the range of possible factual circumstances, 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.

Paragraph (b) requires the deposit to be retained by the court for at least 6 months, as a general rule. During this period, the owner or occupant of the property may apply to the court for payment of compensation, out of the deposited sum, for actual damages incurred by reason of the entry and suitability studies. See section 305.

1 Section 304. [Modification of Court Order]

2 (a) At any time after an order for entry has been made pur-
3 suant to sections 302 and 303, the court after notice may modify any
4 of the provisions of the order.

5 (b). If a deposit is required, or if the amount required to be
6 deposited is increased, by an order of modification, the court shall
7 specify the time within which the required amount must be deposited,
8 and may order any further entry and all suitability studies under the
9 order, as modified, stayed until the required deposit has been made.

Comment

Section 304(a) authorizes the modification of an order for entry and suitability studies upon motion and for good cause shown.

In some cases, as the result of an initial entry and survey, the condemnor may decide that more extensive exploratory studies should be made, including, perhaps, substantial excavations, soil tests, or cutting of trees. If the newly conceived studies were not authorized by the original court order, a modification of its terms may be granted, including an initial or increased deposit for compensation. To ensure the effectiveness of the security deposit requirement, a stay of proceedings may be required 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 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 studies 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 surplus can be disbursed at once to the condemnor pursuant to section 303(b).

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

2 (a) The condemnor is liable to the owner and to any other
3 person with an interest for actual injury to, and for substantial
4 interference with possession or use of, real property caused by
5 entry and suitability studies upon the property. This liability may
6 be enforced in a civil action against the condemnor or by motion in
7 the circumstances provided by paragraph (d). [No notice of claim
8 is necessary or prerequisite to the action or motion.]

9 (b) In an action or motion proceeding for recovery of damages
10 under this section, the prevailing party shall be awarded his court
11 costs necessarily incurred.

12 (c) The court shall award to a person found to be entitled to
13 damages under paragraph (a) his litigation expenses incurred in
14 proceedings under section 302, section 304, and this section 305 if
15 the court determines that the condemnor

16 (1) entered the property unlawfully;

17 (2) entered the property lawfully but thereafter
18 engaged in activities upon the property that were abusive
19 of or inconsistent with due regard for the interests of the
20 owner or occupant; or

21 (3) failed substantially to comply with, or wrong-
22 fully exceeded or abused the authority of an order made
23 under section 302 or section 304.

24 (d) If a deposit is available pursuant to section 303 or
25 section 304, a person entitled to damages under paragraph (a) may
26 upon noticed motion within [six] months following the termination of
27 the entry, request the court to determine the amount he is entitled
28 to recover. The court shall determine the amount and award it to
29 the person entitled thereto, and shall direct that its payment be made
30 out of the money on deposit. If the amount on deposit is insufficient
31 to pay the full amount awarded, the court shall enter judgment
32 against the condemnor for the unpaid portion.

5/15/72

Comment

Paragraph (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 is for use in states where a notice of claim requirement might be deemed applicable to limit liability. Liability under this section is not dependent upon the existence of a court order under section 302; it obtains 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 paragraph (a), as embodied in the terms, "actual 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). The former term is found in similar statutes of several states. See, e.g., Calif. Govt. Code § 816; Kans. Stat. Ann. § 68-2005 (1964); Pa. Stat. Ann., tit. 26, § 1-409 (Supp. 1969). The term, "actual," for example, precludes 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).

Paragraph (b) requires the court to award costs to the prevailing party in an action or proceeding for damages under this section, whether that party is the condemnor or the person seeking damages.

Paragraph (c) requires an award, in addition to damages, of "litigation expenses" incurred in proceedings, if any, under section 302 or 304, and under this section 305, where 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 sections 301-304. The term, "litigation expenses," as defined in section 103(1) includes a reasonable attorney's fee as well as appraisal and engineering fees necessarily incurred by the claimant.

Paragraph (d) 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 under section 303 or section 304. The time period allowed for the motion (here suggested as six months) should be made consistent with the period during which a deposit under sections 302 or 304 is required to be retained by the court. See section 302.

1 section 306. [Preliminary Efforts to Purchase]

2 (a) Except as provided in section 308, an action
3 to condemn property may not be maintained unless the con-
4 demnor has made a good faith effort to acquire the property
5 by purchase before commencing the action.

6 (b) An offer to purchase made in substantial com-
7 pliance with sections 202 and 203, accompanied or followed
8 by reasonable efforts to negotiate consistent with section
9 307, constitutes prima facie evidence of "good faith"
10 within the meaning of paragraph (a).

11 (c) Nothing in this section prevents negotiations
12 for settlement, or a settlement, after the commencement
13 of a condemnation action.

Comment

Section 306 requires that a condemnor, whether a public entity or a private person, should ordinarily (except as provided in section 308) attempt to purchase the property by agreement before commencing an eminent domain action. The purposes of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlement of just 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 Uniform 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 efforts to purchase 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 sections 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, since proof of an issue of failure to "negotiate" might be quite difficult to marshal, and the requirement (unless carefully defined) could provide an opportunity for dilatory tactics by property owners.

Paragraph (b) makes technical conformity with sections 202, 203, and 307, prima facie and not conclusive evidence of compliance. 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 307, and are not mere routine administrative formalities.

Paragraph (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
3 purchase under section 306, the condemnor, acting within
4 the scope of its powers and to the extent not otherwise
5 forbidden by law, may negotiate and contract with respect
6 to:

7 (1) any element of valuation or damages re-
8 cognized by law as relevant to the amount that
9 would constitute just compensation for the property;

10 (2) the kind of or nature of the interests in
11 the property to be acquired;

12 (3) the quantity, location, or boundary align-
13 ment of the property to be acquired;

14 (4) the removal, relocation, or disposition
15 of improvements upon the property and of personal
16 property not sought to be taken;

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

19 (6) the time and method of payment of agreed
20 compensation or other payments authorized by law;
21 and
22 (7) any other terms or conditions conducive
23 to acquisition of the property by agreement.
24 (b) This section does not authorize a condemnor
25 to enter into a contract in violation of law or in
26 excess of its authority.

Comment

Section 307 authorizes public and private condemnors to engage in broad negotiations, within the scope of their lawful powers, leading to purchase. 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" to purchase required by section 306. On the other hand, paragraph (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 of section 306, 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 Not Required]

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

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

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

13 (c) due to conditions not caused by or under
14 the control of the condemnor, there is a compelling
15 need to avoid the delay in commencing the condem-
16 nation action which compliance would require;

17 (d) facts known to the condemnor support
18 its reasonable belief that an offer and negotiations
19 for purchase would be futile or useless; or

20 (e) noncompliance is excused in whole or in
21 part by order of the court pursuant to section
22 [].

Comment

Section 308 provides an "escape" from what might otherwise be an unduly rigorous application of the requirement in section 306 that good faith efforts to purchase precede the commencement of a condemnation action. This makes it clear that the requirement is not jurisdictional, but is a waivable procedural prerequisite to suit.

Paragraph (a) recognizes the possibility of a 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 (b) excuses compliance in cases where it would be legally impracticable or impossible to acquire the property by purchase.

Paragraph (c) 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 (c) 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 shown by the condemnor, and practical effect of requiring compliance upon program commitments and budgetary allocations beyond the condemnor's control.

Paragraph (d) 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 asserted 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 (e) recognizes the court's power under section [] to grant relief from the usual consequences of noncompliance, upon a proper showing of good cause and lack of prejudice to the owner.

1 Section 309. [Condemnation Authorization]

2 (a) A condemnor [public entity] may not commence
3 a condemnation action until it has first adopted a
4 written resolution authorizing the action that substantially
5 conforms to the requirements of section 310.

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

[Alternate Version]

1 Section 309. [Condemnation Authorization]

2 (a) A condemnor [public entity] may not commence a
3 condemnation action until it has first adopted an order,
4 ordinance, resolution or other written declaration required
5 or permitted by law constituting a formal authorization
6 for commencement and prosecution of the action.

- 7 (b) In addition to other legal requirements, the
8 condemnation authorization shall include or be accompanied
9 by the public entity's determination of the matters
10 designated in section 310.
11 (c) The condemnation authorization may be amended
12 or rescinded at any time before the commencement of the
13 condemnation action.

[Contents of Authorization] Section 310.

Comment

(a) In addition to other legal requirements imposed by

Section 309 is presented in alternative versions. Both versions, as drafted, apply to all "condemnors," including both public entities and private persons (e.g., utility companies). The term, "public entity," should be substituted if private condemnors are intended to be omitted from the requirement.

The first version contemplates a uniform practice calling for adoption of a formal resolution. Accordingly, where other statutory requirements, if any, prescribing different methods by which condemnors may authorize a taking by eminent domain are repealed concurrently, the first version would be appropriate for enactment. The alternate version is for use when retention of other statutory types of official authorizations is contemplated.

This section (in both versions) requires that a formal determination to invoke the power of eminent domain be taken by the condemnor, 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 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) in order to secure the property sought to be taken; and (c) to establish an evidentiary basis for certain determinations of law and fact which are essential to an exercise of eminent domain power.

5/15/72

Under this section, the adoption of the required condemnation authorization is a prerequisite to commencement of a condemnation action. If the condemnor does not take the prescribed step, or acts defectively (e.g., without conforming substantially to section 310), it cannot condemn the property and the action should be dismissed. See section []. Dismissal under these circumstances would give rise to liability of the condemnor for litigation expenses. See section []. Defects or omissions in the authorization, however, may be cured by amendment before the commencement of the condemnation action. 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.

1 Section 310. [Contents of Authorization]

2 (a) In addition to other requirements imposed by
3 law, the condemnation authorization required by section
4 309 shall include all of the following:

5 (1) A general description of the proposed
6 public use for which the property is to be taken,
7 and a reference to the specific statute or statutes
8 authorizing the taking of the property by the
9 condemnor.

10 (2) A description of the general location
11 and extent of the property to be taken, with
12 sufficient detail for reasonable identification.

13 (3) A declaration that the condemnor has
14 found and determined each of the following:

15 a. The proposed use is required by
16 public convenience and necessity.

17 b. A taking of the described property is
18 necessary and appropriate for the proposed
19 public use.

20 c. The proposed public use is planned
21 and located in a manner most compatible with
22 the greatest public good.

23 (b) If possession of the property is to be taken
24 prior to judgment, the authorization shall also contain
25 a direction and authorization to designated officers or
26 agents of the public entity to take necessary and proper
27 steps in anticipation of, and to invoke procedures
28 authorized by law for, obtaining early possession of the
29 property.

Comment

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

The requisites here set out are not exclusive. Additional conditions may be established by other statutes, including, for example, the promulgation of an environmental impact statement, adoption of a relocation program, or obtaining the concurrent approval of designated public agencies. No reference is made in this section to any determination of "more necessary public use," the inclusion of which may be required by other statutes governing condemnation of property already dedicated to public use. This section does not replace other requirements but is cumulative with them.

Paragraph (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 expedite a determination by the condemnee as to whether the condemnor is acting within its lawful power of eminent domain.

Paragraph (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, which is required in connection with the actual condemnation action, is not regarded as essential at this preliminary stage of the proceedings.

Paragraph (a)(3) is designed to focus the attention of the responsible officers of the condemnor upon the fundamental policy determinations that are subsumed by a decision to exercise the power of eminent domain. Under clause a, 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 b 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 c 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.

Paragraph (b) requires a specific 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 or in this
3 section, a duly adopted and sufficient condemnation autho-
4 rization conclusively establishes the matters referred to
5 in paragraph (a)(3) of section 310.

6 (b) A condemnation authorization is of no force or
7 effect to the extent that its adoption, contents, or
8 determinations were influenced or affected by fraud,
9 corruption, bad faith, or gross abuse of discretion.

10 (c) If the property described in a condemnation
11 authorization is not located entirely within the terri-
12 torial boundaries of a local public entity adopting it,
13 the authorization creates only a rebuttable presumption
14 that the matters referred to in paragraph (a)(3) of
15 section 310 are true. This presumption is one affecting
16 the burden of proof.

Comment

Section 311 provides a uniform rule governing the effect of a condemnation authorization.

Paragraph (a) states the general rule that the resolution conclusively establishes the matters recited therein pursuant to section 310(a)(3): public convenience and necessity require 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.

This conclusive effect, however, is subject to four qualifications or exceptions:

First, the resolution or authorization must have been "duly adopted" in conformity with law applicable to formal actions taken by the condemnor, and must be "sufficient" under section 310 with respect to its contents.

Second, the rule of conclusive effect does not apply, in light of the exception in paragraph (a), to cases in which it is "otherwise provided by law or in this section." Inclusion of other "law" recognizes that in special circumstances (e.g., in adopting statutes authorizing condemnation by private persons), the legislature may wish to give the condemnation authorization less than conclusive effect.

Third, the resolution, under paragraph (b), may be 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.

Fourth, the resolution has only rebuttably presumptive effect if the property in question lies partly or wholly outside the boundaries of a local public entity, and thus may affect owners and territory for which the governing body has no direct political accountability. As a practical matter this qualification is limited to 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.

A resolution with conclusive effect under paragraph (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 contest the taking upon other grounds. For example, a condemnee could still contend that

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.

C

C

C