#36.53 11/21/72

Memorandum 72-76

Subject: Study 36.53 - Condemnation (Just Compensation--Additives)

It is the purpose of this memorandum to present an overall view of the various aspects of just compensation and measure of damages and to present various policy matters for Commission decision.

Attached Materials

Attached to this memorandum are various statutes and proposed statutes that you will want to study with care:

Exhibit I (pink)--California Relocation Assistance Statute (Govt. Code §§ 7260-7274)

Exhibit II (yellow)--Compensation Article of Draft of Model Eminent Domain Code (This is not the Uniform Laws Committee draft.)

Exhibit III (green)--Hawaii

Exhibit IV (gold)--Kansas

Exhibit V (blue)--Maryland

Exhibit VI (buff)--Michigan

Exhibit VII (white)--New Jersey proposed bill (not enacted)

Exhibit VIII (pink)--New Mexico

Exhibit IX (yellow)--Pennsylvania (This statute is the source of all later revisions and proposed revisions of laws in other states and had a significant effect on the enactment of the federal relocation assistance legislation.)

Exhibit X (green)--Texas

Exhibit XI (gold)--Vermont proposed legislation (not enacted)

Exhibit XII (blue)--Washington

Exhibit XIII (buff)--Wisconsin (This is an important statute.)

It is suggested that you read the attached exhibits with care; you may find something you believe would be desirable for California. The statutes of states not included above either do not contain significant compensation provisions or (in a few cases) are taken from the California statute.

Analysis of Various Aspects of a Compensation Statute

Based on an examination of the statutes of other states and of the legal literature in this field, the staff presents the following analysis of the various aspects of a compensation statute.

The Date of Valuation

This problem is considered in Memorandum 72-75.

The "Fair Market Value" Concept

This problem is considered in Memorandum 72-75.

The "Larger Parcel" Concept

This problem was previously discussed by the Commission and it was decided not to deal with the problem in our statute. Note, however, that the Model Code (Exhibit I, Section 605) and Pennsylvania (Exhibit IX, Section 605) provide a very liberal rule (probably more liberal than California) for determining what constitutes an "entire tract" or "one parcel" for compensation purposes.

Effect of Imminence of Condemnation

This problem is considered in Memorandum 72-75.

Compensation When Entire Parcel Taken

The amount to be paid for the property taken when the entire parcel is taken is considered in Memorandum 72-75. Note how this matter is treated in the various statutes attached. Do any of these appear to be a better method of dealing with the problem than is proposed in Memorandum 72-75?

Compensation When Only Portion of Parcel Taken

The amount to be paid when only a portion of a parcel is taken is considered in Memorandum 72-75. Note how this matter is treated in the various statutes attached. Do any of these appear to be a better method of dealing with the problem than is proposed in Memorandum 72-75?

Special Problems Presented by Machinery, Equipment, and Fixtures

We are deferring this problem until we receive the suggestions that Mr. Spencer is preparing. See Section 607 of the Model Code, Section 12-105(c) of the Maryland statute, Section 36 of the New Jersey bill, and Sections 603 and 607 of the Pennsylvania statute.

Relocation Expenses; Relocation Assistance Programs

As you know, California has enacted a relocation assistance statute (Exhibit I attached) that conforms to federal requirements and applies to all takings, not just those to which the federal requirements are applicable. The payments pursuant to the California relocation assistance statute are summarized in Exhibit XV. You should be familiar with the facts set out in Exhibit XV. The statute does much to mitigate the harsh effects of an acquisition of property for public use, especially in the case of displaced individuals and small businesses. The staff recommends no change in the relocation assistance statute.

Incidental Business Losses

In addition to relocation expenses (discussed above), incidental business losses usually include the following major items:

Loss of goodwill.

Expenses and lost profits resulting from the interruption caused the condemnee as a result of the condemnation.

Lost business profits that will result to the condemnee in the future.

Attached is a copy of a background research study entitled "A Study to Determine Whether the Owner of Real Property Should Be Compensated for Incidental Business Losses Caused by the Taking of Real Property by Eminent Domain." You should read this study for necessary background. You should also read the law review article attached as Exhibit XIV.

Goodwill. The problem of compensating for loss of goodwill is perhaps the most frequently recurring and most difficult one in this area of the law. See Kanner article for discussion. See also pages 7-12 of research study. To some extent, compensation is provided for what is essentially goodwill (or lost profits) under the relocation statute. Otherwise, there is no compensation for this loss under existing law.

Losses from business interruptions. To be distinguished from lost profits (a sometimes difficult distinction) are the business losses that are incurred by the condemnee as a result of the interruption to the business brought about by the taking. This is the loss that results from the difficult and time-consuming requirement that the condemnee find equivalent premises to those being taken and put his business in operation at the new premises. See the discussion on pages 12-16 of the research study.

Lost business profits. A condemnee often suffers permanent business damage as a result of the taking of his property. In some cases, he may not be able to relocate his business at all. In other cases, he simply takes less profit on the new property than he did on the condemned site. See the discussion on pages 16-20 of the research study.

Staff comment. Practitioners and legal writers have long urged that the types of incidental business losses discussed above should be compensable in an eminent domain proceeding. In New Jersey, the committee that prepared the proposal set out in Exhibit VII was unable to agree on a recommendation relating to incidental business losses. Nevertheless, even the relatively conservative proposal put forward in New Jersey was defeated because it was considered a "give away bill" (to use the words of the New Jersey public entity representative I discussed the bill with). The Vermont bill was more ambitious. It included compensation for loss of business profits. (See Exhibit XI attached.) The bill was not enacted.

The federal relocation statute (and the state counterpart) are intended to deal with the problem of incidental losses resulting from acquisition of property for public use. Although the compensation provided will sometimes be inadequate, the experience in California and elsewhere seems to indicate that it was a substantial step forward to secure enactment of this legislation and that it is extremely unlikely that the Legislature will be willing to make any substantial further improvements in the near future. At the same time, there is hope that the California Supreme Court will expand the scope of compensation for incidental business losses. See Klopping v. City of Whittier, Exhibit VII, Memorandum 72-75. The staff fears that an attempt to significantly expand the scope of compensation for incidental business losses would result (after legislative amendments) in an effort by the Legislature to restrict rather than expand such compensation. Accordingly, with a few specific exceptions discussed below, the staff recommends that no provision be made for lost profits and goodwill. Perhaps the best way to deal with the matter is to include a provision in the compensation chapter that, in addition to the compensation specifically provided, the condemnee is entitled to any compensation required by Article I, Section 14, of the California Constitution. This provision would preserve such rights as to compensation for an unreasonable delay in commencing the condemnation action (Klopping), unreasonable temporary interference with property owner's use of property in constructing public improvement, and the like. The staff prefers this approach to attempting to specify those consequential damages to which the condemnee is entitled. Compare Sections 612 and 613 of Model Code, Sections 612 and 613 of Pennsylvania statute.

Lost Rent

In 1960, Wisconsin enacted legislation to compensate condemnees for:

> Rental loss exceeding normal experience where proved to be caused by the public land acquisition project and when the vacancy occurs after the parcel is shown on a relocation order.

The staff recommends a comparable provision be included in our statute and that the provision not require a showing of an unreasonable delay in bringing the condemnation action. Perhaps the provision could be limited to rental loss after the filing of the complaint, and the right to recover for prior rental loss would be limited to the amount recoverable under Klopping.

Cost of Plans to Improve Property

The Wisconsin statute provides compensation for:

> Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

The staff recommends a comparable provision be included in our statute but that compensation be provided only if the expenses were incurred at a time when it was reasonable to expect that the property would not be taken for the public project.

Litigation Expenses

The Commission has determined not to provide generally for the recovery of the expenses of attorneys and expert witnesses or for expenses of preparation of maps, photographs, surveys, and the like. We will consider at a later time such matters as costs in the trial court and costs on appeal.

Other Items

We plan to prepare memoranda in the future to deal with the following matters: expenses incidental to transfer of title to condemnation (covered in relocation assistance statute), proration of taxes, interest, burden of proof on damages and benefits.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

CHAPTER 16. RELOCATION ASSISTANCE [NEW]

Sec.
7260. Definitions.
7261. Relocation advisory assistance by public entity; local offices.
7261.5 Contracts with private entity for services; use of other governmental entities.
7262. Compensation for displaced person; amount.
7263. Additional payment to displaced dwelling owner; amount.
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7264.5 Comparable replacement housing; use of funds; tax assessment information [New].
7265. Additional payment to contiguous property owner; amount.
7265.3 Payments and advice to person who moves as result of rehabilitation or demolition program [New].
7265.4 Expenses of owner; reimbursement [New].
7266. Review by public entity; finality.
7267. Guidelines for public entities [New].
7267.1 Acquisition by negotiation; appraisal [New].
7267.2 Just compensation; offer of fair market value; written statement [New].
7267.3 Scheduling construction or development; written notice; time [New].
7267.4 Fair rental value; short-term occupier [New].
7267.5 Coercion to compel agreement on price [New].
7267.6 Condemnation proceedings; institution by public entity instead of by owner [New].
7267.7 Acquisition of entire property; avoidance of uneconomic remnant [New].
7267.8 Payments; law governing [New].
7268. Rules and regulations.
7269. Status of payments; [illegible] public assistance.
7270. Existence of damages on date of enactment of chapter.
7271. Severability.
7272. Protection of owner or occupant; law governing [New].
7272.3 Legislative intent; minimum requirements; federal funds [New].
7272.5 Existent elements of damage [New].
7273. Compensation for moving expenses of displaced persons [New].
7274. Construction of sections 7267 to 7267.7 [New].

§ 7260. Definitions

As used in this chapter:

(a) "Public entity" includes the state, the Regents of the University of California, a county, city, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state when acquiring real property, or any interest therein, in any city or county for public use * * *.

(b) "* * * Person" means any individual, * * * partnership, corporation, or association.

(c) "Displaced person" means any person who moves from real property * * *, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of a written order from a public entity to vacate the real property, for public use. * * *

(d) * * * "Business" means any lawful activity, except a farm operation, conducted primarily:

(1) For the purchase, sale, lease, or rental of personal and real property, and * * * for the manufacture, processing, or marketing of products, commodities, or any other personal property;

* * * (2) For the sale of services to the public;

* * * (3) By a nonprofit * * * organization; or

(4) Solely for the purpose of Section 7262 for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display, whether or not such display is located on the premises on which any of the above activities are conducted.

* * * (e) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale * * * or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

* * * (f) "Affected property" means any real property which actually declines in fair market value because of acquisition by a public entity for public use of other real property and a change in the use of the real property acquired by the public entity.

* * * (g) "Public use" means a use for which real property may be acquired by eminent domain.

(h) "Mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

§ 7261. Relocation advisory assistance by public entity; local offices

(a) A public entity * * * shall provide relocation advisory assistance to any * * * person, business, or farm operation displaced because of the acquisition of real property by that public entity for public use.

(b) In giving such assistance, the public entity may establish local relocation advisory assistance offices to assist in obtaining replacement facilities for * * * persons, businesses, and farm operations which find that it is necessary to relocate because of the acquisition of real property by the public entity.

(c) Such advisory assistance shall include:

(1) Determining the need, if any, of displaced persons for relocation assistance.

(2) Providing current and continuing information on the availability, prices, and rentals of comparable decent, safe, and sanitary housing for displaced persons, and of comparable commercial properties and locations for displaced businesses.

(3) Assuring that, within a reasonable period of time, prior to displacement, to the extent that it can be reasonably accomplished, there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities, and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced persons who require such dwellings and reasonably accessible to their places of employment, except that, in the case of a federally funded project, a waiver may be obtained from the federal government.

(4) Assisting a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location.

(5) Supplying information concerning federal and state housing programs, disaster loan programs, and other federal or state programs offering assistance to displaced persons.

(6) Providing other advisory services to displaced persons in order to minimize hardships to such persons.

(d) The public entity shall coordinate its relocation assistance program with the project work necessitating the displacement and with other planned or proposed activities of other public entities in the community or nearby areas which may affect the implementation of its relocation assistance program.

§ 7261.5 Contracts with private entity for services; use of other governmental entities

In order to prevent unnecessary expenses and duplications of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons under this chapter, a public entity may enter into a contract with any individual, firm, association, or corporation for services in connection with such program, or may carry out its functions under this chapter through any federal, state, or local governmental agency having an established organization for conducting relocation assistance programs. Any public entity may, in carrying out its relocation assistance activities, utilize the services of state or local housing agencies or other agencies having experience in the administration or conduct of similar housing assistance activities.

§ 7262. Compensation for displaced person; amount

(a) As a part of the cost of acquisition of real property for a public use, a public entity * * * shall compensate a displaced person for his:

(1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property.

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity.

(3) Actual and reasonable expenses in searching for a replacement business or farm.

(b) Any displaced person who moves from a dwelling who elects to accept payments authorized by this subdivision in lieu of the payments authorized by subdivision (a) * * * shall receive a moving expense allowance, determined according to a schedule established by the public entity, not to exceed * * * three hundred dollars ($300), and in addition a dislocation allowance of * * * two hundred dollars ($200).

(c) Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this subdivision in lieu of the payment authorized by subdivision (a) * * *, shall receive a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, * * * except that such payment shall not be less than two thousand five hundred dollars ($2,500) nor more than ten thousand dollars ($10,000). In the case of a business, no payment shall be made under this subdivision, unless the public entity is satisfied that the business cannot be relocated without a substantial loss of patronage * * * and is not a part of a commercial enterprise having at least one other establishment * * * not being acquired, which is engaged in the same or similar business. For purposes of this subdivision, the term "average annual net earnings" means one-half of any net earnings of the business, or farm operation, before federal, state, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property being acquired, or during such other period as the public entity determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two-year or such other period. To be eligible for the payment authorized by this subdivision, the business or farm operation shall make available its state income tax records, and its financial statements and accounting records, for audit for confidential use to determine the payment authorized by this subdivision. In the case of an outdoor advertising display, the payment shall be limited to the amount necessary to physically move or replace such display.

(d) Whenever the acquisition of real property used for a business or farm operation causes the person conducting the business or farm operation to move from other real property, or to move his personal property from other real property, such person shall receive payments for moving and related expenses under subdivision (a) or (b) and relocation advisory assistance under Section 7261 for moving from such other property.

§ 7263. Additional payment to displaced dwelling owner; amount

(a) In addition to the payments * * * required by * * * Section 7262, the public entity, as a part of the cost of * * * acquisition, shall make a payment to the owner of real property acquired for public use which is improved with a * * * dwelling actually owned and occupied by the owner for not less than * * * 180 days prior to the * * * initiation of negotiation for the acquisition of such property.

(b) Such payment, not to exceed * * * fifteen thousand dollars ($15,000), shall be based on the following factors:

(1) The amount, if any, which, when added to the acquisition payment, equals the * * * reasonable cost of a comparable replacement dwelling determined, in accordance with standards established by the public entity, to be a decent, safe and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and the * * * displaced person's place of employment, and available on the market.

(2) The amount, if any, which will compensate the displaced owner for any increased interest costs which he is required to pay for financing the acquisition of a comparable replacement dwelling. The amount shall be paid only if the acquired dwelling was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than 180 days prior to the initiation of negotiations for the acquisition of such dwelling. The amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

(3) Reasonable expenses incurred by the displaced owner for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(c) Such payment shall be made only to a displaced owner who purchases and occupies a replacement dwelling that meets standards established by the public entity within one year subsequent to the date on which he * * * moves from the dwelling acquired by the public entity or the date on which he receives from the public entity final payment of all costs of the dwelling acquired by the public entity, whichever is the later date.

§ 7264. Additional payment to displaced individual or family renters; amount

(a) In addition to the * * * payments required by * * * Section 7262, as a part of the cost of acquisition, the public entity * * * shall make a payment to any * * * displaced person displaced from any dwelling not eligible to receive a payment under Section 7263 which was actually and lawfully occupied by such * * * person for not less than 90 days prior to the * * * initiation of negotiation by the public entity for the acquisition of such property.

(b) Such payment, not to exceed * * * four thousand dollars ($4,000), shall be the additional amount which is necessary to enable such * * * person to lease or rent for a period not to exceed * * * four years, or to make the downpayment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate such * * * persons in areas not generally less desirable in regard to public utilities and public and commercial facilities.

(c) If the payment is to be used as a downpayment for the acquisition of a decent, safe, and sanitary dwelling of such standards, the payment shall not exceed two thousand dollars ($2,000), unless the amount in excess thereof is equally matched by such person.

§ 7264.5 Comparable replacement housing; use of funds; tax assessment information

(a) If comparable replacement housing is not available and the public entity determines that such housing cannot otherwise be made available, the public entity shall use funds authorized for the project for which the real property, or interest thereof, is being acquired to provide such housing.

(b) No person shall be required to move from his dwelling because of its acquisition by a public entity, unless there is replacement housing, as described in paragraph (3) of subdivision (c) of Section 7261, available to him.

(c) For purposes of determining the applicability of subdivision (a), the public entity is hereby designated as a duly authorized administrative body of the state for the purposes of subdivision (c) of Section 408 of the Revenue and Taxation Code.

§ 7265. Additional payment to contiguous property owner; amount

(a) In addition to the * * * payments required by * * * Section 7262, as a cost of acquisition, the public entity * * * shall make a payment to any affected property owner meeting the requirements of this section.

(b) Such affected property is immediately contiguous to property acquired for airport purposes and the owner shall have owned the property affected by acquisition by the public entity not less than * * * 180 days prior to the * * * initiation of negotiation for acquisition of the acquired property.

(c) Such payment, not to exceed * * * fifteen thousand dollars ($15,000), shall be the amount, if any, which equals the actual decline in the fair market value of the property of the affected property owner caused by the acquisition by the public entity for airport purposes of other real property and a change in the use of such property.

(d) The amount, if any, of actual decline in fair market value of affected property shall be determined according to rules and regulations adopted by the public entity pursuant to this chapter. Such rules and regulations shall limit payment under this section only to such circumstances in which the decline in fair market value of affected property is reasonably related to objective physical change in the use of acquired property.

§ 7265.3 Payments and advice to person who moves as result of rehabilitation or demolition program

A public entity may make payments in the amounts prescribed in this chapter, and may provide advisory assistance under this chapter, to a person who moves from a dwelling, or who moves or discontinues his business, as a result of a rehabilitation or demolition program, or enforcement of building codes, by the public entity.

§ 7265.4 Expenses of owner; reimbursement

In addition to the payments required by Section 7262, as a cost of acquisition, the public entity, 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 public entity deems fair and reasonable, for expenses the owner necessarily incurred for recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the public entity.

§ 7266. Review by public entity; finality

Any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the public entity, and the decision of the public entity shall be final.

§ 7267. Guidelines for public entities

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 Acquisition by negotiation; appraisal

(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 Just compensation; offer of fair market value; written statement

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.

§ 7267.3 Scheduling construction or development; written notice; time

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 will be available, or to move his business or farm operation, without at least 90 days' written notice from the public entity of the date by which such move is required.

§ 7267.4 Fair rental value; short-term occupier

If the public entity 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 public entity on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

§ 7267.5 Coercion to compel agreement on price

In no event shall the public entity 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.

§ 7267.6 Condemnation proceedings; institution by public entity instead of by owner

If any interest in real property is to be acquired by exercise of the power of eminent domain, the public entity shall institute formal condemnation proceedings. No public entity shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

§ 7267.7 Acquisition of entire property; avoidance of uneconomic remnant

If the acquisition of only a portion of a property would leave the remaining portion in such a shape or condition as to constitute an uneconomic remnant, the public entity shall offer to and may acquire the entire property if the owner so desires.

§ 7267.8 Payments; law governing

(a) Except as provided in subdivision (b), payments under the provisions of this chapter shall be made to eligible persons in accordance with such rules and regulations as shall be adopted by the State Board of Control for property acquisitions by a state agency, or the governing body of any other public entity, for property acquisitions by such entity.

(b) Payments * * * under the provisions of this chapter by the Department of Public Works for property acquisitions shall be in accordance with such rules and regulations as shall be adopted by the * * * department * * *.

(c) Such regulations shall provide that the payments and assistance required of a public entity under this chapter shall be administered in a manner that is fair and reasonable and as uniform as practicable. The regulations shall also provide that the payments shall be made as promptly as possible or, in hardship cases, in advance. In addition, the regulations shall provide a reasonable mileage limitation in determining the actual and reasonable expense in moving a business for purposes of Section 7262.

Section 7268 of the Government Code is repealed.

§ 7268. Status of payments; income tax and public assistance

No payment received by any person under this chapter shall be considered as income for the purposes of the Personal Income Tax Law, Part 10 (commencing with Section 17001) of Division 2 of the Revenue and Taxation Code, or the Bank and Corporation Tax Law, Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code, nor shall such payments be considered as income or resources to any recipient of public assistance and such payments shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under Part 3 (commencing with Section 11000) of Division 9 of the Welfare and Institutions Code.

§ 7270. Existence of damages on date of enactment of chapter

Nothing contained in this chapter shall be construed as creating in any condemnation proceedings brought under the power of eminent domain any element of damages not in existence on the date of enactment of this chapter.

§ 7271. Severability

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

§ 7272. Protection of owner or occupant; law governing

If under any other provision of law of this state the owner or occupant of real property acquired by a public entity for public use is given greater protection than is provided by Sections 7265.3 to 7267.8, inclusive, the public entity shall also comply with such other provision of law.

§ 7272.3 Legislative intent; minimum requirements; federal funds

It is the intent of the Legislature, by this chapter, to establish minimum requirements for relocation assistance payments by public entities. This chapter shall not be construed to limit any other authority which a public entity may have to make other relocation assistance payments, or to make any relocation assistance payment in an amount which exceeds the maximum amount for such payment authorized by this chapter.

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.

§ 7272.5 Existent elements of damage

Nothing contained in this article shall be construed as creating in any condemnation proceeding brought under the power of eminent domain, any element of damages not in existence on the date the public entity commences to make payments under the provisions of this article as amended by the act which enacted this section at the 1971 Regular Session of the Legislature.

7273.

Funds received pursuant to Sections 2106 and 2107 of the Streets and Highways Code may be expended by * * * any city to * * * provide relocation advisory assistance, and to make relocation assistance payments, to displaced persons * * * displaced because of the construction of city highways or streets.

§ 7274. Construction of sections 7267 to 7267.7

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.

Memorandum 72-76

EXHIBIT II

Draft of Model Eminent Domain Code

Committee on Condemnation Law--Section of Real Property, Probate and Trust Law, American Bar Association (Fall 1967)

ARTICLE VI. JUST COMPENSATION AND MEASURE OF DAMAGES

SEC. 601. JUST COMPENSATION

The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this Article.

SEC. 602. MEASURE OF DAMAGES

Just compensation shall consist of the difference between the full market value of the condemnee's entire property interest immediately before condemnation and as unaffected thereby and the full market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this Article.

SEC. 603. FAIR MARKET VALUE

Fair market value shall be the price which would be agreed to by a willing and informed buyer and seller taking into consideration, but not limited to, the following factors:

1. The public use of the property and its value for such use.
2. The highest and most profitable use for which the land is likely to be needed in the reasonably foreseeable future.
3. The machinery, equipment and fixtures forming part of the real estate taken.
4. Other factors as to which evidence may be offered as provided in Article VII.

SEC. 604. EFFECT OF IMMINENCE OF CONDEMNATION

Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

SEC. 605. CONTIGUOUS TRACTS; UNITY OF USE

Where all or part of several contiguous tracts owned by one owner is condemned or a part of several noncontiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

SEC. 606. EFFECT OF CONDEMNATION USE ON AFTER VALUE

In determining the full market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages and benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. The enhancement, if any, in value of remaining adjoining property of the condemnee by reason of the construction or improvement made or contemplated by the condemnor, shall be offset against the damage, if any, resulting to such remaining adjoining property of the condemnee by reason of the construction or improvement, but such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property, there shall be no recovery over against such condemnee for such excess.

SEC. 607. REMOVAL OF MACHINERY, EQUIPMENT OR FIXTURES

In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The condemnee may within 30 days of such notice elect to remove such machinery, equipment or fixtures, unless this time be extended by the condemnor. If the condemnee elects such a removal, the damages shall be reduced by the fair market value thereof severed from the real estate.

SEC. 608. REMOVAL EXPENSES

The person having legal possession of machinery, equipment or fixtures on the condemned property, not forming part of the realty, including a tenant not entitled to any proceeds of the condemnation, if under the lease the tenant has the right to remove said machinery, equipment or fixtures, shall be entitled to, as damages, the reasonable expenses of the removal, transportation, and reinstallation of such machinery, equipment or fixtures. Reasonable expenses under the provisions of this section shall not exceed $25,000.00 and in no event shall such expenses exceed the market value of the machinery, equipment or fixtures.

SEC. 609. BUSINESS DISLOCATION DAMAGES

The condemnee shall be entitled to damages, as provided in this section, for dislocation of a business located on the condemned property, and only where it is shown that the business cannot be relocated without substantial loss of patronage. Compensation for such dislocc-

tion shall be the actual monthly rental paid for the business premises, or if there is no lease, the fair rental value of the business premises, multiplied by the number of months remaining in the lease, not including unexercised options, not to exceed 24 months or multiplied by 24 if there is no lease. The amount of such compensation paid shall not exceed $5,000.00 and shall not be less than $250.00. A tenant shall be entitled to recover for such business dislocation even though not entitled to any of the proceedings of the condemnation.

SEC. 610. MOVING EXPENSES

The person having legal possession shall be entitled to, as damages, the reasonable moving expenses for personal property other than machinery, equipment or fixtures, not to exceed $500.00, when personal property is moved from a place of residence and not to exceed $25,000.00 when personal property is moved from a place of business. Receipts therefore shall be prima facie evidence of reasonable moving expenses. A tenant shall be entitled to recover these moving expenses even though he is not entitled to any of the proceeds of condemnation. In no event shall such expenses exceed the market value of such personal property.

SEC. 611. DELAY COMPENSATION

The condemnee shall not be entitled to compensation for delay in payment during the period he remains in possession after the condemnation, nor during such period shall a condemnor be entitled to rent or other charges for use and occupancy of the condemned property by the condemnee. Compensation for delay in payment shall, however, be paid at the rate of six per cent (6%) per annum from the date of relinquishment of possession of the condemned property by the condemnee, or if the condemnation is such that possession is not required to effectuate it, then delay compensation shall be paid from the date of condemnation; provided, however, that no compensation for delay shall be payable with respect to funds paid on account, or by deposit in Court after the date of such payment or deposit. Compensation for delay shall not be included by the Commissioners or the Court or jury on appeal as part of the award or verdict, but shall at the time of payment of the award or judgment be calculated as above and added thereto. There shall be no further or additional payment of interest on the award or verdict.

SEC. 612. CONSEQUENTIAL DAMAGES

All condemnors, including the State, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken. Such condemnors are also liable as to damages for deprivation by reason of increased exposure to fire, unsightliness of cuts and fills, and destruction of water courses, insofar as they affect the market value of the land.

SEC. 613. DAMAGES FOR VACATION OF ROADS

Whenever a public road, street, or highway is vacated, the affected owner may recover damages for any injuries sustained thereby, even though no land is actually taken.

SEC. 614. PRORATION OF REAL ESTATE TAXES

At the time of payment of the damages, the condemnor shall pay to the condemnee as part of the damages the pro rata portion of all real property taxes, water and sewer charges, paid to a taxing entity or a municipal authority by the condemnee with respect to the condemned property, allocable to a period subsequent to the filing of the declaration of taking or relinquishment of possession, whichever occurs later.

SEC. 615. UNIQUE OR SPECIAL USE

The condemnor or condemnors, including the State, shall be liable for the replacement costs of a building which is

unique for a special use, and when the particular use that an owner makes of his property is impaired, all condemnors, including the State, shall be liable for damages to that use as distinguished from future injury thereto.

SEC. 616. HARVESTING AND MARKETING OF CROPS

The condemning agency may permit the owner of the property taken to harvest and retain the financial benefits for crops planted before or after filing a declaration of taking and the serving of notice, if the condemnee, in writing, to assume the responsibility for the completion of the growing process and the harvesting and marketing of the crops.

If the condemnor takes possession of the property at a time when such action prevents the condemnee from harvesting and marketing crops planted before or after filing a declaration of taking or serving notice, then the value of such crops shall be included in the compensation awarded for the property taken.

EXHIBIT III

Hawaii

§101-23 Damages assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed. If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, and also how much the portion not sought to be condemned will be specifically benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as compensation or damages. In case of the exercise of the power of eminent domain by the city and county of Honolulu in furtherance of any governmental power under section 70-111 and the improvement ordinance of the city, the amount of damages or compensation assessed, or awarded, or agreed upon in any compromise approved by motion of the city council shall in no case be construed as limiting or affecting the power of the city council to distribute any portion of the cost upon any property found to be benefited thereby proportioned as provided by law in the exercise of their judgment whether under an improvement district or frontage improvement created before or after the acquisition of any such land. If condemnation is for the purpose of widening or realigning any existing highway or other public road, the owner of the property condemned shall be entitled to full compensation for the property actually taken and special benefits shall be considered only insofar as the value of the benefits shall not exceed the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff. That is, if the special benefits shall be equal to the severance damages, then the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the special benefits shall be less than the severance damages, then the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the land taken. [L 1896, c 45, §13; am L 1919, c 63, §2; RL 1925, §821; RL 1935, §63; RL 1945, §314; am L 1947, c 200, §1(c); am L 1953, c 269, §1; RL 1955, §8-21]

EXHIBIT IV

Kansas

SEC. 13. *Compensation.* (*a*) *Necessity.* Private property shall not be taken or damaged for public use without just compensation.

(*b*) *Taking entire tract.* If the entire tract of land or interest therein is taken, the measure of compensation is the value of the property or interest at the time of the taking.

(*c*) *Partial taking.* If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

(*d*) *Factors to be considered.* In ascertaining the amount of compensation and damages as above defined, the following factors, without restriction because of enumeration, shall be given consideration if shown to exist but they are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damages under the provisions of subsections (*b*) and (*c*) of this section:

1. The most advantageous use to which the property is reasonably adaptable.
2. Access to the property remaining.
3. Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
4. Productivity, convenience, use to be made of the property taken, or use of the property remaining.
5. View, ventilation and light, to the extent that they are beneficial attributes to the use to which the remaining property is devoted or to which it is reasonably adaptable.
6. Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land needed to make the change in the improvement.
7. Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.
8. Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.
9. Destruction of a legal nonconforming use.
10. Damage to property abutting on a right of way due to change of grade where accompanied by a taking of land.
11. Proximity of new improvement to improvements remaining on condemnee's land.
12. Loss of or damage to growing crops.
13. That the property could be or had been adapted to a use which was profitably carried on.

Memorandum 72-76

EXHIBIT V

Maryland

§ 12-104. Time as of which value determined.

The value of the property sought to be condemned and of any adjacent property of the defendant claimed to be affected by the taking shall be determined as of the date of the taking, if taking has occurred, or as of the date of trial, if taking has not occurred, unless an applicable statute specifies a different time as of which the value is to be determined. (1963, ch. 52; 1972, ch. 349, § 1.)

§ 12-105. Damages to be awarded.

(a) *For taking entire tract.*—The damages to be awarded for the takings [taking] of an entire tract shall be its fair market value (as defined in § 12-106).

(b) *Where part of tract taken.*—The damages to be awarded where part of a tract of land is taken shall be the fair market value (as defined in § 12-106) of such part taken, but not less than the actual value of the part taken plus the severance or resulting damages, if any, to the remainder of the tract by reason of the taking and of the future used [use] by the plaintiff of the part taken. Such severance or resulting damages are to be diminished to the extent of the value of the special (particular) benefits to the remainder arising from the plaintiff's future use of the part taken.

(c) *Right of tenant to remove improvement or installation.*—For the purpose of determining the extent of the taking and the valuation of the tenant's interest in a proceeding for condemnation, no improvement or installation which would otherwise be deemed part of the realty shall be deemed personal property so as to be excluded from the taking solely because of the private right of a tenant, as against the owner of any other interest in the property sought to be condemned, to remove such improvement or installation, unless the tenant exercises his right to remove the same prior to the date when his answer is due, or elects in his manner to exercise such right.

(d) *Churches.*—The damages to be awarded for the taking of a structure held in fee simple, or under a lease renewable forever, by or for the benefit of a religious body and regularly used by such religious body as a church or place of religious worship, shall be the reasonable cost as of the valuation date, of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body. Such damages shall be in addition to the damages to be awarded for the land on which the condemned structure is located. (An. Code, 1951, art. 33A, § 10; 1945, ch. 804, § 9A; 1958, ch. 75; 1963, ch. 52; 1972, ch. 349, § 1.)

§ 12-106. Fair market value; assessed value.

(a) The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date for the highest and best use of such property which a seller, willing but not obligated to sell, would accept for the property, and which a buyer, willing but not obligated to buy, would pay therefor excluding any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner.

(b) If the condemnor is vested with a continuing power of condemnation, the phrase the effective date of legislative authority for the acquisition of such property, as used in this section, shall mean the date of specific administrative determination to acquire such property.

(c) It shall further be proper, for the defendant property owner who so elects, to present as evidence in a condemnation proceeding, the assessed value of the property, as determined by the Department of Assessments and Taxation, if such assessed value is greater than the appraised value placed on the property by the condemning authority. (1963, ch. 52; 1966, ch. 149; 1972, ch. 349, § 1.)

EXHIBIT VI

Michigan

§ 3.261(28) Enhancement of value of remainder of parcel; determining compensation; procedure.] SEC. 28. Enhancement in value of the remainder of a parcel by reason of laying out, altering, widening or otherwise improving any highway or of changing the line thereof, or by any such action in combination with discontinuing a highway, shall be taken into consideration in determining compensation for the taking of any part of the parcel for any such highway purpose. In such case:

(a) The petitioner shall set forth in the petition the fact that such benefits are claimed and describe the construction proposed to be made which will create such enhancement. If the construction is not completed in substantial compliance with the plan upon which the petitioner based its claim of benefits the respondent, within 1 year of the completion of construction, may reopen the question of compensation. In such event the respondent is entitled to the difference between the value of his property as affected by the actual construction, and the value of his property as it would have been had construction been completed according to plan. The respondent shall not recover more compensation than he would have received had there been no claim of benefits.

(b) In response to such claim by petitioner, the respondent prior to trial may request the court to require petitioner to acquire that portion of the remainder of the tract from which the taking is to be made which petitioner claims to be benefited. The petitioner at any time before trial, may withdraw its claim of benefits and thereby avoid the effect of this paragraph.

(c) The petitioner shall have the burden of proof with respect to the existence of such benefits.

(d) Where the existence or amount of such benefits is disputed by the property owner, the petitioner may acquire the entire tract or parcel of land from which the proposed taking is to be made or the portion thereof which petitioner claims to be benefited.

(CL '48, § 213.388.)

EXHIBIT VII

SENATE, No. 234

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 14, 1966

ARTICLE VII

JUST COMPENSATION

32. Just compensation. The condemnee shall be paid just compensation for the property condemned, damages, if any, to any remaining property and such additional compensation as may be provided for herein or by law.

33. Effect of imminence of condemnation. There shall be excluded from the valuation of property being condemned, any increase or decrease in value substantially due to the general knowledge of the imminence of condemnation, other than a decrease due to physical deterioration of the property within the reasonable control of the condemnee.

34. Date as of which compensation shall be determined. Compensation shall be determined as of the date of the earliest of the following events:

(a) the date of the execution of an agreement of purchase between the condemnor or condemnee;

(b) the date of the commencement of the action;

(c) the date possession of the property is taken by the condemnee in whole or in part;

(d) the date on which an act concerning acquisition is taken by the condemnor which substantially affects the use, occupation and enjoyment of the property by the condemnee.

Where property is condemned or about to be condemned pursuant to chapter 19, of the laws of 1938 (N. J. S. A. 55:14A-1 et seq.), or chapter 187 of the laws of 1949 (N. J. S. A. 40:55-21.1 et seq.), or both, as amended or supplemented, it shall be prima facie presumed that a declaration that the property is located in a "slum area," or the declaration of "blight," or both, pursuant to the provisions of either or both of said statutes, substantially affects the use, occupation and enjoyment of the property, and the burden of establishing to the contrary shall be upon the condemnor.

35. Uneconomic remnants. If as a result of a partial taking, the remaining property shall consist of a parcel or parcels of land having little or no economic value, the condemnor may, and at the request of condemnee shall acquire the entire parcel. Any dispute arising hereunder shall be determined by the court in accordance with the rules.

36. Condemnor's election not to acquire machinery, fixtures and equipment. If a condemnor does not require machinery, equipment or fixtures constituting a part of the property being condemned, it shall so notify the condemnee. Within 60 days thereafter, or within such extended time as may be fixed by the condemnor or the court upon notice, the condemnee may elect, in writing to remove such machinery, equipment and fixtures in whole or in part. If the condemnee so elects, the compensation shall be reduced by the fair market value of such machinery, equipment and fixtures so elected to be removed, as if severed from the property. The notices and election herein provided for shall be in accordance with the rules.

37. Damages and benefits to remaining lands. In determining damages to property remaining after a partial taking, consideration shall be given to the project to which the property being condemned shall be devoted, and the damages and benefits specifically affecting such remaining property due to its proximity to the project for which the property is being condemned. General benefits shall not be considered in determining the after value of the remaining property. Special benefits to remaining property shall not exceed the compensation for damages to remaining property.

EXHIBIT VIII

New Mexico

22-9-9.1. Measure of damage to remainder in partial condemnation. —In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable.

History: C. 1953, § 22-9-9.1 enacted by Laws 1968, ch. 30, § 1.

Title of Act.

An act relating to eminent domain; providing for a method of measuring

EXHIBIT IX

Pennsylvania

ARTICLE VI

Just Compensation and Measure of Damages

ARTICLE VI

Just Compensation and Measure of Damages

Section 601. Just Compensation.—The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this article.

Comment:

This section is derived from the Pennsylvania Constitution, Article I, §10, and Article XVI, §8, and indicates that just compensation is defined and is to be determined as set forth in this article.

Section 602. Measure of Damages.—Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.

In case of the condemnation of property in connection with any urban development or redevelopment project, which property is damaged by subsidence due to failure of surface support

resulting from the existence of mine tunnels or passageways under the said property, or by reason of fires occurring in said mine tunnels or passageways or of burning coal refuse banks the damage resulting from such subsidence or underground fires or burning coal refuse banks shall be excluded in determining the fair market value of the condemnee's entire property interest therein immediately before the condemnation.

Comment:

This section sets forth what damages the condemnee is entitled to when his property is condemned. The first paragraph of this section codifies existing case law by adopting the "before and after rule," which is firmly entrenched in the law, *Brown v. Commonwealth*, 399 Pa. 156 (1960), and adds other items of damages as provided in Sections 606, 609, 610, 611, 612, 613 and 614.

Section 603. Fair Market Value.—Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) The present use of the property and its value for such use.

(2) The highest and best reasonably available use of the property and its value for such use.

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.

Comment:

This section is intended to enlarge the traditional definition of fair market value to conform to modern appraisal theory and practice, which differentiates between market *price*, which is the price actually paid for a property under conditions existing at a certain date regardless of pressures, motives or intelligence, and market *value*, which is what a property is actually worth, a theoretical figure which assumes a market among logical buyers under ideal conditions.

This section contemplates first a "willing" seller and buyer. This means that neither is under abnormal pressure or compulsion, and both have a reasonable time within which to act.

Secondly, it contemplates an "informed" seller and buyer, which means that both are in possession of all the facts necessary to make an intelligent judgment.

Clause (1) will permit consideration of any special value the property may have for its existing use, including improvements uniquely related to that use and, in conjunction with the provisions of Section 703 (3) (iv), will provide for proper valuation of special use properties, such as churches, which have no normal market, because it presupposes a buyer who would purchase it for its existing use.

Clause (2) permits the traditional consideration of the property's value for the highest and best use to which it is adapted and capable of being used, provided such use is reasonably available. If it is claimed that the property is more valuable for a use other than its existing use, it should be shown that such use is reasonably available after considering the existing improvements, the demand in the market, the supply of competitive property for such use, the zoning and all other reasonably pertinent factors. Existing zoning would ordinarily be controlling, but evidence may be given of a sufficient probability of a change in zoning as to be reflected in market prices of similarly zoned properties. See *Snyder v. Commonwealth*, 412 Pa. 15 (1963).

Clause (3) is in accord with existing law since it assumes that the machinery, equipment and fixtures are part of the real property taken. See *Diamond Mills Emery Co. v. Philadelphia*, 2 Dist. R. 30 (1893), and also *Philadelphia & Reading Railroad Co. v. Geis*, 113 Pa. 214 (1886).

Clause (4) was included in order to make it clear that in ascertaining fair market value, all matters which may properly be introduced into evidence as provided in Article VII of this act may be considered.

It is not intended by this section to repeal statutes providing for the consideration of additional factors or criteria. See, for example, Second Class County Port Authority Act, 1956, April 8, P. L. (1955) 1414, as amended (55 P. S. §551 et seq.).

Section 604. Effect of Imminence of Condemnation.—Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

Comment:

This section is new. Although it has no counterpart in existing law, the language of this section is based on the language in *Olsen & French, Inc. v. Commonwealth*, 399 Pa. 266 (1960), at page 272, where the court used the phrase "general knowledge of the imminence of . . . condemnation. . . ." In many cases, condemnees suffer an economic loss because of an announcement of the proposed condemnation by the condemnor prior to the actual condemnation. Where such announcement is made and published, which may be several years before the actual condemnation, the tenants of the condemnee move out or fail to renew their leases and new tenants cannot be obtained because of the proposed condemnation. Under these conditions, the property which is to be condemned is economically deteriorated through no fault of the owner-condemnee, and as a consequence, at the time of actual condemnation, the amount of damages may be affected to the detriment of the innocent condemnee because of lack of tenants or because the condemnee was forced to rent at lower rentals for short terms. This section permits the condemnee to show these economic circumstances in order to prove what his damages actually are at the date of taking. On the other hand, in many cases an announcement of the proposed condemnation causes an inflation of property values and as a result the condemnor may have to pay more for the condemned property. The condemnor may show this increase in the value of the condemned property. Any decline or increase in the fair market value caused by the general knowledge of the imminence of the condemnation is to be disregarded.

Physical deterioration of the property which may occur because of the imminence of the condemnation is also to be disregarded in determining fair market value if the condemnee has acted reasonably in maintaining and protecting his property.

Section 605. Contiguous Tracts; Unity of Use.—Where all or a part of several contiguous tracts owned by one owner is condemned or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel.

Comment:

This section codifies existing case law. *Morris v. Commonwealth*, 367 Pa. 410 (1951) (non-contiguous tracts); *H. C. Frick Coke Co. v. Painter*, 198 Pa. 468 (1901) (contiguous tracts).

Section 606. Effect of Condemnation Use on After Value.—In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken. Future damages and general benefits which will affect the entire community beyond the properties directly abutting the property taken shall not be considered in arriving at the after value. Special benefits to the remaining property shall in no event exceed the total damages except in such cases where the condemnor is authorized under existing law, to make special assessments for benefits.

Comment:

The provisions of this section are meant to emphasize that the value of the remaining property after a partial taking, as affected by the condemnation, would be that which a prudent buyer would pay, recognizing the damages and benefits accruing to the remaining property as they can be interpreted and evaluated at that time. While the ultimate benefits to be derived from improvements within the part taken may be great, the owner of the remaining property may not enjoy them in some cases for several years. In determining the fair market value of the remaining property, consideration should be given to the necessary time discount, inconvenience and other effects of the construction period, which might materially affect the price which the condemnee would receive if he were to sell the remaining property to a third party immediately after the day of condemnation, but before completion of the improvement.

It is also the purpose of this section to provide, in accordance with existing law, that general benefits and damages which accrue to the community as a whole are not to be considered in arriving at the after value. Only special, particular and direct benefits and damages to the remaining property may be considered in arriving at the after value. The special benefits may not exceed the amount of damages to which the condemnee is entitled; in other words, the condemnor cannot obtain a judgment against the condemnee on the basis that the special benefits exceed the damages.

This act is not intended to supersede or otherwise affect those statutes which authorize the assessment of benefits covering the cost of public improvements, such as sewers, or the method of assessing them, except where a condemnation cognizable under this act accompanies the installation of the assessable improvement, in which case the entire proceeding is intended to be under this act and such benefits may be assessed as provided in the last sentence of this section.

Section 607. Removal of Machinery, Equipment or Fixtures.—In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee. The condemnee may within thirty days of such notice elect to remove said machinery, equipment or fixtures, unless the time be extended by the condemnor. If the condemnee so elects, the damages shall be reduced by the fair market value thereof severed from the real estate.

Comment:

If the machinery, equipment and fixtures are a part of the real estate, they, of course, are condemned with the real estate. See Comment to Section 608. In many cases the condemnor is not interested in the machinery, equipment and fixtures. In such cases, this section requires the condemnor to so notify the condemnee and the condemnee, if he so elects, may remove them. The condemnee of course is not required to remove the machinery, etc., but if he does, his damages are reduced by the fair market value thereof

severed from the real estate, in arriving at which, the cost of removal and reinstallation may be considered.

Section 608. Removal Expenses.—The person having legal possession of machinery, equipment or fixtures on the condemned property, not forming part of the realty, including a tenant not entitled to any proceeds of the condemnation, if under the lease the tenant has the right to remove said machinery, equipment or fixtures, shall be entitled, as damages, to the reasonable expenses of the removal, transportation and reinstallation of such machinery, equipment or fixtures. Reasonable expenses under the provisions of this section shall not exceed twenty-five thousand dollars ($25,000) and in no event shall such expenses exceed the market value of the machinery, equipment and fixtures.

Comment:

This section adds a new element of damages in eminent domain cases. There is nothing in existing law which gives a condemnee or the tenant of a condemnee the right to recover as a separate item of damages, removal, transportation and reinstallation expenses of machinery, equipment and fixtures which are on the condemned property but which are not a part of the real estate. Existing law does provide that the cost of removal of machinery, equipment and fixtures although not allowable as a separate item of damages, may be considered in fixing the before and after values. *Butler Water Company's Petition*, 338 Pa. 282 (1940); *James McMillin Printing Co. v. Pittsburg, Carnegie & Western R.R. Co.*, 216 Pa. 504 (1907) Cf. *Delaware County Redevelopment Authority v. Carminatti*, 18 D. & C. 2d 704 (1959).

"Reasonable expenses" of removal are to be considered as not exceeding the market value of the machinery, equipment and fixtures in place and are to be determined in connection with the value of the machinery, equipment and fixtures. If the cost of removal exceeds the value of the machinery, etc., the cost would obviously be unreasonable. In addition, in ascertaining the reasonableness of the removal expenses another factor to be considered is the distance of the move.

Section 609. Business Dislocation Damages.—The condemnee shall be entitled to damages, as provided in this section, for dislocation of a business located on the condemned property, but only where it is shown that the business cannot be relocated without substantial loss of patronage. Compensation for such dislocation shall be the actual monthly rental paid for the business premises, or if there is no lease, the fair rental value of the business premises, multiplied by the number of months remaining in the lease, not including unexercised options, not to exceed twenty-four months or multiplied by twenty-four if there is no lease. The amount of such compensation paid shall not exceed five thousand dollars ($5000) and shall not be less than two hundred fifty dollars ($250). A tenant shall be entitled to recover for such business dislocation even though not entitled to any of the proceeds of the condemnation.

Comment:

This section changes existing law which makes no provision for damages for business dislocation losses. Under it the initial burden is on the claimant to show that the business is of such a local character that it cannot be relocated without substantial loss of patronage. Generally this would be true only of the small neighborhood business. If this burden is sustained then the section provides a mechanical formula for fixing the amount of compensation for this loss. Formulae for business valuation based on earnings or accounting procedures were discarded as too complicated for use in eminent domain cases.

The rent or rental value on which the calculation of compensation is based is the rental of the portion of the property devoted to the business use only, which may be and normally is less than the entire property. This section is intended to compensate in a limited way the small neighborhood merchant substantially put out of business by the condemnation of his business property.

Section 610. Moving Expenses.—The person having legal possession shall be entitled to, as damages, the reasonable moving expenses for personal property other than machinery, equipment or fixtures, not to exceed five hundred dollars ($500), when personal property is moved from a place of residence and not to exceed twenty-five thousand dollars ($25,000) when personal property is moved from a place of business. Receipts therefor shall be prima facie evidence of reasonable moving expenses. A tenant shall be entitled to recover these moving expenses even though he is not entitled to any of the proceeds of the condemnation. In no event shall such expenses exceed the market value of such personal property.

Comment:

This section changes existing law by allowing the condemnee to recover as a separate and additional item of damages his reasonable expenses for moving his personal property, as distinguished from machinery, equipment and fixtures. Cf. *Henry Becker v. The Philadelphia & Reading Terminal R.R. Co.*, 177 Pa. 252 (1896). See also *Delaware County Redevelopment Authority v. Carminatti*, 18 D. & C. 2d 704 (1959).

It is the purpose of this section to permit the recovery by the condemnee of these moving expenses in addition to the expenses for moving machinery, equipment and fixtures as provided in Section 608 of this article. If a tenant is involved and has no right to any of the damages for the property taken, he would still be entitled to these moving expenses. In ascertaining whether the expenses are reasonable, a factor to be considered is the distance of the move as well as the total amount of the expenses.

Section 611. Delay Compensation.—The condemnee shall not be entitled to compensation for delay in payment during the period he remains in possession after the condemnation, nor during such period shall a condemnor be entitled to rent or other charges for use and occupancy of the condemned property by the condemnee. Compensation for delay in payment shall, however, be paid at the rate of six per cent per annum from the date of relinquishment of possession of the condemned property by the condemnee, or if the condemnation is such that possession is not required to effectuate it, then delay compensation shall be paid from the date of condemnation: Provided, however, That no compensation for delay shall be payable with respect to funds paid on account, or by deposit in court, after the date of such payment or deposit. Compensation for delay shall not be included by the viewers or the court or jury on appeal as part of the award or verdict, but shall at the time of payment of the award or judgment be calculated as above and added thereto. There shall be no further or additional payment of interest on the award or verdict.

Comment:

This section is suggested by the procedure in Federal takings where interest is automatically added to the final award at the rate of 6%, but no interest is allowed on any money paid into court. Feb. 26, 1931, c. 307, §1, 46 Stat. 1421 (40 USCA §258a).

This changes the existing law which states that the condemnee is *prima facie* entitled to damages for delay except where the delay is the fault of the condemnee (*e.g.*, unreasonable demand by the condemnee). *Moffat Appeal*, 400 Pa. 123 (1960). The courts, however, have been reluctant to find that the delay was the fault of the condemnee. In the absence of evidence of the commercial rate of interest, the condemnee is entitled to 6% for delay compensation. *Lehigh Valley Trust Co. v. Pennsylvania Turnpike Commission*, 401 Pa. 185 (1960). This section sets the figure in all cases at 6%.

Under this section the condemnee is entitled to delay compensation as a matter of right. However, he is not entitled to such compensation on the money which has been paid to him or deposited in court by the condemnor who has done so to obtain possession. See Section 407. Where the money is paid to the condemnee or deposited in court by the condemnor to obtain possession from the condemnee, the condemnee would still be entitled to delay compensation from the date of taking to the date the money is paid to him or deposited in court. The condemnee is only entitled to the one 6% on his award. He would not be entitled to the 6% and then interest on that 6%. In other words, it is not intended by this section to have interest being paid on delay compensation.

The date from which delay compensation is to be calculated will be fixed by the viewers in their report.

The first sentence of this section is included to make it clear that while the condemnee is in possession of the condemned property, he does not get delay compensation but the condemnor is not entitled to rent or other charges for use and occupancy. The reason for this is that while the condemnee is in possession, the condemnee is not building up damages for delay and the condemnor is not accruing liability for delay damages. Consequently, the delay compensation and the rent, in a sense, offset each other.

Section 612. Consequential Damages.—All condemnors, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken.

Comment:

Under existing law the Commonwealth is not liable for consequential damages unless liability therefor is expressly provided by statute. *Meyer v. Commonwealth*, 183 Pa. Superior Ct. 333 (1957); *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487 (1932). Municipal and other corporations having the power of eminent domain are liable for consequential damages. Pennsylvania Constitution, Article XVI, §8. This section makes the Commonwealth liable for consequential damages to the extent set forth.

Section 618. Damages for Vacation of Roads.—Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken.

Comment:

Under existing case law, the vacation of a highway or street is not an injury to the abutting land owners within the provisions of the Constitution requiring compensation for property taken, injured, or destroyed, and in the absence of legislation allowing damages, none can be recovered. *Howell v. Morrisville Borough*, 212 Pa. 349 (1905). The legislature has, however, provided for damages for vacation of streets in many cases. See, e.g., The Borough Code, 1927, May 4, P. L. 519, Art. XVI, §1650, as re-

enacted and amended (53 P. S. §46650); the Act of 1905, March 21, P. L. 46, §§1, as amended, 2 (53 P. S. §§1948, 1945). The purpose of this section is to have a general provision applicable to all condemnors relating to and allowing damages for the vacation of public roads.

It is not intended by this section to broaden the extent of liability for vacation of streets or to change existing case law relating thereto. See *Clementine W. Apple v. City of Philadelphia*, 103 Pa. Superior Ct. 458 (1931). See also *In re Melon Street*, 182 Pa. 397 (1897) involving a *cul-de-sac*.

Section 614. Proration of Real Estate Taxes.—At the time of payment of the damages, the condemnor shall pay to the condemnee as part of the damages the pro rata portion of all real property taxes, water and sewer charges, paid to a taxing entity or a municipal authority by the condemnee with respect to the condemned property, allocable to a period subsequent to the filing of the declaration of taking or the relinquishment of possession, whichever occurs later.

Comment:

Under existing law and practice the condemnee is chargeable with taxes for the whole year even though the property is condemned during that year. This is based upon the principle that the owner of the property on the first day of the tax year is liable for the taxes for the whole year. See *Shaw v. Quinn*, 12 S. & R. 299 (1825). It is intended that the condemnee be reimbursed for the real estate taxes and water and sewer charges paid on the part of the property condemned for the time subsequent to the date of condemnation or relinquishment of possession and that he should be chargeable with the real estate taxes and water and sewer charges only to the date of condemnation or the date he relinquishes possession.

Memorandum 72-76

EXHIBIT X

Texas

Art. 3265. 6518-28 **Rule of damages**

1. The commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by reason of the condemnation of the property, and its employment for the purpose for which it is to be condemned, and according to this rule shall assess the actual damages that will accrue to the owner by such condemnation.

2. When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

3. When only a portion of a tract or parcel of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.

4. In estimating either the injuries or benefits, as provided in the preceding article, such injuries or benefits which the owner sustains or receives in common with the community generally and which are not peculiar to him and connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the commissioners in making their estimate.

5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

Memorandum 72-76

EXHIBIT XI

1969 Vermont Draft

Subchapter 3. Compensation

§ 5681. RIGHT TO JUST COMPENSATION

(a) A condemnee whose property is taken under this chapter is entitled to just compensation for the property taken.

(b) Just compensation shall consist of:

(1) The fair market value of the property, when an entire parcel is taken.

(2) When less than an entire parcel is taken, the difference between the fair market value of the property immediately before the taking and the fair market value of the remaining property immediately after the taking. In determining the fair market value of the property remaining after the taking, the following qualifications shall apply:

(A) Benefits to the remaining property shall be considered, but only if the sums inure directly and specifically to that property as distinguished from the general public benefit; and

(B) Any benefits to the remaining property resulting from easements, cattle passes, access roads or other benefits provided by the condemnor in order to lessen or minimize damage to the remaining property from the taking shall also be taken into account.

(3) Any loss of business profits on the part of the condemnee resulting from the taking. In determining loss of business profits under this subdivision, the following limitations and rules shall apply:

(A) The computation of business loss shall be based on loss of net business profits directly resulting from the taking;

(B) A reasonable allowance for any services contributed by the condemnee to the business shall be deducted in arriving at net profits;

(C) A reasonable allowance for the use of any real estate of the condemnee used in the business shall be deducted in arriving at net profits;

(D) The recovery of net business profits shall be limited to the period of time reasonably needed to reestablish the business at a new location.

(4) Moving expenses, which are defined for purposes of this chapter as the actual reasonable cost to the condemnee attributable to the taking of moving himself, his family, his business, or his farm operation, including personal property, to the nearest suitable location which is available within one hundred miles travel distance from the prior location. However, a condemnee entitled to moving expenses in accordance with section 30 of the Federal-Aid Highway Act of 1968, and any state legislation implementing said act, or under any other federal legislation providing equivalent compensation, shall not be entitled to receive moving expenses under this subdivision. For purposes of this subdivision, "business" shall mean any lawful activity conducted primarily for the sale, manufacture, processing or marketing of goods, products, commodities or services, or which is conducted by a nonprofit organization; "family" shall mean two or more individuals living together in the same dwelling who are related to each other by consanguinity, marriage, adoption or legal guardianship; "farm operation" shall mean any activity conducted solely or primarily for the production of agricultural products or commodities which contributes materially to the operator's support.

Memorandum 72-76

EXHIBIT XII

Washington

8.04.110 **Trial—Damages to be found.** A judge of the superior court shall preside at the trial to determine the compensation and damage to be awarded, which trial shall be held at the court house in the county where the land, real estate, premises or other property sought to be appropriated or acquired is situated: and in the case of each such trial by jury the jurors by their verdict shall fix as a lump sum the total amount of damages which shall result to all persons or parties and to any county and to all tenants, encumbrancers and others interested therein, by reason of the appropriation and use of the lands, real estate, premises or other property sought to be appropriated or acquired. Upon the trial, witnesses may be examined in behalf of either party to the proceedings as in civil actions; and a witness served with a subpoena in each proceeding shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. In case a jury is not demanded as provided for in section 894 such total amount of damages shall be ascertained and determined by the court or judge thereof and the proceedings shall be the same as in trials of an issue of fact by the court. [1925 ex. s. c 98 § 2; 1891 c 74 § 5; RRS § 895.]

Reviser's note: "Section 894" refers to RRS § 894 herein codified (as amended) as RCW 8.04.070, 8.04.080, 8.04.090 and 8.04.100.

Witnesses, examination of: Title 5. **Rules of court:** Pleading—rules 20 through 27.

EXHIBIT XIII

Wisconsin

32.09 Rules governing determination of just compensation

In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(1) The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by s. 32.05(7) (c) or 32.06(7).

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

(3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of damages described under sub. (6).

(4) Where a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation shall be paid for such depreciation except as expressly allowed in sub. (6) and s. 32.19.

(5) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right of way without cost to abutting lands.

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

(a) Highest and best use of the property.

(b) Applicable zoning.

(c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.

(d) Severance damage, if any.

(e) Maps and pictures to be used.

(f) Costs of reproduction less depreciation and rate of depreciation used.

(g) Statements of capitalization of income where used as a factor in valuation, with supporting data.

(h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.

(i) A recitation of all damages claimed by owner.

(j) Qualifications and experience of witnesses offered as experts.

(9) A condemnation commission or a court may make regulations for the exchange of the statements referred to in sub. (8) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between parties for the purpose of simplifying the issues at the commission hearing or court trial.

32.19 Additional items payable

(1) Declaration of purpose.

(1) The legislature declares that it is in the public interest that persons displaced by any public project be fairly compensated by payment for the property acquired and other losses hereinafter described and suffered as the result of programs designed for the benefit of the public as a whole; and the legislature further finds and declares that, notwithstanding ch. 275, laws of 1931, or any other provision of law, payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements. If * * * the public improvement is funded in whole or in part by a nonlapsible trust, the relocation payments and assistance constitute a purpose for which the fund of the trust is accountable.

(2) Definitions. In this section and ss. 32.25 to 32.27:

(a) "Person" means:

1. Any individual, partnership, corporation or association which owns a business concern; or

2. Any owner, part owner, tenant or sharecropper operating a farm; or
3. An individual who is the head of a family; or
4. An individual not a member of a family.

(2) (c) "Displaced person" means any person who moves from real property or who moves his personal property from real property, on or after July 1, 1970, as a result of the acquisition * * * of such real property, in whole or in part * * * or subsequent to the issuance of a jurisdictional offer under this chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation.

(2) (d) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease or rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

2. For the sale of services to the public;

3. By a nonprofit organization; or

4. Solely for the purpose of sub. (3) for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(e) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(f) "Comparable dwelling" means one which, when compared with the dwelling being taken, is substantially equal concerning all major characteristics and functionally equivalent with respect to: the number of rooms, area of living space, type of construction, age, state of repair, type of neighborhood and accessibility to public services and places of employment. "Comparable dwelling" shall meet all of the standard building requirements and other code requirements of the local governmental body and shall also be decent, safe and sanitary as defined by the department of local affairs and development and the department of industry, labor and human relations, jointly.

(3) Relocation payments. Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation under this chapter may be exercised, shall make fair and reasonable relocation payments to displaced persons, business concerns and farm operations under this section. The following items shall be compensable in eminent domain proceedings where shown to exist. Payments shall be made as follows:

(a) *Moving expenses; actual.*

(3) (a) The condemnor shall compensate a displaced person for his actual and reasonable expenses in moving himself, his family, his business or his farm operation, including personal property * * *; actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property; and actual reasonable expenses in searching for a replacement business or farm.

(b) *Moving expenses; optional fixed payments.*

(b) 1. Any displaced person who moves from a dwelling and who elects to accept the payments authorized by this paragraph in lieu of the payments authorized by par. (a) may receive a moving expense allowance, determined according to a schedule established by the condemnor not to exceed * * * $300 and dislocation allowance of * * * $200.

2. "Businesses and farm operations."

2. (intro.) Any displaced person who moves or discontinues his business or farm operation and who elects to accept payment authorized under this paragraph in lieu of the payment authorized under par. (a), may receive a

fixed payment in an amount equal to the average annual net earnings of the business or farm operation, * * * except that such payment shall not be less than $2,500 nor more than $10,000. In the case of a business, no payment shall be made under this subsection unless the condemnor * * * is satisfied that the business:

a. Is not able to be relocated without a substantial loss of its existing patronage; and

b. Is not part of a commercial enterprise having at least one other establishment, not being acquired by the condemnor which is engaged in the same or similar business. For the purpose of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before payment of federal, state and local income taxes, during the 2 taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the condemnor determines to be more equitable for establishing such earnings. "Average annual net earnings" includes any compensation paid by the business or farm operation to the owner, his spouse or his dependents during such 2-year period. To be eligible for the payment authorized by this subsection, the business or farm operation shall make its state and federal income tax returns available and its financial statements and accounting records available for audit to determine the payment authorized by this subsection.

(3) (c) *Optional payment for businesses.* Any displaced person who moves his business, and elects to accept the payment authorized in par. (a), may, if otherwise qualified under par. (b) 2, elect to receive the payment authorized under par. (b) 2, minus whatever payment he received under par. (a), if he discontinues his business within 2 years of the date of receipt of payment under par. (a), provided that he has suffered a substantial loss of existing patronage. In no event shall the total combined payment be less than $2,500 nor more than $10,000.

(4) Replacement housing.

(a) *Owner-occupants.* In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed $15,000, to the owner of real property acquired for a project which property is improved by a dwelling actually owned and occupied by the owner for not less than 180 days prior to the initiation of negotiations for the acquisition of the property. For the purposes of this paragraph, a nonprofit corporation organized under ch. 181 may, if otherwise eligible, be considered a displaced owner. Such payment includes only the following:

1. The amount, if any, which when added to the acquisition payment, equals the reasonable cost of a comparable replacement dwelling which is decent, safe and sanitary as determined by the department of local affairs and development and the department of industry, labor and human relations jointly, reasonably accessible to public services and places of employment and available on the private market.

2. All expenses incurred by the owner to finance the purchase of another property substantially similar to the property taken provided that: a) at the time of the taking the land condemned was subject to a bona fide mortgage or was held under a vendee's interest in a bona fide land contract; and b) such mortgage or land contract had been executed in good faith not less than 180 days prior to the initiation of the attempt to purchase such property. Such expenses shall include reasonable incidental fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking if actually incurred, and increased interest cost above that provided in the former financing. The computation of the increased interest costs shall be based upon and limited to:

a. A principal amount of indebtedness not to exceed the unpaid debt at the date of taking.

b. A term not to exceed the remaining term of the original mortgage or land contract at the date of taking.

c. An interest rate not to exceed the prevailing rate charged by mortgage lending institutions doing business in the vicinity.

d. The present worth of the future payments of increased interest computed at the prevailing interest rate paid on savings deposits by commercial banks doing business in the vicinity.

3. Payment under this section shall be made only to a displaced owner who purchases and occupies a decent, safe and sanitary replacement dwelling not later than one year after the date on which he moves from the dwelling acquired for the project, or the date on which he receives payment from the condemnor, whichever is later.

(b) *Tenants and certain others.* In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under par. (a) which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to the initiation of the attempt to purchase such property. For purposes of this paragraph, a nonprofit corporation organized under ch. 181 may, if otherwise eligible, be considered a displaced tenant. Such payment shall be either:

1. The amount which is necessary to enable such person to lease or rent for a period not to exceed 4 years a decent, safe and sanitary dwelling meeting standards established by the department of local affairs and development and the department of industry, labor and human relations, jointly, and adequate to accommodate such individual or family in area not generally less desirable in regard to public utilities, public and commercial facilities and places of employment, but not to exceed $4,000; or

2. The amount necessary to enable such person to make a downpayment, including incidental expenses described in par. (a) 2, on the purchase of a decent, safe and sanitary dwelling meeting standards established by the department of local affairs and development and the department of industry, labor and human relations, jointly, and adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities, public and commercial facilities and places of employment, but not to exceed $4,000, but if the amount exceeds $2,000, the person must equally match the excess over $2,000 in making the downpayment.

(c) *Expenses incidental to transfer of property.* In addition to amounts otherwise authorized by this chapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:

1. Recording fees, transfer taxes and similar expenses incidental to conveying such property.

2. Penalty costs for prepayment of any mortgage entered into in good faith encumbering such real property if the mortgage is recorded or has been filed for recording as provided by law prior to the date specified in par. (a) 2.

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

4. The cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access.

5. Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

6. Reasonable net rental losses where a) the losses are directly attributable to the public improvement project and b) such losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.

7. Cost of fencing reasonably necessary pursuant to s. 32.09(6) (g) shall, when incurred, be payable in the manner described in s. 32.20.

(d) No payments received under this section shall be considered as income for the purposes of ch. 71; nor shall such payments be considered as income or resources to any recipient of public assistance and such payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under any welfare law.

(5) **Eminent domain.** Nothing in ss. 32.19 or 32.25 to 32.27 shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages.

32.20 Procedure for collection of itemized items of compensation

Claims for damages itemized in s. 32.19 shall be filed with the * * * highway commission or other public body, board, commission or utility, which is carrying on the project through which condemnee's or claimant's claims arise. All such claims must be filed after the damages upon which they are based have fully materialized but in no event later than 2 years after the condemnor takes physical possession of the entire property acquired. If such claim is not allowed within 90 days after the filing thereof, the claimant shall have a right of action against the condemnor, or in case no condemnation is involved against the highway commission or public body, board, commission or utility, which is carrying on the project through which the claim arises. Such action shall be commenced in a court of record in the county wherein the damages occurred. In causes of action involving any state commission, board or other agency, excluding counties, the sum recovered by the claimant shall be paid out of any funds appropriated to such condemning agency. Any judgment shall be appealable by either party and any amount recovered by the body against which the claim was filed, arising from costs, counterclaims, punitive damages or otherwise may be used as an offset to any amount owed by it to the claimant, or may be collected in the same manner and form as any other judgment.

EXHIBIT XIV

EMINENT DOMAIN—COMPENSATION FOR LOST RENTS—Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970). When private property is taken by the government for public use, compensation is required by both the federal and state constitutions.[1] Distinctions have been drawn, however, as to the type of compensation recoverable by the property owner. The usual measure of compensation to be awarded the owner is the price which would have been agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy; in other words, the test is the "fair market value" of the land.[2] However, consequential losses that result from a taking for public use have not been held, absent statutory authority, to be compensable under the fifth amendment provision of the United States Constitution.[3] The "just compensation" clause of the Wisconsin Constitution similarly has not been construed as requiring payment for all injuries imposed upon persons or property by acts of government.[4] But in Wisconsin, statutory enactments have provided for additional compensation for condemnees where certain "consequential" losses have been suffered.[5]

In *Luber*, the Wisconsin Supreme Court was faced with the problem of to what extent lost rents, suffered consequential to a condemnation proceeding, were compensable. The Milwaukee County Expressway Commission condemned a building which had been leased for business purposes by the Lubers. Two-thirds of the building was occupied up until the actual taking by the Commission. One-third of the building had been leased to a liquor wholesaler since 1944. When this firm's lease expired in 1964, it failed to renew after learning that acquisition of the property by the Commission was imminent.[6] Plaintiffs proved that the reason the wholesaler did not renew its lease was because it had to have a long-term lease of property to retain its liquor licenses with the United States Government, the State of Wisconsin, and the City of Milwaukee. After the premises were vacated on July 1, 1964, the Lubers found it impossible to rent the property because of the expected taking, and the property remained vacant until it was actually acquired by the Expressway Commission on February 28, 1967. Had there been no condemnation, it was undisputed that the wholesaler would have renewed its lease for a three to five year period at a monthly rent of $350. Since the Lubers would have received rentals totaling $11,200 (32 x $350) if there had been no condemnation, they declined the Commission's offer of $2,100 as rental loss.

1. U.S. CONST. amend. V; WIS. CONST. art. I, § 13.
2. *See* Roberts v. New York, 295 U.S. 264 (1935).
3. U.S. v. General Motors, 323 U.S. 373, 385 (1945).
4. *See* More-Way North Corp. v. State Highway Comm., 44 Wis. 2d 165, 168, 170 N.W.2d 749, 751 (1969).
5. WIS. STAT. §§ 32.09, .19 (1967).
6. Brief for Appellant at 3, Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

The Lubers commenced suit for the $11,200 rental loss.[7] The defendants, Milwaukee County and the Milwaukee County Expressway Commission, moved for summary judgment on the ground that they were not liable for lost rentals during the pending eminent domain proceeding, except that which had already been tendered pursuant to section 32.19(4).[8] The Lubers filed a counter affadavit to defendant's motion for summary judgment and asked that summary judgment be entered in their favor in the amount of $11,200, on the basis that the statutory limitation on their right to recover lost rents only in the year preceeding taking was not consistent with constitutional requirements of "just compensation."[9] The trial court found that while the statute was not unconstitutional, it had been improperly applied to the plaintiffs. It awarded plaintiffs $4,200 for lost rents in the year preceeding taking as well as interest for the period during the pendency of the eminent domain proceeding.

Reversing on appeal, the Wisconsin Supreme Court held that the plaintiff's interest in rental losses was significant enough to require recovery under the "just compensation" clause of article I, section 13, of the Wisconsin Constitution. Section 32.19(4) was therefore declared unconstitutional insofar as it limited such compensation.[10] The court awarded the plaintiffs $11,200 but denied interest because the rental loss suffered was not liquidated at the time of the "taking."[11]

I. Discussion

In finding that lost rentals constituted a "taking" under the Wisconsin Constitution, the court departed from precedent and significantly altered the rule in Wisconsin as to what types of "consequential" damages are compensable as a result of an eminent domain action.

Since by definition all damages resulting from a taking of land for the public use are "consequential," for analytical purposes damages have been broken down into three groups. The first group has been classified as "consequential" losses (despite the difficulty with the word) and cover those damages which are suffered where no property is taken but the land has nonetheless been reduced in value because of a public taking in an adjacent area.[12] "Severance" damages describe the second group of losses and include those injuries suffered when only part of the fee is taken.[13] The third

7. Suit was commenced pursuant to Wis. Stat. § 32.20 (1967).
8. Wis. Stat. § 32.19(4) (1967) read in part:

> The following items shall be compensable in eminent domain proceedings where shown to exist:
>
> (4) Net Rental Loss. Net rental losses resulting from vacancies during the year preceeding the taking of the property, provided that: 1) such loss is limited to the amount that exceeds the average annual rental losses caused by vacancies during the first 4 years of the 5-year period immediately preceding the taking; and 2) such rental loss was caused by the proposed public land acquisition.

9. Wis. Const. art. I, § 13: "The property of no person shall be taken for public use without just compensation therefor."
10. Luber v. Milwaukee County, 47 Wis. 2d 271, 283, 177 N.W.2d 380, 386 (1970).
11. *Id.* at 284, 177 N.W.2d at 387.
12. 4 Nichols, Eminent Domain, § 14.1[1], at 476-81 (3rd ed. 1962).
13. *Id.* § 14.2, at 507.

group of losses is characterized as "incidental" and include nonphysical losses where the entire fee is taken.[14] The lost rentals in *Luber*, where the entire fee was taken, were nonphysical losses and thus fell within the class of "incidental" damages. The scope of this note will be limited to a discussion of how the *Luber* decision affects the compensability of this latter type of damage.

When the power of eminent domain was first exercised in the United States, the property taken was generally underdeveloped with the result that the private landowner's actual damage was only the physical loss of his fee. The standard of compensation which evolved—the fair market value of the land—was designed to compensate only for this type of loss.[15] With increasing industrialization, condemnation actions began increasingly to inflict consequential, severance, and incidental losses upon the private land owner. As a result, the courts as well as the state legislatures began softening the harshness of the rule that the condemnee could recover only the fair market value of the land taken. In order to allow for all three types of condemnation loss, many legislatures amended their constitutions to permit recovery for land taken or damaged by the state.[16] Other states, like Wisconsin, have enacted statutes which allow compensaion for damages not covered by the fair market value standard.[17]

A. Luber Court's Approach

The courts also have taken the initiative to allow for damages not compensable under a strict fair market value standard. The *Luber* court recognized this judicial trend and noted two approaches utilized by the judiciary in awarding compensation for nonphysical injury to a landowner as a result of condemnation. The first is to allow full recovery for severance damages, where there has been a partial taking of the land, applying a different market value formula.[18] Instead of giving the fair market value for the piece of land actually taken, the formula is usually changed to the fair market value of the entire property before the partial taking minus the value of the land after the taking.[19] In *Richards v. State*,[20] this for-

14. Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 n.4 (1957).

15. *Id.* at 65.

16. 2 NICHOLS, EMINENT DOMAIN, § 6.44, at 466 (3rd ed. 1962). *See also* MCCORMICK, DAMAGES, § 132, at 536 (1935); A. Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 610 (1942); Luber v. Milwaukee County, 47 Wis. 2d 271, 280, 177 N.W.2d 380, 385 (1970).

17. WIS. STAT. § 32.19 (1967).

18. 47 Wis. 2d at 281, 177 N.W.2d at 385.

19. Basnah v. City of Fond du Lac, 35 Wis. 2d 755, 151 N.W.2d 725 (1967); Richards v. State, 14 Wis. 2d 597, 111 N.W.2d 505 (1961); Caranella v. State, 269 Wis. 588, 70 N.W.2d 206 (1955); *see also* WIS. STAT. § 32.09(6) (1967).

20. 14 Wis. 2d 597, 111 N.W.2d 506 (1961). Here, the condemnee's land

mula was used to allow recovery for damages resulting from the inconvenience occasioned by highway construction over part of the land.

A second approach taken by the judiciary in awarding compensation for nonphysical losses as a result of an eminent domain proceeding is to interpret the scope of the constitutional provision to include such damages. In *Luber*, the court noted that such an approach was taken by the Florida Supreme Court.[21] In *Jacksonville Expressway Authority v. Henry G. DuPree Co.*,[22] the Florida court specifically granted moving expenses which were necessitated by a partial taking of commercial property. Though recognizing that such a decision went counter to the great weight of authority, the court felt that the "theory and spirit" of the constitutional guarantee required that a practical effort be made to make the owner whole and that fair market value was merely a tool to assist the court in determining what is full or just compensation.[23]

It should be noted that the two approaches described in *Luber* have been used only when courts dealt with a situation in which severance damages were incurred; that is, a situation where there was only a partial taking of the land. The *Luber* court adopted the second approach—constitutional interpretation—even though the case involved a situation where the entire fee was taken, and therefore any damages incurred fell within the class of incidental damages. Such damage, absent statutory enactment, has previously been held noncompensable under a constitutional provision such as Wisconsin's.[24]

Denial of these types of losses has usually proceeded on two grounds. The first is that although these interests in fact involve property interests, they are not property rights vis-à-vis the government. The argument is that, since the scope of taking is restricted to the property involved and since the government gains only the use of the property, the right to compensation is only a property right, not a personal one.[25] This argument was rejected in *Luber* when the court stated that the test in determining damages was not what the government had gained, but what the owner had lost.[26]

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was split in two by the interstate highway. The court said any inconvenience occasioned by the construction could be taken into account in determining the value of the property after the taking.

21. 47 Wis. 2d at 282, 177 N.W.2d at 336.
22. 108 S.2d 289 (Fla. 1958).
23. *Id.* at 291, 292.
24. Dusevich v. Wisconsin Power & Light Co., 260 Wis. 641, 51 N.W.2d 732 (1952); Sheeley v. Chippewa County, 217 Wis. 41, 258 N.W. 359 (1935); *see also* W. Crouch, *Valuation Problems Under Eminent Domain*, 1959 WIS. L. REV. 608.
25. Comment, *supra* note 14, at 67.
26. 47 Wis. 2d at 279, 177 N.W.2d at 334.

The second ground used to deny incidental losses is that such damages are too speculative.[27] This basis, though not raised in the *Luber* case, has been attacked as illogical. Not only are such damages capable of being ascertained in tort and contract, but courts have also been able to successfully measure them in condemnation actions in Canada and Great Britain.[28] As a practical matter, it would seem that the speculative argument is not a sound one.

It is apparent that the *Luber* court's allowance of incidental damage, although relying on an approach developed to deal with severance type losses, was based on solid policy considerations. Since it represents a departure from precedent, the decision will have a significant impact on the way Wisconsin courts will view incidental losses in the future.

B. *Future Implications: Moving Expenses, Good Will, and Lost Profits*

Narrowly construed, the *Luber* case stands for the principle that a property owner is entitled to compensation for lost rents incurred during the pendency of a condemnation proceeding. But because of the way the court approached the problem and the conclusions that it reached, the decision will most likely have profound influence on whether other incidental losses sustained as a result of condemnation are now compensable under the Wisconsin Constitution.

1. MOVING EXPENSES

Generally, a property owner is not entitled to compensation for personal property not attached to the real estate as a permanent fixture, and the owner must pay for removal expenses.[29] The principal reason the courts give for such a rule is that the government in no way benefits from such expenditures.[30] The Wisconsin Supreme Court, by the way of dictum, approved this stance on the issue in *Fiorini v. Kenosha*.[31]

However, *Luber* clashes head on with the basic policy behind denial of such damage. It was stated that the proper standard for the measurement of damages is "what the owner has lost, not what the condemnor has gained. . . ."[32] This reasoning entirely undercuts the traditional rationale given for not allowing recovery for moving expenses. Secondly, the court expressed approval of the Florida de-

27. Crouch, *supra* note 24, at 620.
28. Comment, *supra* note 14, at 72.
29. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 69, at 306 (2d ed. 1953).
30. Crouch, *supra* note 24, at 617.
31. 208 Wis. 496, 243 N.W. 761 (1932).
32. 47 Wis. 2d at 279, 177 N.W.2d at 384.

cision[33] which allowed recovery for moving costs.[34] In fact, the Florida case was, to a great degree, the persuasive force that led to the *Luber* decision. Finally, the *Luber* court noted that the Wisconsin Legislature has recently amended section 32.19[35] to include certain relocation assistance. Statutory enactments which give relocation assistance are evidence of the increasing dissatisfaction with the market value formula as the sole standard of recovery. There is every reason to conclude that the same rationale which led the court to hold the statute[36] in *Luber* to be an unconstitutional limitation on the recovery of lost rents, would require a similar interpretation of unconstitutionality where damages for moving expenses are precluded by statute.

2. GOOD WILL

Another incidental loss which a businessman suffers as a result of condemnation is what has been characterized as "good will." The relocation of a business as a result of condemnation proceedings often results in the loss of business or professional patronage.[37] A portion of these losses are recovered under the market value formula since property is evaluated to its "best available use."[38] This does not, however, compensate the owner for all the good will that he has lost. One federal court of appeals has described this type of injury in the following manner:

> A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that, used in an established business that has won favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the established business, are property of value. This latter privilege is known as good will.[39]

This definition measures good will in terms of an excess of value over and above the market value of the tangible property.[40] Generally, this type of good will loss has been held noncompensable for the same reason that courts have denied recovery in the case of moving expenses; that is, the damage does not in any way benefit the government.[41] An additional argument used to support the noncompensability of these injuries is that such loss is too speculative to be accurately remedied.[42] The first argument, as has al-

33. Jacksonville Exp. Auth. v. Henry G. DuPree Co., 103 So. 2d 289 (Fla. 1958).
34. 47 Wis. 2d at 282, 177 N.W.2d at 386.
35. Ch. 409, § 3, [1969] Wis. Laws 1366, *repealing and recreating* WIS. STAT. § 32.19.
36. WIS. STAT. § 32.19(4) (1967).
37. *See* 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 75, at 325 (2d ed. 1953).
38. *See* Comment, *supra* note 14, at 74.
39. Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219, 221-22 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930).
40. *See* Aloi & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604, 626 (1968).
41. *Id.* at 626.
42. Aloi & Goldberg, *supra* note 40, at 628.

ready been noted, is squarely faced and rejected in the *Luber* decision.[43] The second argument, that these injuries are too speculative, has been severely attacked by students of the problem. Canada and England[44] have allowed compensation for good will losses over the years. These two countries have encountered no difficulty in administering such a system of compensation.[45] Moreover, American courts have had little trouble in ascertaining such damages in the areas of contract and tort.[46] If the standard of recovery is to be what the owner has lost and not what the condemnor has gained, the *Luber* decision would seem to support the conclusion that the constitution requires compensation for damaged good will.

3. LOST PROFITS

When the entire fee is taken,[47] expected profits have traditionally not been within the scope of the constitutional provision forbidding the taking of land for the public use without just compensation. Usually such losses occur when the businessman finds it extremely difficult to relocate his enterprise and hence incurs this type of injury. All the arguments used to support the noncompensability of other incidental losses are also used when lost profits are sought by a landowner.[48] As noted above in the case of moving expenses and loss of good will, the rationale supporting the *Luber* decision runs contrary to these arguments.

A portion of the damages claimed and awarded in *Luber* amounted to lost profits. The lost rent recovered by the Lubers included the profits which they would have realized had their tenant not vacated because of the expected condemnation proceeding. It would seem inconsistent for the court to allow such losses to be compensated in the case where rents were lost but deny them in other situations. The *Luber* decision supports the notion that recovery for lost profits, where the entire fee is taken, is constitutionally required.

II. CONCLUSION

The foregoing summary suggests that *Luber* marks a departure from the usual treatment the court has given incidental losses. The decision undercuts the traditional arguments for denying such relief. Approaching the issue through the method of constitutional interpretation, the court significantly expanded the scope of recovery where such injury has been suffered. The Wisconsin Constitution requires just compensation for what the owner has lost. Not only lost rents but also moving expenses, loss of good will, and lost profits should be compensable using the *Luber* rationale. The court is no longer willing to force individuals to absorb incidental losses where land is taken for the public use.

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43. 47 Wis. 2d at 279, 177 N.W.2d at 394.
44. 4 NICHOLS, EMINENT DOMAIN, § 13.31, at 454 (3rd ed. 1962).
45. *See* Comment, *supra* note 14, at 72.
46. *Id.* at 71.
47. 4 NICHOLS, EMINENT DOMAIN, § 13.1[2], at 448 (3rd ed. 1962).
48. *See* Comment, *supra* note 14 at 80.

Memorandum 72-76

EXHIBIT XV

SUMMARY OF RELOCATION PAYMENTS UNDER CALIFORNIA

RELOCATION ASSISTANCE STATUTE

(References to sections in Exhibit I)

Families and Individuals

Payment for moving and related expenses. The displaced person may elect to receive either:

(1) Payment for actual reasonable moving expenses [§ 7262(a)(1)]; or

(2) A fixed moving expense allowance not to exceed $300 and, in addition, a dislocation allowance of $200 [§ 7262(b)].

Payment to assist in obtaining a replacement housing unit. This may be either the payment described in (1) or (2) below:

(1) A payment to displaced homeowners, not to exceed $15,000, and covering the following:

(a) The difference, if any, between the acquisition payments made by the condemnor and the reasonable cost of a comparable suitable replacement housing unit [§ 7263(b)(1)];

(b) An amount to compensate the displaced homeowner for the present worth of any loss of favorable financing [§ 7263(b)(2)]; and

(c) An amount to compensate the displaced homeowner for reasonable closing costs incident to the purchase of a replacement housing unit, but not including prepaid expenses [§ 7263(b)(3)].

(2) A payment to displaced tenants and certain others, which may not exceed $4,000, which may be either:

(a) A payment to assist the displaced person in the rental of a replacement housing unit for a period not to exceed four years [§ 7264(b)]; or

(b) A payment to assist the displaced person in making a downpayment toward the purchase of a suitable comparable housing unit except that, if such amount exceeds $2,000, such displaced person must equally match any amount in excess of $2,000 in making the downpayment [§ 7264(b), (c)].

Business Concerns

Displaced business concerns may be eligible for either:

(1) Payments to cover the following:

(a) Actual reasonable moving expenses [§ 7262(a)(1)];

(b) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property [§ 7262(a)(2)]; and

(c) Actual reasonable expenses in searching for a replacement business or farm [§ 7262(a)(3)].

OR

(2) A fixed payment equal to the business concern's average annual net earnings, but not less than $2,500 nor more than $10,000, if it is determined that the business cannot be relocated without a substantial loss of patronage and is not a part of a commercial enterprise having at least one other establishment not being acquired which is engaged in the same or similar business [§ 7262(c)].

Property Owners Adjacent to Airports

A public entity shall make a payment (not to exceed $15,000) to property owners whose land is immediately contiguous to land acquired for airport purposes. The payment is authorized only where the decline in fair

market value of the affected property is reasonably related to objective physical change in the use of acquired property [§ 7265].

Relocation Advisory Assistance

Substantial advisory assistance is made available to individuals and businesses. See Section 7261.

A STUDY TO DETERMINE WHETHER THE OWNER OF REAL PROPERTY SHOULD BE COMPENSATED FOR INCIDENTAL BUSINESS LOSSES CAUSED BY THE TAKING OF REAL PROPERTY BY EMINENT DOMAIN*

*This study was made for the California Law Revision Commission by the law firm of Hill, Farrer & Burrill, Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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INCIDENTAL LOSSES

I. The Scope of the Study

Incidental losses in eminent domain usually encompass the following major items: moving expenses, loss of goodwill, expenses and lost profits resulting from the interruption caused the condemnee as the result of condemnation, and lost business profits that will result to the condemnee in the future. (Among the "minor" incidental costs condemnees often bear are the costs of purchasing and installing new fixtures in the new location and costs incident to changes in business stationery, telephone service, advertising and signs).

It should be underscored that incidental losses as described in this study concern only those losses suffered by a condemnee when there is initially an acknowledged taking of a property interest. This study does not directly consider other types of damages which are germane to incidental losses but which encompass much broader and even more controversial as well as more difficult questions. Specifically, the question of the police power v. the power of eminent domain, the questions as to indemnification for loss to market value resulting from impairment of access, diminution of value due to noise, smoke, fumes, etc. and other consequential damage suffered by individuals, which the courts often label damnum absque injuria, are perplexing

questions that need separate and special attention. It is recognized that these larger problems dovetail with the problem of incidental losses. But, believing that the two can be separated at this time, it is hoped that the broader problems of consequential damages as distinguished from incidental losses can be tackled at some subsequent time.

A prior study has extensively reviewed the legal status and arguments involved with moving costs. This study will attempt to review principally the questions of loss of goodwill, interruption expenses and losses, and loss of profits. Many of the legal theories that are propounded to support the rejection of compensation for moving costs are equally applicable in denying compensation for good will, interruption losses, and lost profits. In fact, courts generally group these items together and usually label them "noncompensable business losses".

A. An Analysis of the Arguments Denying Compensation.

The courts begin from the premise that in eminent domain, the market value system provides for two separate determinations: A taking must be found; existence of a taking is gauged by the gain inuring to the condemnor. Once the fact of a taking has been established, the measure of compensation is determined according to prevailing market price.[1] As a result of this premise incidental losses do not amount to a "taking". (The condemnor has not literally

taken over any of these intangible losses). The second major argument used to close the door on compensation for these losses is that they are speculative.[2] Before examining the individual losses involved in this matter, it is well to examine, at least broadly, the merit of these two arguments.

The first argument that stands as a barrier against remuneration to the condemnee for these incidental losses is, as stated, that there has been technically no "taking" of any "property interest". In California, as in almost all other jurisdictions, courts reason that governmental authorities need only pay for that which they "take" and that a taking involves a "tangible interest".[3] Since the government, when condemning property, seldom takes over anything but the realty, it need only pay for what it has gained rather than for what the condemnee has lost. Indeed, the Supreme Court, in a case wherein the condemnee's canning business was destroyed due to the inability to re-establish elsewhere, succinctly summed up this argument:[4]

> "There is no finding as a fact that the Government took over the business or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act as the intention to take is lacking."

This proposition was reinforced in United States ex rel TVA v. Powelson,[5] where the Court held that "the sovereign must pay only for what it takes, not for opportunities which the

owner may lose." In California the leading case concurring on these views is Oakland v. Pacific Coast Lumber and Mill Co.[6] This argument has been further buttressed and given constitutional foundation by the assertion that the right to just compensation is a property right and not personal; in effect the distinction results in the scope of taking being restricted to the property involved. The classic statement of this in rem--in personam dichotomy was advanced by the Supreme Court in Monongahela Nav. Co. v. United States:[7]

> "And this just compensation, it will be noticed, is for the property and not the owner. Every other clause in the Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent of the property taken."

That the Monogahela position continues to be the commanding one in the courts cannot be denied. It has on occasion, even before its actual pronouncement, been denounced and some courts even today either ignore it or try to distinguish it.[8] While some recent decisions, as will be shown later, have gone beyond such a restrictive definition of "property" and limited concept of "taking", these narrowly defined terms remain a significant obstacle to the payment to condemnees of the losses involved herein.

The second major argument for denying recovery is that these losses are speculative. Repeatedly, particularly

in recent years, the courts have asserted that compensation for losses which the market standard excludes will result in unfounded and exaggerated awards.[9] Basing their reasoning on the belief that these losses are too difficult, remote and uncertain to measure accurately, they hold that any effort to allow compensation for them would undermine the entire objectivity that is claimed to exist in the market value formula.

It may be argued that such losses are not as speculative as the courts have asserted. Nonetheless, there can be no doubt that economists and accountants differ widely with the measurement of good will.[10] In compensating a condemnee for losses due to the interruption in his business or for lost profits in the future would raise difficulties of evaluation as well as insure the condemnee for expected earnings. As the courts have stated in the past:

> "The business might chance to be exceedingly profitable, at the time of taking, so that an interruption of it from an interference with the full use of the real estate might cause a loss far greater than the reasonable rental price of the property. . . ." [11]

> "That the plaintiff had made profits in his business in the past was no indication that he would continue to make them in the future. . ." [12]

Still in all there is no denying that in other fields of the law, e. g., contract, tort, and taxation, courts have resolved almost identical problems which have arisen in private suits. Cases exist in contract law where the plain-

tiff has been awarded lost profits even though the business in which he was engaged had actually yet to begin;[13] and often either lessees or lessors are awarded damages based upon estimated profits;[14] future profits, it is clear, are often the basis of a recovery. In tort law the same is equally true.[15] And in the field of taxation there are numerable cases wherein the courts have ascertained the value of good will.[16]

Furthermore, even in the field of condemnation English and Canadian courts have awarded for lost profits, losses due to interruption of the business, and for good will and there hardly has been any mention in these reported cases or other authorities of any undue difficulty involved in these determinations.[17] Even in this country, at the turn of the century, various Eastern states awarded condemnees compensation for these incidental losses in special types of takings. (see Moving Cost Study) Moreover, a number of states in this country allow for these incidental losses in cases involving partial takings.[18]

Thus confronted by the dual obstacles of a restricted definition of "property" and the assertion that such losses are "speculative", condemnees have generally been denied compensation for incidental losses.[19] In so acting, the courts have ignored their own dictates that the property owner should be idemnified in condemnation so that after the taking he should be no worse off than before.[20] While there

are strong arguments to adhere to the position that a limited definition of "taking" and "property" should be utilized in eminent domain and that allowance for such losses will result in "swollen verdicts",[21] this position perhaps overlooks the concept of just compensation. As the English court stated in this matter:[22]

> "What a payer has to pay by way of compensation is . . . a sum so as to put, so far as money can do it, the owner in the same position as if his land had not been taken from him; and this . . . is exactly the same measure as the measure of damages applied to the case of a man liable to pay compensation for breach of contract, or, for that matter (where there is no question of punitive damages) in tort."

B. Good Will

Of the incidental losses resulting from condemnation, good will is perhaps the most frequently recurring and one of the most vexatious. One form of good will, that which inheres in the real estate itself, is normally compensable since it is included as part of the market value formula -- property is evaluated according to its "highest and best use". A second category of good will, one enjoyed by most small businessmen, is more personal. It inheres in the business aside from the physical property and grows from the personality and the ability of the proprietor, the reputation of the business and the customers' habit of dealing with a firm due to its tradition and familiarity.[23] For this type of good will, often greatly damaged when the owner must move

from the neighborhood to some other locale, often a considerable distance away as the result of modern takings, American courts seldom grant (and even more rarely admit granting) compensation.

In rejecting claims for loss of good will, the courts generally resort to one of the two standard arguments: That no "property" was taken or that the loss is speculative. At times, they also contend that the good will losses are de minimis. But dismissing such a loss as one court has, by stating "a good plumber should be able to continue his business in almost any location and do as well as he formerly did in a neighborhood where in many homes there was a lack of adequate plumbing facilities,"[24] expresses business naivete, especially since courts denying good will compensation have recognized that the businesses were irreparably destroyed by condemnation.

At times courts have awarded for good will by stretching the strictures of the market value formula by considering good will a factor to be included within that formula. For example, in Housing Authority v. Lustig,[25] a 1952 Connecticut case, the court there was confronted with the fact that the property was valued at $6,500.00. On the property was an established poultry slaughtering business which was valued at $10,000. The court there asserted that the "highest economic use" made this particular property more valuable and awarded the condemnee $16,500.00. While this

case has been attacked by other courts and authorities,[26] it is illustrative of the ways in which good will and akin losses are at times compensated for though technically such factors should not rightfully be included within the market value formula.

The tendency to expand the borders of market value has been highlighted by the United States Supreme Court in Kimball Laundry Co. v. United States.[27] In that case the taking by the condemnor was a temporary one and the property was to be returned to the condemnee-lessee within a specified time prior to the time when the lessee's term would have terminated. This taking effectively damaged the lessee's business trade routes, an element of good will. The court sought to distinguish such situations from a taking of the entire fee where good will is held noncompensable; the argument in the former, unlike the latter, event is that the condemnee remains saddled with the property temporarily assumed by the government. Accordingly, his future business conduct is rendered uncertain, and he deserves special consideration, or as Justice Frankfurter stated "it is a difference in degree wide enough to require a difference in result".[28]

It is difficult, however, to reconcile the Court's holding in Kimball with the different result in a permanent taking situation. As Justice Douglas stated in dissent:[29]

> "There would be a complete destruction of the trade routes if the taking of the plant were permanent and a depreciation of them (I assume) where it is temporary. Why the latter is compensable when the former is not is a mystery. Even the academic dissertation on valuation which the opinion imports into the Fifth Amendment from accounting literature conceals the answer."

Whatever the reasoning of Kimball, however, that case indicates the Supreme Court's willingness (and that of other courts as well) to discard the notion that "taking" in condemnation must be equated to "taking over", and rejects the concept that such items as good will are not "property rights" within the scope of just compensation. The courts therefore are, apparently, relying mainly upon the proposition that incidental losses, including good will, are too speculative to be the basis of compensation. As indicated before such losses are admittedly difficult to ascertain and often involve considerable guess work and speculation. Nonetheless, the same problems have been dealt with by courts in other fields of law and the results there have not been met by this speculative argument.

Indeed, so effective has the speculative argument been intertwined with compensation for good will and other incidental losses, that courts are prone to deny compensation for these losses and label them speculative when, in the fact situations involved, the value of good will is scarcely speculative. For example, in a 1959 Alabama case, City of Dothan v. Wilkes,[30] the court denied the lessee-

condemnee remuneration for amounts he paid for the good will factor to the prior lessee. This amount was clear, certain, definite and certainly not speculative. The court, however, labelled good will as being speculative and held that this evidence was inadmissible as to the question of compensation. The courts in other cases involving other incidental losses that could hardly be labelled speculative have acted in a similarly summary manner.[31]

A recent case by the Georgia Supreme Court[32] discarded both the strictures of the market value formula and the legerdemain of "expanding" the market value formula; it forthrightly allowed, despite the opposing argument "speculative", for loss of a good will item although it admittingly was not an element of market value. Ignoring the legal barrier created by case law, the court found the market value standard inapplicable wherever it failed to indemnify the condemnee for all his losses, including incidentals. The assertion is summarized in the approved charge to the jury:

> "I further charge you, gentlemen, that the Constitutional provision as to just and adequate compensation does not necessarily restrict the lessee's recovery to market value. The lessee is entitled to just and adequate compensation for his property; that is, the value of the property to him, not its value to the Housing Authority. The measure of damages for property taken by the right of eminent domain, being compensatory in its nature, is the loss sustained by the owner, taking into consideration all relevant factors . . ."

The recent tendency, as can be seen both here and in subsequent pages, is to compensate the condemnee for these factors, factors over and above the market value formula.

C. Losses due From Business Interruptions.

Germane to and at times indistinguishable from lost profits resulting from condemnation are the business losses that are incurred by the condemnee as a result of the interruption to the business brought about by the taking.[33] All the arguments advanced against granting awards for incidentals, as outlined above in this study and in the moving cost study, are utilized by the courts in denying compensation for these damages,[34] even though such denials may seriously, and often permanently, injure the economic position of the enterprise concerned.

Business interruptions, which are seldom avoidable, are often of considerable duration; some businesses, both large and small, can rarely re-establish as going concerns within a matter of days, or even weeks. And the effect of interruptions, especially in retail trade where annual profits are largely dependent on volume, may be sufficient to eradicate the earnings of an entire year. True, a condemnee may know of the impending taking months in advance and prevent the interruption and its concomitant loss, but such action would force the condemnee to bear without compensation the expense of two sites for the period prior to the time

of eviction. Moreover, these losses due to interruption in business enterprises are somewhat more prevalent in modern takings since today's public improvements often cover large contiguous areas thus making it more difficult and more time-consuming for the condemnee to find equivalent premises to those being taken.

While the courts have been fairly unanimous in rejecting claims for compensation for these costs due to interruption, a 1959 Michigan case, seems to have caused a major breach in the otherwise solid wall against remuneration in these instances. In Highway Department v. Dake Corporation,[35] a unanimous Michigan Supreme Court clearly awarded the condemnee $53,000 in expenses which he incurred in preparing for and in facilitating the operation of a new substitute plant so as not to lose any production during the changeover from the condemned property to the new site. The condemnee in that case hired the Certified Public Accountant firm of Ernst and Ernst to do a cost study of the actual expenses incurred in that over-all operation and the detail and certification of the method adopted by the condemnee, as incorporated in the accounting firm's report, was convincing enough to the court so as to influence it in permitting compensation for those expenses. Apparently, the methodical planning was such as to overcome the barrier of "speculative losses." Indeed,

the court, after allowing for these losses, stated:

> "To recover damages from business interruption the proof must not be speculative and must possess a reasonable degree of certainty. The Dake Corporation, by resorting to the methodical methods it did, met that reasonable degree of certainty."

The Dake case, aside from its importance in allowing for business interruption losses, is also significant insofar as it distinguishes those losses from lost profits due to condemnation.

The Dake case reviewed Michigan law in regard to interruption losses and lost profits. Initially, it is well to note that Michigan law both in regard to incidental losses and compensation for fixtures is fairly unique among American jurisdictions.[36] Two 19th century Michigan cases, are among the very few throughout the United States that allow condemnees compensation for business interruption losses.[37] In fact, so broad were these holdings that a fair reading of them would allow for incidental losses including good will and lost profits. Later 20th century Michigan cases, however, appeared to veer away from the concept that compensation in eminent domain should be measured by the same rules that cover compensation in the fields of contracts and torts.[38] The condemnor in the Dake case cited these more recent cases in the course of arguing that the Michigan courts had reputiated the tort concept of compensation in eminent domain and the earlier cases. In allowing for business interruption losses as dis-

tinguished from lost profits, the Dake court referred to the more recent Michigan cases cited by the condemnor and the court stated:

> "An examination of the four above cases cited by the appellant discloses that the Court held that the property owner could not recover loss of profits because of damages caused by business interruption but did not repudiate Moesta or Weiden in regards to expenses incurred by business interruption. To eliminate any doubts of this court's position, we hold that the evidence introduced in this condemnation proceeding showing expenses occasioned by business interruption was properly introduced for consideration as to value and weight by the commissioner making the award." (emphasis added)

This distinction between expenses incurred as a result of business interruption, on the one hand, and lost profits due to business interruption, on the other hand, is a very fine one and obviously will be quite difficult to ascertain in most instances. The case, therefore, truly seems to hold that if interruption expenses are certain and definite, they may be recovered; but that lost profits, whether or not certain or definite, are noncompensable. The crux of this holding is apparently based upon the belief that lost profits are seldom non-speculative; although a 1952 Michigan case presented a situation wherein such lost profits were fairly certain, nonetheless, this same Michigan court rejected such evidence.[39]

It is further interesting to note that the Dake case, while not specific on this point, apparently awarded these business interruption losses over and above the market value

of the property taken. As indicated elsewhere, if such incidentals are to be awarded the condemnee, they rightfully should not be incorporated within the market value formula.

D. Business Lost Profits Resulting From Condemnation.

Certainly the most difficult to determine and one of the most recurring incidental losses is the loss profits involved in the condemnee's business or his inability to relocate. As might be expected, the courts buttress their denial of compensation for these losses by using all the traditional arguments.

A condemnee often suffers permanent business damage as the result of the taking of his property. To begin with, he may be forced to bear increased expenses for comparable property. In urban renewal programs, for example, condemnation of large areas of land may cause a diminution of available sites resulting in higher costs for the remaining property.[40] Since the market value of the condemned property is established as of the time of the taking, this increase may not be reflected in the award. Moreover, there might also be added the testimony of one appraiser who states:[41]

> "Often a homeowner or the owner of a business site in a neighborhood where the property is moderately priced is compelled to sell for a sum of money which will be inadequate to pay for similar property in a different section of the town, thus necessitating a substantially larger outlay of funds. In many cases he may not be in a position to raise the excess amount required. This happens frequently where freeways require the taking of numerous properties."

A condemnee, moreover, may not be able to relocate at all.[42] This is more likely to arise in extensive takings in a concentrated area. Particular businesses that are established to cater to the nature of the condemned neighborhood may find that their services are not in demand because of the different complexion of the changed area, or are not needed or permitted in other surrounding areas. Often such businesses as automobile repair firms, paint shops and chemical companies find it virtually impossible to procure a suitable location not too far removed from their present location due to local zoning laws.[43]

The vast amount of cases involving lost profits, however, involve situations wherein the condemnee is likely to make less profit on the new property than he did on the condemned site. (It might be added, of course, that often condemnees make more profit on the new sites than they did on the condemned property.) Due to a fear of "opening up the flood gates" courts are almost unanimous in denying for lost profits in these situations.[44] On the few occasions when they have afforded the condemnee compensation for these losses by "expanding" the market value formula, the lost profit figure was fairly certain and ascertainable.[45] However, because the courts are so sensitive that any exception to the denial of lost profits would bring about a wholesale raid upon the condemnor's treasury, they have denied compensation

for lost profits even though there was undisputed proof that past profits and "orders on hand" would, with reasonable certainty, guarantee similar profits in the future.

In the wake of this overwhelming weight of authority effectively denying condemnee for lost profits and other business losses, the State of Vermont, cognizant of the inequities involved in that situation, in 1957 enacted remedial legislation. The 1959 Vermont statute reads as follows:[46]

> "II. Damages resulting from the taking or use of property under provisions of this act shall be the value for the most reasonable use of property or right therein and of the business thereon, and the direct and proximate lessening in the value of the remaining property or right therein and the business thereon . . ."

Even a quick reading of this language is enough to show both that legislature sought to allow for business losses and, secondly, that the statute is undoubtedly too broad insofar as apparently on the surface it permits the condemnee to receive the value of his business whether or not there is a business loss. This provision was tested in a late 1959 case before the Supreme Court of Vermont. In Record v. Vermont State Highway Board[47] the defendants' land, used as a house trailer park, was condemned. The court held that since the condemnees had been fortunate in developing a like business in another place, that fact could be considered as lessening or mitigating their business damages; it, therefore, held that the capitalized value of the business on the

property being taken, under the instant fact situation, was not the proper measure of compensation. The court cited the 1957 Vermont statute (supra) and stated in that regard:

> "Prior to this enactment our law measured damage by the market value rule. This value was the difference between the value of the entire tract before the taking and its value thereafter. [cases cited] In the Nelson case [110 Vt. 44, 52, 1 A. 2d 689, 692] the Court recognized that there are many injuries resulting from highway construction for which land owners cannot be compensated. Mindful of these inequities the legislature quite clearly recognized that in some instances a business enterprise might be invaded and the yield of the business lessened or destroyed as the result of the taking of the land upon which the business is situated. Thus it imposed the statutory function upon the trial court to look beyond the value of the improved real estate actually seized by the state and search out to what extent, if any, the business interests of the land owners were damaged. It is only to the extent that a business is taken by the appropriation of the land on which it is situated that the legislature meant the compensation to be paid. A business may be intrinsicably [sic] related and connected with the land where it is located so that an appropriation of the land means an appropriation of the business. More often, however, this is not the case and an appropriation of the land has but a limited effect on the business. And this effect is not necessarily adverse. Where an appropriation necessitates a relocation in whole or in part of the business the question is what has, or would the business suffer by being transplanted. The trial court was required to look at all of the circumstances. A factual problem was presented, -- rather than a legal one."

The above language indicates that while the court found there was a complete mitigation of business damages in this case, in future cases Vermont will allow for business losses, specifically including lost profits, whenever the condemnee is unable to lessen or mitigate a business damage

due to the taking. To say the least, this is a radical departure from modern case law and even goes beyond both the limited exceptions presently being carved out in various jurisdictions regarding moving costs and the broad language used by some courts so as to enable condemnees to be reimbursed for losses of good will and for interruption expenses. In fact, the Vermont statute and the language in the Record case is virtually the same as the statutes and case law involved with the special Water Supply Statutes that existed in a few states at the turn of the century. (See discussion in Moving Cost Study.)

The difficulty with the Vermont statute is clear. Aside from the unnecessary and harmfully broad and ambiguous language adopted, the statute is exceedingly difficult to administer in the cases wherein the condemnation proceeding commences before the condemnor takes possession and the condemnee has moved to a new site. But even assuming these obstacles can be overcome by adequate statutory provisions, the question still remains, from a policy point of view, to what extent should a condemnor be held liable for business losses?

In conclusion, therefore, it might be stated that while courts will, on rare occasions, allow for lost profits by unduly expanding the market value formula, they are exceedingly wary of punching a hole in the dike of denial for fear of the ultimate or at least unknown consequences. Probably the Record case is a major modern exception to this rule.

E. Summary of Present Status of the law in Regard to Incidental Losses.

As was shown in the Moving Costs Study, there has been a recent trend by both the legislatures and courts permitting condemnees to recover for at least some of their moving expenditures. The "liberalization" of compensation has been reflected, as well, in regards to other aspects of incidental losses suffered by many condemnees as the result of governmental takings.[48] A few cases have awarded the condemnee for good will, business interruption damages, and other business losses, generally by broadening the market value formula. This trend is nowhere near as marked as the trend witnessed in moving cost situations. Indeed, the overwhelming weight of authority still is against the condemnee being compensated for such business damage. Even more pronounced is the continued denial by the courts and legislatures to consider the question of compensability for business lost profits.[49] The Vermont statute and the related case in that state are certainly exceptions to the rule.

But while the denial of business losses, in general, and lost profits, in particular, is still part of the basic pattern of compensation in American jurisdictions, it is equally clear that the grounds for this denial are somewhat more rational and more limited than formerly. No longer do the courts stress that these losses do not constitute property or property interests. No longer do the courts stress that

a "taking" must be equivalent to "taking over" in order that compensation be allowed. No longer do courts ignore these losses or dismiss them as being de minimis. Clearly, today the crux of non-compensability for incidental losses is that they are or may prove to be speculative and that, consequently, payment for these losses may impair future public improvements and may straddle the taxpayer with too much of a burden.

II. Recommendations Regarding Compensability for Incidental Losses.

Any proposed recommendation made must be advanced with the full recognition that the conflict on this subject involves perhaps the most basic tenet in all eminent domain law: What is "just compensation"? We have seen in this study as in the Moving Cost, Evidence and Apportionment studies the brooding omnipresence of this most difficult and unresolved question. The courts have taken the bull by the horns and have run in both directions -- they assert that the owner must be made whole, he must be indemnified and he must be put in the position, pecuniarily, after the taking as he was before. At the same time (excepting the instances as pointed out throughout these studies) the courts have almost unanimously adopted the in rem criterion of compensation. Having accepted this position, they have, in effect, equated just compensation with market value.

As the Evidence Study indicated, the problem of what is just compensation has not been squarely met by most

courts; the "internal" approach to value (with which the Evidence Study dealt) avoids the question by equating just compensation with market value, rather than with indemnification. This Study on Incidental Losses (including the study of moving costs) cannot evade this question. The "external" approach to value which includes factors over and above those things considered within market value, necessitates a resolution of the conflict as to whether just compensation really means indemnification.

We suggest that just compensation does and should mean nothing less than indemnification. There is no rational ground for differentiating between the rights of an individual as against other individuals, on the one hand, and as against a public body, on the other hand. In litigation between individuals the evolution of the law clearly has been brought to a stage wherein it can be said that if a person in any way harms another, without lawful cause, the injured person receives indemnification for his loss.[50] When a duty between private parties is broken, the law imposes a standard of indemnification because that is held to be in the expectation of the parties. Compensation for legal injury in private actions means indemnification. Today, it is advanced, the same expectation exists on the part of individuals whenever a public body causes injury. There remains no acceptable reason why the rights of the individual against the State or

its agencies should be relegated to an inferior position -- particularly in light of the import of the Fifth Amendment and the various state constitutions.

It is, therefore, advanced that incidental losses whenever provable to a reasonable certainty should be compensated for in condemnation actions. We cannot differentiate between those incidental losses discussed in this Study and moving costs but we find it necessary to go one step further and suggest that because of the long history of the denial of all incidental losses; because of the admitted difficulties that the courts and others will have in administering any proposed statute that encompasses compensation for all incidental losses; and, lastly, because of the many questions as yet unanswered (due to the lack of adequate experience with such statutes) a moratorium or delay would be in order before effectuating such a change.

Assuming that a moving cost statute is adopted, the courts, administrators and attorneys will have an opportunity to gain experience with reimbursement of at least one type of incidental loss. This should provide all concerned with some guidance in providing compensation for other incidental losses. To some extent it will give a better clue as to what the costs involved in broadening the scope of compensation will actually amount to. It will give public bodies time to test various methods of administering these costs which are over and above the market value criterion.

This considered delay will enable all those concerned to weigh the effects that the allowance of moving costs will have on courts, juries, appraisers and others.[51] Lastly, it will help to clarify, at least to some extent, the question of whether incidental losses are speculative and whether payment for these losses will lead to "swollen" verdicts.

Just compensation calls for nothing less than indemnification. Practicalities, however, warrant a delay in enforcing a full measure of compensation.

FOOTNOTES

(1) 1 Orgel on Valuation §3; see, generally, Evidence Study II.

(2) See, Comment, 67 Yale L.J. 61 (1957).

(3) 1 Orgel §2; Commissioners of Homochitto River v. Withers, 29 Miss. 21, 32 (1855); cf. Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 398, 153 Pac. 705, 707 (1915).

"The decision as to whether compensation should be made generally has been reached, however, upon purely legalistic grounds with a physical conception of the eminent domain process in mind." Cormack, "Legal Concepts in Cases of Eminent Domain," 41 Yale L.J. 221, 257-58 (1931).

(4) Mitchell v. United States. 267 U. S. 341, 345 (1925).

(5) 319 U.S. 266, 282 (1943).

(6) 171 Cal. 392, 398, 158 Pac. 705, 707 (1915).

(7) 267 U.S. 341, 345 (1925). See also State Hwy. Comm. v. Burk, 200 Ore. 211, 244-45, 265. P. 2d 783, 799, (1954).

(8) A number of judicial protests were raised against the practice of using such reasoning to deny compensation for non-physical losses. See Patterson v. Boston, 40 Mass. (23 Pick) 425 (1839). Compare Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); Eaton v. B.C. & M.R.R.,

51 N.H. 504, 511 (1872); Thompson v. Androscoggin River Improvement Co., 54 N.H. 545, 551 (1874) where courts objected to the restricted meaning of "taking". See also Sedgwick, Statutory and Constitutional Law 524 (1857). See, generally, Cormack, supra Note 3.

Nichols states that the Eaton case, supra, came "too late to stand on its own merits as an interpretation of the constitution." 2 Nichols 288. But see, e. g., Jacksonville Express Auth'y v. Henry C. Dupree Co., 108 S. 2d 289, 291 (Fla. 1958) and Housing Auth'y v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E. 2d 671 (1955).

(9) See United States v. General Motors Corp., 323 U.S. 373, 385 (1945) (Douglas J., concurring in part: "promises swollen verdicts"). See also United States v. 3,544 Acres of Land, 147 F. 2d 596, 598 (3d Cir. 1945); Eagle Lake Improvement Co. v. United States, 141 F. 2d 562, 564 (5th Cir. 1944); Housing Auth'y v. Green, 200 La. 463, 474, 8 So. 2d 295, 299 (1942); Sawyer v. Commonwealth, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902); In re Slum Clearance, 332 Mich. 485, 496, 52 N.W. 2d 195, 200 (1952); Banner Milling Co. v. New York, 240 N.Y. 533, 540, 148 N.E. 668, 670 (1925).

(10) See, generally, Note, "Good Will", 53 Colum. L. Rev. 660 (1953). See also Foreman, "Conflicting Theories of Good Will", 22 Colum. L. Rev. 638 (1922).

(11) Bailey v. Boston & P.R.R., 182 Mass. 537, 539, 66 N.E. 203, 204 (1903).

(12) Sauer v. Mayor, 44 App. Div. 305, 308, 60 N.Y. Supp. 648, 650 (1st Dept. 1889).

(13) Standard Mach. Co. v. Duncan Shaw Corp., 208 F. 2d 61 (1st Cir. 1953).

(14) Perkinsv. Langdon, 237 N.C. 159, 74 S.E. 2d 634 (1953); Pace Corp. v. Jackson, 284 S.W. 2d 340 (Tex. 1955); Wood v. Pender-Doxey Grocery Co., 151 Va. 706, 144 S.E. 635 (1928). See Webster v. Beau, 77 Wash. 444, 450, 137 Pac. 1013, 1015 (1914) where the court said: "[W]here an established business has been interrupted or destroyed by breach of contract, or by tort, a resulting loss of profits may become the basis of a recovery, there being a past experience sufficient to render the extent of such loss reasonably certain, and fairly susceptible of proof." See, generally, 5 Corbin, Contracts §§1020, 1023, 1029 (1950).

(15) Roseland v. Phister Mfg. Co., 125 F. 2d 417, 420 (7th Cir. 1942) (expected profits allowed in restraint of Trade suit); Johnson v. Railroad, 140 N.C. 574, 578-79, 53 S.E. 362, 364 (1906) (prospective profits allowed where factory tortiously burned). See also 1, 2 Harper & James, Torts §§6.13, 25.3 (1956); Nims, "Damages and Accounting Procedure in Unfair Competition Cases, 31 Cornell L. Q. 431 (1946); Wright, "Tort

Responsibility for Destruction of Good Will," 14 Cornell L.Q. 298 (1929); Note, The Requirement of Certainty in the Proof of Lost Profits, 64 Harv. L. Rev. 317, 318 (1950); Note 7 Stan. L. Rev. 97, 111 (1954).

(16) See Adams Express Co. v. Ohio, 166 U.S. 185, 221 (1897) (good will thing of value and taxable as such); Raytheon Production Corp. v. Comm'r, 144 F. 2d 110 (1st Cir.), cert. denied, 323 U.S. 779 (1944); Richard S. Wyler, 14 T.C. 1251 (1950); Armstrong, "Tax Valuation of Good Will" 1951 U. So. Calif. Tax. Inst. 453; Schwartz, "Good Will in Tax Law," 8 Tax. L. Rev. 96 (1952); Note, 1 Stan. L. Rev. 64 (1948).

(17) None of the reported cases and none of the authorities in England and Canada have broached the existence of any particular problem in ascertaining these losses. The consultants have communicated with various authorities in England, particularly the Ministry of Housing and Local Government and the Ministry of Transportation, both ministries are responsible for the bulk of condemnation in England. In replying to our letters, they have stated that the payment of incidental losses (Moving Cost and other disturbance costs) has not impaired to any noticeable extent public improvement. Nor have they made mention of any difficulty that may possibly arise regarding the ability of the courts to

determine exactly the amounts payable for these losses. The Moving Cost Study cited the various cases, statutes and authorities in England and Canada on this subject. The British Housing Act of 1957 grants the Ministry the discretionary power for compensating condemnees for these incidental losses. The following is the pertinent text of that Act:

"Part II - Section 32
Payments to persons displaced.

"32. A local authority may pay to persons displaced from a house to which a demolition order made under this Part of this Act, or a closing order, applies, or which has been purchased by them under this Part of this Act, such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose."

"Part III - Section 63
Power of local authority to make allowances to persons displaced.

"63. - (1) A local authority may pay to any person displaced from a house or other building -

(a) to which a clearance order applies, or

(b) which has been purchased by them under the provisions of this Part of this Act relating to clearance areas, or

(c) which has been purchased by them under the provisions of this Part of this Act relating to redevelopment areas as being unfit for human habi-

tation, and not capable at reasonable expense of being rendered so fit,

such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house or other building, they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or building, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose.

(2) Where, as a result of action taken by a local authority under the provisions of this Part of this Act relating to clearance areas, the population of the locality is materially decreased, they may pay to any person carrying on a retail shop in the locality such reasonable allowance as they think fit towards any loss involving personal hardship which in their opinion he will thereby sustain, but in estimating any such loss they shall have regard to the probable future development of the locality."

(18) See In re Slum Clearance 332 Mich. 485, 495, 52 N.W. 2d 195, 199-200 (1952); Dallas v. Priolo, 150 Tex. 423, 426-27, 242 S.W. 2d 176, 179 (1959); Herndon v. Housing Auth'y, 261 S.W. 2d 221, 223 (Tex. Civ. App. 1953). See also 6 Fla. Stat. Ann. §73.10 (Supp. 1956) Cf. Ind. Ann. Stat. §3-1706 (Burns Supp).

(19) See, generally, Comment, 67 Yale L.J. 61 (1957).

(20) See United States v. New River Collieries Co., 262 U.S. 341 (1923); United States v. Miller, 317 U.S. 369 (1943).

(21) United States v. General Motors Corp., 323 U.S 373, 385 (1945); United States v. Building Known

as 651 Brannan Street, 55 F. Supp. 667, 670 (N.D. Cal. 1944); Housing Auth'y v. Holloway, 63 Ga. App. 485, 488, 11 S.E. 2d 418, 420 (1940).

(22) W. Rought, Ltd. v. West Suffolk County Council [1955] 2 all E.R. 337, 342 (C.A.).

(23) See Note, "Good Will," 53 Colum. L. Rev. 660, 664-65 (1953). See also 1 Orgel §75; McCormick, Damages, 547.

(24) In re Jeffries Home Housing Project, 306 Mich. 633, 651, 11 N.W. 2d 272, 276 (1943).

(25) Housing Auth'y v. Lustig, 139 Conn. 73, 90 A. 2d 169 (1952).

(26) See 1 Orgel §164. Cf. Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 420-21, 281 P. 2d 707, 719-20 (1955). See, generally, Comment, 67 Yale L.J. 61, 75-76; 26 Conn. B.J. 404, 406-07 (1952).

(27) 338 U.S. 1 (1949).

(28) 338 U.S. at 15.

(29) 338 U.S. at 23.

(30) 114 So. 2d 237, 242 (1959).

(31) The courts have labeled such losses "speculative" even when a condemnee's moving expenses at the time of condemnation have proved necessarily greater than those which would

exist at some future date. See 1 Orgel §69; cf. New York Cent. & H.R.R.R. v. Pierce, 35 Hun. 306 (N.Y. Sup. Ct. 1885), or when the condemnee has not acted upon whim in relocating after condemnation, but has incurred only reasonable expenses. See, e.g., St. Louis v. St. Louis S.M.&S. Ry., 266 Mo. 694, 698, 182 S.W. 750, 751 (1916) ("It is conceded even that, if these three items were proper subjects of damage, then the amount allowed the respondent therefor is fair and reasonable."). See also United States v. 40,558 Acres of Land, 62 F. Supp. 98, 100-01 (D.C. Del. 1945); Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 281 P. 2d 707 (1955). See Note (39).

(32) Housing Auth'y v. Savannah Iron & Wire Works, Inc., 91 Ga. App. 881, 87 S.E. 2d 671 (1955).

(33) The Michigan court in the Dake case, infra, sought to distinguish "interruption expenses" from "lost profits due to interruption". It is doubtful whether such a distinction will be meaningful in most instances.

(34) See, generally, 67 Yale L.J. 81, 80 (1957).

(35) 357 Mich. 20, 97 N.W. 2d 748 (1959).

(36) Compare Grand Rapids & I.R. Co. v. Weiden,

70 Mich. 390, 38 N.W. 294, 295 (1888) with Dake and In re Slum Clearance, 332 Mich. 485, 495, 52 N.W. 2d 195, 199-200 (1952)

(37) Weiden case, supra and Commissioners of Parks & Boulevards v. Moesta, 91 Mich. 149, 154, 151 N.W. 903, 905 (1892).

(38) 97 N.W. 2d at 753-54.

(39) In re Slum Clearance, 332 Mich. 485, 496, 52 N.W. 2d 195, 200 (1952).

(40) See, e.g., In re Slum Clearance, N. 39 supra See also Slonim, "Injustices in Eminent Domain," 25 Appraisal J. 421, 423 (1957).

(41) Slonim, supra, Note (40)

(42) See Mitchell v. United States, 267 U.S. 341 (1925) (inability to find substitute land to raise particular crop); Reeves v. Dallas, 195 S.W. 2d 575, 581 (Tex. Civ. App. 1946) (inability to find substitute premises for night club.)

(43) See Slonim, supra Note (40), at 424.

(44) See, Comment, 67 Yale L. J. 61, 62, N. 7.

(45) See, e.g. Patterson v. Boston, 40 Mass. (23 Pick.) 425, 430 (1840).

(46) 19 V.S.A. §221 (2) (1957).

(47) 154 A. 2d 475 (1959).

(48) See, e.g., The Dake and Record cases, supra. See also, Searles and Rapheel, "Current Trends in the Law of Condemnation," 27 Ford. L. Rev. 529, 549 (1959).

(49) See "Report of Massachusetts Special Commission Relative to Certain Matters Pertaining to the Taking of Land by Eminent Domain," House No. 2738, p. 13 (1956); See also 88 Cong. Rec. 1649, 1650, 1653, 1654, 1656 (1942). Even the "liberal" Dake case emphasized that lost profits are noncompensable.

(50) See notes 13-16, supra.

(51) Cf. Pearl, "Appraiser's Guide Under Law Allowing Moving Costs", 21 Appraisal J. 327, 330 (1930) wherein the author after commenting about the fact that some appraisers "subconsciously" allow for incidental losses, indicated the probable effect of the 1952 federal act allowing Moving Costs in defense projects: "While no actual cases of such influences [subsconscious inclusion] have been documented or are known to exist, suffice to say that henceforth defense projects, large and small alike, will be removed from the pale of such influences, objective or subjective. All will know and be ever mindful that by the payment of his expenses in moving a fair and specific contribution is being effected towards making the seller truly 'whole'",