#36.80 4/26/73

Memorandum 73-46

Subject: Study 36.80 - Condemnation (Defendant's Responsive Pleadings)

The purpose of this memorandum is to present for Commission consideration the general scheme of the Uniform Eminent Domain Act on defendant's responsive pleadings. This scheme is contained in a revised preliminary draft of Article V of the Uniform Act which is attached to this memorandum. We are concerned only with the desirability of the Uniform Act scheme generally, not with the details of the scheme. We plan to present for Commission consideration at the June meeting a draft of the entire procedure chapter of our Eminent Domain Law. For this reason, it would be helpful to have Commission direction on the subject matter of this memorandum.

The Uniform Act scheme was worked out by the outstanding lawyers who are members of the Uniform Laws committee, by Professor Van Alstyne who (as you probably know) is an expert in California pleading, and by members of the advisory committee. The scheme would replace a variety of schemes used in various states and is intended to provide a simple, workable scheme that places a minimum burden on the defendant and yet deals with the unique nature of the condemnation action. The scheme assumes that the condemnation action will follow the general rules applicable to civil actions and will be commenced by filing a complaint. The Uniform Act scheme is generally outlined in the Prefatory Comment on pages 5.1-5.2 of attached Article V.

Existing California pleading rules for defendant's responses are summarized in Exhibit I attached (an extract from the recently published CEB book on California condemnation law).

The Uniform Act scheme is comparable to Federal Rules Civ. Proc. § 71A:

(e) APPEARANCE OR ANSWER. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

Moreover, the Uniform Act scheme is consistent with other recently prepared revisions of condemnation law. Pennsylvania uses preliminary objections without the requirement of an answer. A recently completed Oklahoma Eminent Domain Code (submitted to the 1973 Legislature) adopts a scheme somewhat similar to the Uniform Act. See Section 403 (pages 11-12) of attached draft of Oklahoma statute. See also Sections 401 and 402 of the same draft.

Two important matters must be noted in reading the Uniform Act. The Uniform Act contemplates that only property in substantially the same ownership may be joined in the same action. The staff believes that, for various reasons, this is a sound limitation; and, despite an earlier decision by the Commission to the contrary, we think that the Commission can be persuaded that the limitation should be included in the California statute. Second, the Uniform Act will not contain specific limitations on takings for future use, excess, substitute, and the like. All objections to takings in these types of cases will be included in a general objection that "fraud, corruption, bad faith, or gross abuse of discretion" exists on the part of the plaintiff (which the defendant must prove by "clear and convincing evidence"). We will substitute a specific

listing of the grounds on which the objection can be made, and we have various provisions allocating the burden of proof. See Exhibit II (attached).

The staff recommends that the Commission tentatively approve the general scheme of the Uniform Act as the basis on which the staff should prepare the draft of the procedure chapter. We believe it would be profitable to go through the Uniform Act draft at the meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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EXHIBIT I

EXTRACT FROM CEB "CONDEMNATION PRACTICE IN CALIFORNIA"

IV. CONDEMNEE'S PLEADINGS

A. Disclaimer

1. [§8.15] USE

Disclaimer is a means of eliminating from the action either a party who has no valid interest in the property or one who may have an interest but does not choose to assert a claim in the condemnation action. It may be prepared for the disclaiming party by the condemnor's or any condemnee's attorney and then filed with the court. If the disclaiming party is a corporation, the disclaimer should be accompanied by an acknowledgment and resolution of the board of directors.

B. Answer

1. [§8.17] STATUTORY REQUIREMENTS

In most condemnation actions, the only pleading the property owner must file is the answer. Anyone who has an interest in the property and who has been properly served with the complaint must be prepared to answer and otherwise appear if he is to protect his right to compensation. Ordinarily, all matters in issue between the condemnor and the condemnee can be raised in the answer.

Code of Civil Procedure §1246 states that the answer must

(a) Allege any interest defendant may have in the property described in the complaint, and

(b) State the amounts defendant claims for the taking or other types of damage.

Code of Civil Procedure §1246 also provides that a person not named in the complaint, but claiming an interest in the property described in the complaint, may become a party to the action as if he had been named in the complaint, *i.e.*, an unnamed claimant may appear and defend. The liberality of this provision makes unnecessary the use of motions either to intervene or to substitute a party defendant before judgment in condemnation actions. For example, if a defendant owner dies before trial, the attorney simply files a new answer on behalf of the executor or administrator.

2. [§8.18] CONTENTS

If the owner's entire property interest is being taken, the answer must contain an allegation that defendant is the owner of that interest, which should then be specifically defined. In a partial taking, defendant should allege that he is the owner of specified interests in the property being acquired and in the larger parcel of which the take is a part. Any questions concerning ownership or clouds on title should be resolved by the court rather than the jury. See *People v Volz* (1972) 25 CA3d 480, 102 CR 107.

Disagreement may exist between parties concerning the number and extent of larger parcels. This issue, like the ownership question, should be decided either at pretrial conference or in a preliminary legal-issue

trial. Counsel should note that interrogatory, deposition, and pretrial exchange are often satisfactory procedures for ascertaining the other party's contentions as to number and extent of larger parcels. See §§9.5-9.14. Also, the condemnee may demand, at least 30 days before trial, that the condemnor prepare a map of the area the condemnor believes to be the larger parcel. CCP §1247b. However, these methods may not always be successful for the condemnee. For example, the condemning agency occasionally uses a demurrer to the answer to require the owner to describe his interest early in the case, before discovery techniques can be implemented. Also, the condemnor's map need not be served on the condemnee until 15 days before trial when it may be too late to be of substantial help.

When the property is large and includes different uses, the condemnee may desire a ruling that several "larger parcels" exist. For example, if the property being valued is a one-acre lot with a machine shop, warehouse, paint store, and sheet metal shop, evidence of sales of property of comparable size and improvement will be difficult to acquire. If, however, the contiguous ownership has been divided into separate larger parcels, comparable sales will be easier to find. Also, when part of the property has been leased, the apportionment phase will be simplified if the leased area has been appraised separately.

Code of Civil Procedure §1246 requires that the condemnee, in his answer, allege the value of the property interest being taken and the amount of any severance damages. Because the answer must be filed before formal appraisal information is available to the condemnee or his attorney, danger always exists that the answer's opinion of valuation and damages will be an inaccurate estimate and will state a claim that is too low; this claim can be used at trial as an admission against interest. One means of avoiding this problem is to set the allegations of valuation and damages at a generously high level. When the estimate is high and the owner later testifies to a lesser value, he will rarely be asked why he earlier claimed the greater amount. Alternatively, although this procedure could be a subject of demurrer, the condemnee may allege that he does not yet know the fair market value of the property and may request leave to amend his answer when he has ascertained actual value and damages.

Severance damages and other special types of damages (see CCP §1248) must be specially pleaded in the answer. Thus in alleging severance damages, the condemnee's answer must state that his interest in the remainder has been damaged in a designated amount by virtue of the taking, by construction of the public improvement in the manner proposed by the condemnor, and by the need thus created for specified alterations in the condemnee's remaining property. See CCP §1248.

3. [§8.19] AFFIRMATIVE DEFENSES

Affirmative defenses include challenge of the condemnor's right to exercise the power of eminent domain, nondeterminations and erroneous determinations of public use and necessity, and lack of intent to use the condemned property for the public use designated in the complaint. These defenses must be raised by the condemnee in his answer and pleaded specially. For example, a general denial of the complaint's allegation that the property is intended to be used for public purposes is not sufficient. *San Mateo v Bartole* (1960) 184 CA2d 422, 432, 7 CR 569, 575. Necessity may be placed in issue by an express allegation

of fraud, bad faith, or abuse of discretion. However, challenges based on the ground of public use and necessity are rarely successful, because the condemnor's allegation in his resolution is usually conclusive. *People v Chevalier* (1959) 52 C2d 299, 340 P2d 598; see chap 6.

The condemnee may allege that the condemning agency lacks authority to condemn property for the use described in the complaint when neither constitution nor statute delegates authority to the condemnor for the purpose in question or when an ostensible delegation is fatally defective (*e.g.*, when conditions necessary to invoke the delegation have not occurred).

In alleging that the condemnor's determination to acquire the condemnee's property for a public use is erroneous, defective, or nonexistent, the condemnee should state both the actual purpose of the taking and the absence of legal authorization.

The condemnee may also allege that the condemnor is attempting to take an excessive amount of property. He must allege not only that more land is being taken than the project specified in the complaint requires, but also that the condemnor has no plans for a public use for the excess parcel. The condemnee would assert that a taking in excess of a project's needs is unauthorized except under certain statutory conditions (see, *e.g.*, CCP §1266), which are not found in the instant case.

The condemnee may further contend in his answer that the condemnor does not intend to put the property to the public use designated in the complaint.

Defendant may raise the issue of future uses by alleging that the condemnor does not intend to appropriate the property to the public use set forth in the complaint within a reasonable period of time. The courts tend to favor planning for the future by condemnors. See, *e.g.*, *Kern County Union High School Dist. v McDonald* (1919) 180 C 7, 179 P 180; *Anaheim Union High School Dist. v Vieira* (1966) 241 CA2d 169, 51 CR 94. Authority for refusing to permit condemnation for hypothetical future uses exists. See *San Diego Gas & Elec. Co. v Lux Land Co.* (1961) 194 CA2d 472, 14 CR 899. In certain instances, condemnation for future use is specifically authorized. Str & H C §104.6; Wat C §§258, 11575.1.

Acceptability of most of these affirmative defenses depends on whether the taking is conclusively presumed to be proper. Such conclusive presumptions are generally found in legislation. If the public agency is armed with the conclusive presumption, the defenses of necessity, abuse of discretion, and greatest public good and least private injury are *not* available. Only an affirmative allegation of fraudulent intent to use the property for private profit will be heard. For further discussion, see §§6.6-6.13, 6.22-6.23. These defenses *are* available when the condemnor does not have the conclusive presumption of necessity. *Los Angeles County Flood Control Dist. v Jan* (1957) 154 CA2d 389, 316 P2d 25.

5. [§8.21] SERVICE

Although the claim of ownership asserted by one defendant's answer may be completely adverse to the claim of ownership of another answering defendant, no law requires that defendants serve copies of their answers on each other. *Santa Cruz v MacGregor* (1960) 178 CA2d 45, 49, 2 CR 727, 729. If defendant who did not receive copies of a codefendant's pleadings can show prejudice attributable to that failure, he might be entitled to relief. *Redevelopment Agency v Penzner* (1970) 8 CA3d 417, 423, 87 CR 183, 186.

6. [§8.22] AMENDMENT OF ANSWER

Under CCP §473, the court has broad discretion to permit amendment of pleadings at any time before judgment. This general provision is applicable to answers in eminent domain actions. A motion for leave to amend an answer should not, however, be made in the jury's presence. *People v Lundy* (1965) 238 CA2d 354, 361, 47 CR 694, 699. See generally California Civil Procedure Before Trial 450-460 (Cal CEB 1957); California Civil Procedure During Trial §§6.21-6.32 (Cal CEB 1960).

C. [§8.23] Demurrer

Because the allegations of the complaint are carefully prescribed by CCP §1244, a demurrer to the complaint is appropriate in ordinary condemnation cases only when the provisions of that section are not met. The most frequent omission is failure to allege a "statement of the right of the plaintiff" as required by CCP §1244(3). This problem typically arises when the complaint fails to state the facts that constituted a basis for exercise of the condemnation power; or when that power is exercised under such statutes as CCP §1266 (permitting taking of a whole parcel if severance damage to the remaining portion would equal fair market value of the whole parcel), or under Deering's Wat C Uncodified Acts, act 4463 §§16 1/2, 16 5/8, West's Wat C App §§28-16 1/2, 28-16 5/8 (allowing the Los Angeles County Flood Control District, under certain circumstances, to take property in addition to that actually needed for the public project). For examples of questions raised by demurrer, see, *e.g.*, *Harden v Superior Court* (1955) 44 C2d 630, 636, 284 P2d 9, 13; *San Bernardino County Flood Control Dist. v Superior Court* (1969) 269 CA2d 514, 75 CR 24.

On demurrers generally, see CCP §§472-472d; California Civil Procedure Before Trial 399-421 (Cal CEB 1957).

D. [§8.24] Cross-Complaint

An answer is a sufficient responsive pleading in most eminent domain cases. Its scope is broad enough to cover most functions of the usual cross-complaint. The answer can be used to raise issues such as lack of public use and necessity and to claim the various items of damages. See CCP §1246. See also *Bayle-Lacoste & Co. v Superior Court* (1941) 46 CA2d 636, 645, 116 P2d 458, 464. Nevertheless, a cross-complaint can be a useful tool in certain situations.

The cross-complaint must state a cause of action that is related to the principal cause of action, *i.e.*, whether asserted against plaintiff, codefendant, or a nonparty, it must be based on the condemnor's action to take the property described in the complaint. CCP §428.10(a)-(b). Defendant may not state an unrelated cause of action against plaintiff in his cross-complaint; CCP §428.10(a), allowing *any* cause of action to be asserted in a cross-complaint against plaintiffs generally, is expressly made inapplicable to eminent domain proceedings.

Because the cause of action stated by cross-complaint against plaintiff is necessarily related to the principal cause of action, arguably that cause *must* be raised in a cross-complaint, rather than in a separate, subsequent complaint. See CCP §426.30(a) on compulsory cross-complaints. On the other hand, eminent domain proceedings may be within the exception (noted at the beginning of CCP §426.30(a)) to the compulsory cross-complaint requirement, because of their special treatment in CCP §428.10(a).

A cross-complaint is often used to determine future rights and obligations among various defendants. It can be used to quiet title to a remainder, to give declaratory relief, and to rescind or reform a sale contract or lease (to reflect the condemnation action's present or future effect on the contract). *People v Buellton Dev. Co.* (1943) 58 CA2d 178, 136 P2d 793. For example, if the court, in deciding an owner's cross-complaint, rescinds a lease on the ground of economic frustration of purpose, one element of the owner's damage (loss of the lease) has already been determined; the lessee's rights and obligations have also been determined, and he will not be a party to any subsequent apportionment proceeding. See §§10.1-10.15 on apportionment.

A cross-complaint has been used to raise issues between condemnor and condemnee not normally covered by the complaint and answer. A typical cause arises when the condemnor's conduct, other than the act of taking itself, has a detrimental effect on the condemned property or on the remainder parcel. For example, the condemnor may abuse its right of entry to make preliminary surveys (see §4.71), or the condemnor may seek to take a right-of-way and then make changes in the character of the condemnee's land adjoining but not within the right-of-way. In this situation, the condemnee may bring a cross-complaint for damages; alternatively, his cross-complaint may seek to force a sale to the condemnor of the excess property affected. These causes of action could instead be asserted in a separate complaint in inverse condemnation. See chap 13. However, the cross-complaint procedure is preferable in most situations because it speeds resolution of the matter, avoids multiple actions, and decreases the parties' expenses. Moreover, compulsory cross-complaint requirements may be applicable. See CCP §426.30(a).

A cross-complaint may be based on the condemnor's activities on the condemnee's property. *People v Clausen* (1967) 248 CA2d 770, 57 CR 227 (condemnor trespassed on condemnee's remainder parcel). See §4.71.

The condemnee's attorney should recognize that a potential cross-complaint (or separate action in inverse condemnation) is a factor to be raised in settlement negotiations with the condemnor. See chap 7. The total amount sought by the condemnee for property taken should include the additional recovery anticipated from the cross-action.

If a cross-complaint has been improperly filed against plaintiff, either because the issues could have been raised in the answer (see *People*

v Los Angeles County Flood Control Dist. (1967) 254 CA2d 470, 62 CR 287) or because they allege an entirely unrelated dispute (see *El Monte School Dist. v Wilkins* (1960) 177 CA2d 47, 1 CR 715), the agency may challenge it by demurrer or motion to strike. CCP §435. The motion to strike may also be made by third party cross-defendants who have been improperly joined. See, *e.g., El Monte School Dist. v Wilkins, supra.* A motion to strike, however, may not be granted as long as the cross-complaint has some proper purpose, even though a demurrer to certain allegations may be sustained. *People v Buelton Dev. Co.* (1943) 58 CA2d 178, 185, 136 P2d 793, 797.

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§ 1260.330. Grounds for objection where resolution conclusive

1260.330. Grounds for objection to the right to take, regardless whether the plaintiff has duly adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1240.110) of Chapter 4, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought pursuant to Section 1240.330, 1240.420, 1240.510, or 1240.610, but the acquisition does not satisfy the requirements of those provisions.

(g) Any other ground provided by statute.

§ 1260.340. Grounds for objection where resolution not conclusive

1260.340. Grounds for objection to the right to take where the plaintiff has not adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1240.110) of Chapter 4 include:

(a) The plaintiff is a public entity and has not adopted a resolution of necessity that satisfies the requirements of Article 2 of Chapter 4.

(b) The public interest and necessity do not require the proposed project.

(c) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(d) The property described in the complaint, or right or interest therein, is not necessary for the proposed project.

OKLAHOMA CODE OF EMINENT DOMAIN

FINAL DRAFT

As approved October 26, 1972, by the Ad Hoc Committee on Eminent Domain for submission to the 1972 Interim Judiciary Committee of the State Legislative Council.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

ARTICLE I

SHORT TITLE

SECTION 101. SHORT TITLE. This act shall be known and may be cited as "The Eminent Domain Code."

ARTICLE II

GENERAL PROVISIONS

SECTION 201. PURPOSE. It is intended by this Code to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and assessments of damages therefor. This Code is not intended to enlarge or diminish the power of condemnation given by law to any condemnor.

SECTION 202. DEFINITIONS. The following words, when used in this Code, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this section:

1. "Condemn" means to take, injure or destroy private property by authority of law for a public purpose;

2. "Condemnee" means the owner of a property interest taken, injured or destroyed;

3. "Condemnor" means the entity, including the state, taking, injuring or destroying private property under authority of law for a public purpose;

4. "Necessary" means that which is reasonably requisite and proper for the accomplishment of the end in view;

5. "Action for inverse condemnation" means an action brought by an owner of land taken and occupied for a public purpose before just compensation is paid or a declaration of taking is filed;

6. "Putative condemnor" means the defendant named by an owner in an action for inverse condemnation; and

7. "Person" includes a natural person and all other entities capable of owning property.

SECTION 203. ACTION FOR INVERSE CONDEMNATION. In case any condemnor authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this Code, any property, without having purchased or condemned the same, the damage thereby inflicted on the owner by the taking or occupying of such property shall be determined in the manner provided in this Code upon petition of the owner of such property. The owner's petition shall be filed in the district court in which is located all or a portion of the property and shall contain the following:

1. The name and address of the owner;

2. The name and address of the putative condemnor;

3. A description or plan of the property claimed to be taken sufficient for identification thereof;

4. A statement of the nature of the owner's title;

5. A statement of the nature and extent of the taking and the date on which it initially occurred; and

6. A demand for a jury trial as provided for in Section 404 of this Code.

In such case, the same proceeding shall be had as near as may be possible, as provided for condemnation proceedings when the condemnor has filed his declaration of taking. The questions to be decided by the trier of fact shall be if there has in fact been a taking, and if so, the amount of damages due the owner.

ARTICLE III

PROCEDURE TO CONDEMN

SECTION 301. JURISDICTION AND VENUE. The district court shall have exclusive jurisdiction of all condemnation proceedings. All condemnation proceedings shall be brought in the district court of the county in which the property is located, or, if the property is located in two or more counties, then in the district court of any one of the counties. Where the property is located in two or more counties, and a proceeding is commenced in the court of one of the counties, all subsequent proceedings regarding the same property shall be brought in the same county and filed under the same court style and number as the original petition. However, in the event the owner of the fee resides in one of said counties, he shall have the exclusive right at his option, to have all proceedings removed to the county of his residence where a portion of said property is located.

SECTION 302. EFFORT TO PURCHASE. A. No proceedings shall be taken to condemn land or other property, or any interests therein, until a bona fide and ineffectual effort has been made to acquire the same from an owner thereof by purchase, except where such consent cannot be obtained because of the incapacity of the owners or one or more of them or because such owner is unknown or cannot with

reasonable diligence be found within this state.

B. When an estate is being probated, or a minor or incompetent person has a legal guardian, or a conservator has been appointed, the administrator or executor of the estate, or guardian of the minor or incompetent person, or conservator, shall have the authority to execute all instruments of conveyance on behalf of the estate, minor or incompetent person without proceedings other than approval by the judge of the district court endorsed on the instrument of conveyance. Competent evidence to prove that reasonable compensation is being paid for the execution of said instrument shall be presented to the court prior to said approval.

SECTION 303. DECLARATION OF TAKING. A. In any eminent domain proceeding, the petitioner shall file in the cause a declaration of taking signed by the petitioner or its duly authorized agent or attorney empowered by law to acquire the property described therein, declaring that said property is thereby taken for the use of the petitioner. Said declaration of taking shall contain or have annexed thereto:

1. A statement of the authority under which and the use for which said property is taken;

2. A description of the property taken sufficient for the identification thereof;

3. A statement of the estate or interest in said property taken for said use; and

4. A statement of the sum of money estimated by said petitioner to be just compensation for the property taken and damages to the remainder, if any.

B. Upon the filing of said declaration of taking and of the deposit in the court, for the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, the title or interest set forth in the declaration shall vest in the petitioner. The right to just compensation for the same shall vest in the persons entitled thereto; and such compensation shall be determined as hereinafter provided and established by judgment. The said judgment shall include, as part of the just compensation awarded, interest at the rate of six percent (6%) per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of judgment; but interest shall not be allowed on so much thereof as shall have been paid into court. The person entitled to the award shall not be charged with poundage.

C. Upon the application of the parties in interest, the court shall order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the petitioner for the amount of the deficiency, and, if less, the court shall enter judgment against such parties in favor of the petitioner for the difference.

D. Upon the filing of a declaration of taking, the court shall fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

SECTION 304. RECORDING NOTICE OF CONDEMNATION. The condemnor, upon filing its declaration of taking and depositing therewith its estimate of just compensation, shall on the same day file for record a notice thereof in the office of the county clerk of the county in which the property is located. If the property is located in two or more counties, the notice shall be recorded in all such counties. The notice shall specify the district court style and number of the declaration of taking and the date it was filed, and shall contain a description or plan of the property condemned sufficient for the identification thereof and the names of the owners of the property interests condemned, as the condemnor by reasonable diligence can ascertain, and shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor and the condemnor as grantee.

SECTION 305. NOTICE TO CONDEMNEE. A. Within thirty (30) days after the filing of the declaration of taking, the condemnor shall give written notice of the filing to the condemnee, as follows:

1. The notice shall be served by and in the manner provided for service of summons in civil actions or by the condemnor delivering a copy thereof to the condemnee or leaving a copy thereof at his usual place of residence with some member of his family over fifteen (15) years of age. In the event service cannot be made within thirty (30) days, alias notices may be given;

2. Service of notice may be had by publication upon any condemnee who resides out of this state, or resident of this state who has departed therefrom with intent to avoid service of such notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of an owner, by publishing such notice once

a week for two consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the declaration of taking is filed. A copy of such notice and declaration of taking shall be mailed to such condemnee's last-known mailing address within five (5) days of the first publication thereof; and

3. In all cases where service may be made by publication, the notice and declaration herein provided may be served by personal service on any condemnee out of the state with the same force and effect as if personally served within this state.

B. Notice to be given to the condemnee shall state:

1. The caption of the case;

2. The date of filing of the declaration of taking and the court number thereof;

3. The name, or names, of each condemnee to whom it is directed;

4. The name and address of the condemnor;

5. That the condemnee's property has been condemned, including a description of the property and estate or interest therein taken as set forth in the declaration of taking;

6. A statement that if the condemnee chooses to challenge the power or authority of the condemnor to appropriate the condemned property, the adequacy of the initial deposit, or the public necessity for the taking he or his attorney must file a written challenge to the declaration of taking with the court clerk within thirty (30) days after being served with notice of condemnation;

7. A statement that if the condemnee chooses to contest the amount of just compensation estimated by the condemnor in the declaration of taking he or his attorney must file a written demand for trial with the court clerk within thirty (30) days after being

served with notice of condemnation; and

8. If the condemnee was served by publication, such publication notice shall contain a statement that the thirty-day time limits in paragraphs 6 and 7 of this subsection shall commence to run on the date of first publication.

C. A copy of the declaration of taking shall be attached to the notice served or mailed to the condemnees.

D. Proof of service of said notice shall be filed with the court clerk.

E. The notice required under this section shall be prepared by the Administrative Director of the Courts and approved by the Supreme Court.

SECTION 306. RIGHT OF ENTRY PRIOR TO CONDEMNATION. A. The condemnor, through its authorized agents and employees, shall have the right to enter upon private property prior to condemnation for the purpose of surveying the land or making an inspection thereof. Such entry shall not be deemed a trespass, nor shall an entry for such purpose be deemed an entry under any condemnation proceedings; but notice shall be given by the condemnor to the owner of the property or person residing on the premises, personally or by registered or certified mail, at least ten (10) days prior to such entry.

B. If, following service of the notice specified in subsection A hereof, the owner of or person residing on the premises shall refuse to allow entry to the condemnor for the purposes herein allowed, the district court in the county in which the property is situated shall, on application of the condemnor, direct the sheriff of that county to afford entry to the condemnor.

C. The condemnor shall make reimbursement for any actual damages resulting to property as a result of activities pursuant to this section. In the event of a disagreement as to the amount of the damage, either the person damaged or the condemnor may file a petition with the district court for the determination of such damages, to which the state hereby consents and waives its immunity from suit for such purpose.

ARTICLE IV

CHALLENGES TO DECLARATION OF TAKING AND DEMAND FOR TRIAL

SECTION 401. CHALLENGE TO NECESSITY OF TAKING. A. The defendants in eminent domain proceedings may, within thirty (30) days of the date on which they are served notice of the declaration of taking, file with the court clerk a challenge to the necessity of the taking. If the service was by publication, the thirty-day time limit shall begin to run from the date of first publication.

B. The challenge to the necessity of the taking must be in writing, filed with the court clerk in the style and number of the case, and the fact that copies thereof were mailed to the condemnor or its attorney shall be endorsed thereon by the defendant or his attorney.

C. The public necessity for the taking shall be determined by the district court sitting as trier of the law and facts, and such determination shall be appealable as an interlocutory order substantially affecting the merits of the litigation. Provided, however, that if the issue is decided by the district court in favor of the condemnor, no appeal shall operate to stay the possession of the property by the condemnor. Provided further, that if the issue is decided by the district court in favor of the condemnee, the condemnor's right to possession of the property shall be stayed until

the issue is finally determined by appeal or otherwise. In the event this issue is appealed to the Supreme Court, the cause shall be advanced upon the docket of that court for determination at the earliest possible time.

D. If this issue is finally determined in favor of the defendants, the district court shall enter an order restoring title and the right of possession to the property in the defendants. A copy of such order shall be filed of record with the clerk of the county where the property is situated. Further provided, if this issue is finally determined in favor of the defendants, that the court shall tax all costs of the proceedings, including reasonable litigation expenses and attorneys' fees, against the condemnor. If the parties cannot agree thereon, the court shall conduct a hearing and issue an order setting such costs and fees, and such order may be appealed from as a final order as otherwise provided for by law.

SECTION 402. CHALLENGE TO ADEQUACY OF DEPOSIT. A. The defendants in eminent domain proceedings may, within thirty (30) days of the date on which they are served notice of the declaration of taking, file with the court clerk a challenge to the adequacy of the estimated just compensation deposited by the condemnor. If the service was by publication, the thirty-day time limit shall begin to run from the date of first publication.

B. The challenge to the adequacy of the deposit must be in writing, filed with the court clerk in the style and number of the case, and the fact that copies thereof were mailed to the condemnor or its attorney shall be endorsed thereon by the defendant or his attorney.

C. The only issue to be raised by this challenge shall be whether the estimate of just compensation was reasonable. This issue shall be determined by the court sitting as a trier of the law and facts, and shall not be an appealable order. The purpose of this provision is not to make a final determination of just compensation.

D. The defendants shall have the right, prior to a hearing by the court under this section, to discover, by timely filed interrogatories served upon the condemnor, the amounts of all appraisals made by or for the condemnor on the condemned property. If the condemnor can be shown to have deposited less than the highest of those appraisal amounts as an estimate of just compensation, the defendant shall be deemed to have made a prima facie showing that the deposit was not reasonable; provided, however, that the condemnor shall have the opportunity to rebut that presumption.

E. If the court determines that the initial deposit was not reasonable and should be increased, he shall state in his order the amount that said deposit should be increased by, and the condemnor shall deposit said increase within thirty (30) days from the date of said order. Provided further, that if such increase be ordered the condemnor shall have thirty (30) days from the date of such order within which to demand a trial on the issue of just compensation.

SECTION 403. CHALLENGE TO THE POWER OR AUTHORITY TO CONDEMN. A. The defendants in eminent domain proceedings may, within thirty (30) days of the date on which they are served notice of the declaration of taking, file with the court clerk a challenge to the power or authority to condemn. If service was by publication, the thirty-day time limit shall begin to run from the date of first publication.

B. The challenge to the power or authority to condemn must be in writing, filed with the court clerk in the style and number of the case, and the fact that copies thereof were mailed to the condemnor or its attorney shall be endorsed thereon by the defendant or his attorney.

C. The challenge to the power or authority to condemn shall state all grounds or reasons on which it is based, and shall be decided by the court sitting as a trier of the law and the facts. Provided further, that if the issue is decided by the district court in favor of the condemnee, the condemnor's right to possession of the property shall be stayed until the issue is finally determined by appeal or otherwise. In the event this issue is appealed to the Supreme Court, the cause shall be advanced upon the docket of that court for determination at the earliest possible time.

D. If this issue is finally determined in favor of the defendants, the district court shall enter an order restoring title and the right of possession to the property in the defendants. A copy of such order shall be filed of record with the clerk of the county where the property is situated. Further provided, if this issue is finally determined in favor of the defendants, that the court shall tax all costs of the proceedings, including reasonable litigation expenses and attorneys' fees, against the condemnor. If the parties cannot agree thereon, the court shall conduct a hearing and issue an order setting such costs and fees, and such order may be appealed from as a final order as otherwise provided for by law.

SECTION 404. DEMAND FOR TRIAL. A. The defendants in eminent domain proceedings may, within thirty (30) days of the date on which they are served notice of the declaration of taking, file with the court clerk a demand for trial on the issue of just compensation. If

the service was by publication, the thirty-day time limit shall begin to run from the date of publication.

B. The demand for trial must be in writing, filed with the court clerk in the style and number of the case, and the fact that copies thereof were mailed to the condemnor or its attorney shall be endorsed thereon by the defendant or his attorney.

C. The thirty-day time limitation herein shall not be extended by the filing of challenges to the declaration of taking, even though such challenges have not been ruled upon by the court.

D. The only issue to be raised by a demand for trial is the amount of compensation due the defendant filing the demand, for the appropriation of his property.

E. If no demand for trial is filed within the time limit herein specified, and no challenges to the taking are filed within the time limits herein specified or sustained by the court, the condemnor may, without further notice to the other parties, obtain from the court an order confirming the taking.

F. When a timely demand for trial has been filed, unless the parties otherwise agree as hereinafter provided, the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court.

G. If the parties agree and the court approves, the amount of compensation may be determined by a jury of less than twelve (12) but no less than six (6) members. The parties may also agree to waive a jury and try the issue of just compensation to the court sitting without a jury.

H. The parties may also agree, with the approval of the court, to submit the question of just compensation to a board of three (3) commissioners, to be agreed upon by the parties and the court. Such commissioners shall view the property and hear the evidence and arguments of the parties, and shall return their verdict to the court, which shall enter judgment thereon in the same manner as in civil actions. Formal rules of evidence shall not apply to the hearings conducted by said commissioners, but they first shall take an oath in open court that they are not interested in any way in the property involved, and that they will fairly and impartially perform their duties. They shall be instructed by the court as to the law and issues they are to consider, and any two (2) of them must sign their final report. Their report must be delivered in open court, at which time they may be questioned by the parties or the court on the basis on which they made their report, and the court shall then approve or reject said report. Rejection may be done for errors of law or fact contained in the report. The fees of the commissioners shall be fixed by the court and taxed among the parties as right and justice shall require.

I. Any party aggrieved by a ruling of the court may appeal therefrom as otherwise provided for by law and the rules of the Supreme Court relative to civil appeals.

J. In the event the court orders an increase in the amount of estimated compensation deposited by the condemnor with the declaration of taking, the condemnor shall have thirty (30) days from its receipt of said order to file a demand for trial. If such demand for trial be filed, procedures shall be followed as under this section.

K. In the event the final judicial determination of fair market value is at least ten percent (10%) and One Thousand Dollars

($1,000.00) above the condemnor's deposited estimate of fair market value, the court may award a reasonable fee to the condemnee's attorney, to be paid by the condemnor, not to exceed Five Thousand Dollars ($5,000.00). The amount of the fee so awarded may be appealed by either party as a final order.

ARTICLE V

PRETRIAL CONFERENCES

SECTION 501. All proceedings in eminent domain in which either plaintiff or defendant has demanded a trial on the issue of just compensation shall be set for a pretrial conference to be held more than thirty (30) days in advance of the trial date.

SECTION 502. Thirty (30) days advance notice by mail of the pretrial conference shall be given by the court clerk to all attorneys and parties of record. The notice shall contain the following instructions:

1. The attorneys who shall conduct the trial are required to attend;

2. All discovery shall be completed;

3. All amendments to pleadings and stipulations shall be filed in the case before the conference;

4. All trial exhibits shall be obtained and brought to the conference;

5. A list of all witnesses showing the business address of each one shall be brought to the conference together with a brief summary of the evidence of each one showing the following:

a. size of the landowner's unit,

b. the highest and best use of the land before the taking,

c. the highest and best use of the remaining land after the taking,

d. the method and approaches used in evaluating the land,

e. a list, together with pertinent data, of all comparable sales proposed to be offered in evidence,

f. any special damages claimed,

g. the date of the taking,

h. the details of the public improvement to be made,

i. the before value of the unit,

j. the after value of the remainder of the unit,

k. the estimate of just compensation,

l. the estimate of any special off-setting benefits to the unit, and

m. the qualifications of the witnesses; and

6. All special requested instructions.

SECTION 503. Counsel for the condemning authority shall prepare a pretrial conference order containing the results of the conference. All attorneys of record shall approve the order and the order shall be presented to the court for signature within fifteen (15) days following the conference. In the event of a conflict, the contents of the pretrial order shall supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the court in the interest of justice.

SECTION 504. Failure to comply with the order of the court setting a pretrial conference by not attending or failing to comply with the instructions contained in the notice thereof, except for good cause shown, shall subject the demand for trial to an order of dismissal or entry of judgment as shall be determined by the court.

ARTICLE VI

TRIAL (GENERAL)

SECTION 601. PROCEDURE. The condemnor shall have the burden of proof, shall go forward with the evidence and shall open and close the case.

SECTION 602. MEASURE OF DAMAGES. A. Just compensation shall consist of the difference between the fair market value of the condemnee's entire unit immediately before the taking and the fair market value of condemnee's remaining property, if any, immediately after the taking and as it will exist after the public improvement is made, including benefits thereto, but in no event shall any alleged resulting benefits to the remaining property exceed any claimed damages to the remaining property.

B. Fair market value shall be the price in terms of money that a willing buyer would pay and a willing seller would accept for the property, neither being under compulsion and both being knowledgeable as to its highest and best use.

SECTION 603. HIGHEST AND BEST USE. The highest and best use shall be the most profitable use for which the property is likely to be used in the reasonably foreseeable future.

SECTION 604. 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 may be assessed as if such tracts were one parcel.

SECTION 605. HARVESTING AND MARKETING OF CROPS. A. 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; agrees to assume the responsibility for the completion of the growing process and the harvesting and marketing of the crops.

B. 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.

ARTICLE VII

TRIAL (EVIDENCE)

SECTION 701. COMMISSION HEARING. A. The commissioners may hear such testimony, receive such evidence and make such independent investigation as they may deem appropriate, without being bound by formal rules of evidence.

B. The commissioners may consider everything each deems to be appropriate, including facts which they have discovered by their own investigation and view, in order to arrive at their decision as to just compensation.

C. The condemnor and the condemnee may, at a hearing before the commissioners, present expert testimony as to just compensation.

D. The condemnee, or an officer of a corporate condemnee, may without further qualification testify as to just compensation.

SECTION 702. TRIAL IN COURT. A. In all instances the jury shall be given the option to view the property and failure of the trial court to inform the jury of its option shall constitute reversible error.

B. Testimony as to the value of property may be given only by:

1. Witnesses qualified to express such opinion; and

2. The owner of the property or property interest being valued.

C. 1. A qualified valuation expert may, on direct or cross-examination, state any or all facts and data which he considers in arriving at his opinion, whether or not he has personal knowledge thereof, and his statement of such facts and data and the sources of his information shall be subject to impeachment and rebuttal; and

2. A qualified valuation expert may testify on direct or cross-examination in detail as to the valuation of the property on a comparable market value, reproduction cost or capitalization basis, which testimony may include but shall not be limited to the following:

a. the price and other terms of any bona fide sale of the condemned property or bona fide sales of comparable property made within a reasonable time before or after the date of condemnation,

b. the rent reserved and other terms of any lease of the condemned property or comparable property which was in effect within a reasonable time before or after the date of condemnation,

c. the capitalization of the net rent, including reasonable net rent attributable to the real property customarily determined by a percentage or other measurable portion of gross sales or gross income of a business which may be reasonably conducted on the premises, as distinguished from the capitalized value of the income or profit attributable to any business conducted thereon,

d. the value of the land together with the cost of replacing or reproducing the existing improvements thereon less depreciation, and

e. the cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.

D. Either party may show the difference between the condition of the property and of the immediate neighborhood at the time of the condemnation and at the time of view by the commissioners or jury.

E. The assessed valuations of property condemned shall not be admissible as evidence for any purpose.

F. A qualified expert may testify that he has relied upon written reports of another expert as to the cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation, but only if a copy of such written report has been furnished to the opposing party at the pretrial conference.

G. If otherwise qualified, a valuation expert shall not be disqualified by reason of not having made sales of property nor having examined the condemned property prior to the condemnation, provided he can show he has acquired knowledge of its condition at the time of the condemnation.

H. In arriving at his valuation of the remaining part of the property in a partial condemnation, an expert witness may consider and testify to the use to which the condemned property is intended to be put by the condemnor.

I. Notwithstanding the other provisions of this section, the following matters are inadmissible as evidence and are not a proper basis for an opinion as to the value of property:

1. The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain;

2. The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered or listed for sale or lease;

3. The value of any property or property interest as assessed for taxation purposes, but nothing in this section prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable rental value attributable to the property or property interest being valued; and

4. The amount deposited in court by the condemnor as its estimate of just compensation.

ARTICLE VIII

ABANDONMENT

SECTION 801. WRITTEN NOTICE. The plaintiff may abandon the proceeding at any time after the filing of the declaration of taking and prior to the expiration of ten (10) days after final judgment by serving upon defendant(s) and filing in court a written notice of such abandonment. Such notice shall be served upon the defendant(s) by mailing a copy thereof to them and to their attorney of record at the last-known mailing address of each by certified mail with return receipt requested, and the fact of such mailing shall be endorsed by the condemnor on the copy of the notice filed in court.

SECTION 802. SETTING ASIDE ABANDONMENT. The court may, upon motion made within thirty (30) days after filing in court a written notice of such abandonment by plaintiff, set aside the abandonment if it determines that the position of the moving party has been materially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

SECTION 803. JUDGMENT DISMISSING PROCEEDING - COSTS AND DISBURSEMENTS. A. Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendant(s) their recoverable costs and disbursements. Recoverable costs and disbursements include:

1. All expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial and in any subsequent judicial proceedings in the condemnation action; and

2. Reasonable attorney fees, appraisal fees and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial and at any subsequent judicial proceedings in the condemnation proceedings whether such fees were incurred for services rendered before or after filing of the complaint.

B. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred

had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken.

C. The court shall, at the time judgment is entered dismissing the condemnation proceeding, make such orders as right and equity require with regards to transfer of title of record of the property back to the condemnee, and repayment of any funds previously deposited by the condemnor and withdrawn by the condemnee.

ARTICLE IX

MISCELLANEOUS

SECTION 901. SEVERABILITY. If any provision of this Code or the application hereof to any person or circumstances is held invalid the remainder of this Code, and the application of such provision to other persons or circumstances, shall not be affected thereby and to this end the provisions of this Code are declared to be severable.

SECTION 902. EFFECTIVE DATE. The provisions of this act shall become effective upon approval by the people of the amendment of Article II, Section 24, of the Oklahoma Constitution referred by Senate Joint Resolution No. _____ of the First Session of the Thirty-fourth Oklahoma Legislature.

SECTION 903. REPEAL OF CONFLICTING LAWS. Upon the approval by the people of the question referred by said Senate Joint Resolution No. _____, all conflicting laws and parts of laws are repealed.

PRELIMINARY REVISED DRAFT

UNIFORM EMINENT DOMAIN CODE

Article V. Defendant's Response

Article V

[Defendant's Response]

Prefatory Comment

Under the approach to the pleadings here adopted, all objections to the complaint or to the action, and all defenses to the taking (as distinguished from the compensation to be awarded) must be included in a timely answer, and no demurrer or motion is permitted. However, it is contemplated that all preliminary objections and defenses will be heard and decided prior to trial on the compensation issues.

To avoid entry of his default, the defendant must file either a statement of appearance, an answer, or a disclaimer within the normal [20] day period allowed by section 501. A disclaimer, however, may also be filed "at any time" thereafter, even after the defendant's default has been entered. Thus, the scheme of the Code contemplates 4 procedural postures for a defendant:

(1) The defendant may file a statement of appearance. This waives all objections and defenses to the taking (see section 503) but maintains the defendant as a party in the action who may introduce proof at the trial with respect to the scope and extent of his claimed property interest and the amount of compensation to be paid for it.

(2) The defendant may answer and thereby raise and litigate any permissible issues of law or fact. See section 504.

(3) The defendant may file a disclaimer. This removes him

from the action for all purposes, and he is not entitled to share in the award. See section 505.

(4) The defendant may default by making no response of any kind. A default waives all objections and defenses to the taking. After entry of his default, the defendant is no longer entitled to notice of the proceedings, and cannot file pleadings or motions, or introduce evidence at the trial, except by leave of the court on timely application. See section 502. A defaulting defendant, however, is entitled to share in the award of compensation to the extent of his interest, and the plaintiff must prove the amount of such compensation, unless a disclaimer is filed.

Section 501. [Required Response]

(a) A defendant shall serve and file a response to the complaint, or to an amended complaint, within [20] days after it has been served upon him.

(b) The response may consist of:

(1) a statement of appearance;

(2) an answer; or

(3) a disclaimer of any interest in the action.

(c) A person who is not named as a defendant, or a defendant who was not served with process, who claims an interest in the property described in the complaint, may appear in the action by serving and filing a response to the complaint or amended complaint

(1) as of right within [90] days after the commencement of the action; or

(2) by permission of the court granted not later than [30] days before the date set for the trial of the issue of compensation, upon noticed motion for leave to appear in the action.

(d) The time allowed by this section for responding to a complaint or amended complaint may be shortened or extended, prior to the entry of the defendant's default, by

(1) written stipulation filed with court, signed by counsel for all plaintiffs and by counsel for the defendant who is required to respond, or

(2) order of the court, granted with or without notice,

for good cause shown, upon a finding that no party will sustain substantial prejudice because of the change in the time for the response.

(e) A response shall be served upon all parties of record at the time it is filed.

(f) Nothing in this section impairs the right of a defendant to serve and file a disclaimer of any interest in the action at any time.

Comment

Section 501(a) prescribes the time within which the defendant's response ordinarily must be made. The period of time allowed, here shown in brackets as 20 days, should be conformed to the period for answer allowed in other civil actions in the state. In most cases, the time limit provided in paragraph (a) will run from the date on which personal service of process is accomplished. See section 409. On the other hand, if service is by publication pursuant to court order, the period would run from the date of last publication, unless the court order or an applicable statute otherwise provided.

Paragraph (b) designates the only forms of response that may be made. No pleading or motion other than a statement of appearance (see section 503), an answer (see section 504), or a disclaimer statement

(see section 505) is allowed by way of response.

Paragraph (c) provides for the relatively rare case of a person with an interest in the subject property who is not named as a defendant (or included in any general "unknown owners" designation), or a defendant who for any reason is not served with process. Such persons who learn of the action are permitted to appear voluntarily as defendants, provided they meet the time limits of paragraph (b). The right to appear, however, is limited to a person claiming to have a legal or equitable interest in the property. This would include, for example, one claiming (a) title by an unrecorded deed, (b) a leasehold interest, (c) an interest based on possession under claim of right, (d) title by adverse possession, (e) as purchaser under an executory land sale contract, or (f) as beneficiary of a trust impressed on the property. Persons who would not be directly affected by the adjudication of title or the award of compensation in the action (e.g., persons merely opposed to the project in question) would not be authorized automatically to file a response, or to obtain leave of court to do so.

Paragraph (d) authorizes an extension or shortening of the time to respond; but such a change in the time limits is only available prior to entry of default. No requirement is included for a noticed motion to sucure an extension of time from the court; an ex parte application is sufficient unless the court directs that a notice of motion be served. An order shortening or extending time to respond may be made in connection with the granting of permission to appear pursuant to a motion

under paragraph (c)(2).

Paragraph (e) requires the response to be served only on parties of record. Later-appearing parties may obtain notice of the contents of earlier responses by consulting the clerk's file.

Paragraph (f) preserves a defendant's right to file a disclaimer at any time, even though some other response was previously filed or his default was entered. See section 505(a). The availability of a disclaimer may facilitate settlement of minor and tenuous claims of interest both as between plaintiff and defendant and as between adversely claiming defendants.

> Reporter's Note: This section has been extensively rewritten based on the June 1972 meeting. It now incorporates the provisions of former sections 406 and 503, this bringing all provisions relating to the form and time of response into one place.

Section 502. [Default on Failure to Respond]

(a) When a defendant has failed to respond to the complaint within the time provided in section 501, the clerk shall, upon proper application as in other civil actions, enter his default.

(b) Subject to paragraphs (c) and (d), a defendant whose default has been entered is deemed to have waived:

(1) any preliminary objections to procedural defects in

the action or to the taking of the property described in the complaint;

(2) any objection to the amount which the court determines from the evidence at the trial to be just compensation for his interest in the property;

(3) his right to file a response or other application for relief of any kind in the action;

(4) his right to notice of any proceedings in the action after the date of entry of his default;

(5) his right to present evidence or argument, or otherwise to participate as a party, in any hearings or at the trial.

(c) A defendant whose default has been entered

(1) shall be served with notice of any amendment of the complaint that substantially changes the amount or nature of the property sought to be taken, or the purpose for which it is to be taken;

(2) shall be entitled to receive his distributive share of any award of compensation, damages, or costs made in the action, to the extent specified in the judgment; and

(3) may serve and file a disclaimer statement under section 505.

(d) Upon duly noticed motion made not less than [30] days prior to the date set for the commencement of trial upon the issue of compensation, the court for good cause shown may set aside an entry of default and permit the defendant to serve and file an answer or statement of appearance to the complaint within such time, and subject to such terms and conditions, as may be just.

Comment

Section 502 provides for the consequences of a defendant's failure to file a timely response. While these matters are presumably covered by general procedural provisions, the many unique procedural features of condemnation procedure suggest the desirability of providing explicitly for the consequences of default.

Under paragraph (a), entry of default is obtained by application

as in other civil actions. The entry itself only cuts off the defendant's right to plead and defend, but not his right to share in the award of compensation. See paragraph (c).

Under paragraph (b), entry of default waives all objections and defenses to the taking that could otherwise have been asserted. However, the plaintiff must still prove the amount of compensation that should be awarded to the defaulting defendant. The waiver, moreover, is not necessarily conclusive; paragraph (b) declares it to be "subject to paragraphs (c) and (d)."

Paragraph (c) makes it clear that a defendant whose default has been entered is still a party to the condemnation action for certain purposes. First, he is entitled to notice of any amendment that substantially changes the scope of the "take" or the public use for which the property is to be taken. This notice will make it possible for the defendant in default to make a motion under paragraph (d) to set aside the default and permit the filing of an answer or statement of appearance where the change in the complaint warrants a change in defensive position. For example, a defendant might elect to default if the complaint sought only to take a small portion of his property for a highway easement; but an amendment that changes the scope of the "take" to a major portion of the premises, to be taken in fee, for stockpiling of highway maintenance supplies of sand and gravel could reasonably provoke an entirely different response. Notice is essential to ensure fairness to a defendant in default in such circumstances. Second, a

defendant in default is entitled to receive his proportionate share of the compensation, damages, and costs that may be awarded. Third, he may still file a disclaimer under section 505. Since disclaimers remove the defendant from the action for all purposes, they should be encouraged in the interest of reducing litigation, simplifying the issues, and providing a convenient device for facilitating settlements.

Paragraph (d) authorizes the court "for good cause shown" to set aside a default on noticed motion, subject to appropriate terms and conditions to be prescribed by the court in view of all of the relevant circumstances. If the motion is made shortly before the trial date, for example, an equitable disposition might direct that the default be vacated on condition that defendant file a statement of appearance rather than an answer. Compare section 503 with section 504. In other instances, the court's order might limit the defendant to an answer pleading only specified defenses, or permit an answer to be filed on condition that defendant pursue only specified discovery procedures within a prescribed period of time. In ruling on the motion, the court has ample discretion to consider all relevant factors, including the effect of its ruling upon the date for trial, the need for additional discovery, possible prejudice to the plaintiff and to other defendants, and the extent to which additional proceedings made available by vacating the default might prove to be unduly burdensome or oppressive.

Reporter's Note: Section 502 and the Comment have been revised to reflect decisions made at the June 1972 meeting. The principal changes relate to: (a) treating the default as

a waiver of objections and of defendant's right to participate, rather than a consent to the taking, and (b) provision for notice of substantive amendments to the complaint.

Section 503. [Statement of Appearance]

(a) A statement of appearance shall contain a description, in terms sufficient for identification, of the nature and extent of the interest claimed by the defendant in the property described in the complaint, but may not allege any objection to the action or to the taking of the property.

(b) By filing a statement of appearance, a defendant waives:

(1) any preliminary objections to procedural defects in the action or to the taking of the property described in the statement; and

(2) any claim to or interest in any other property sought to be taken in the action or in any award of compensation for the taking of property other than that described in the statement.

(c) A defendant whose response to the complaint consists of a statement of appearance:

(1) is entitled to notice of, and may participate in, any proceedings in the action that may relate to or affect the property described in the statement;

(2) may present evidence at the trial relating to the scope and extent of his ownership interest in any property not clearly embraced by the waiver described in paragraph (b), and the amount of compensation and damages, if any, to which he is entitled; and

(3) shall be entitled to receive his distributive share of any award of compensation, damages, or costs made in the action, to the extent specified in the judgment.

Comment

Section 503 provides for the contents and effect of a defendant's response in the form of a statement of appearance. The statement is intended to be a simple document, capable of being filed without aid of counsel, designed primarily to clarify the ownership interest in the subject property that is claimed by the responding defendant. Accord-

ingly, the description of the property claimed by the defendant need not be a legal description, but merely one adequate to identify the scope of his claimed interest.

Under paragraph (b), the defendant waives all objections to the action and to the taking of his property. The statement also amounts to a waiver of any interest in any property not described in it.

Under paragraph (c), the defendant remains a party to the action entitled to notice and to participation in all proceedings in the action, including the trial, that relate to his claimed ownership interest and to the compensation and damages to which he is entitled.

The effect of a statement of appearance, as a response in the condemnation action, is subject to the power of the court to permit its amendment, or the substitution of an answer in lieu thereof. See section 506. The subsequent filing of a disclaimer would also supersede a statement of appearance and make this section inapplicable. See section 505.

> Reporter's Note: This section has been rewritten to conform to suggestions made at the June 1972 meeting. The principal changes are in paragraphs (b) and (c), which attempt to spell out the exact consequences of a statement of appearance.

Section 504. [Answer]

(a) An answer shall contain:

(1) a description of the nature and extent of the interest claimed by the defendant in the property described in the complaint; and

(2) a statement of preliminary objections which may be inconsistent with one another, together with a short and plain description of the basis for each objection.

(b) The statement of preliminary objections shall include every legally tenable ground for objecting to the maintenance of the action which the defendant seeks to assert, including, but without limitation thereto, the grounds that:

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

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

(3) the court lacks jurisdiction of the defendant or of subject matter, or is not the proper venue, or the complaint or any other procedural aspect of the action is defective, insufficient, or improper.

(c) Subject to the provisions of section 506, any ground of objection not fairly set forth in the defendant's answer is deemed waived.

Comment

Section 504 prescribes the contents of the answer. In addition to a description of defendant's claimed interest in the property sought to be taken, all preliminary objections which the defendant wishes to assert must be pleaded in the answer. Any objections not set forth are waived. The answer is thus the only pleading by which the defendant may assert that the condemnation action is unauthorized or has been defectively prosecuted. Section 501 precludes the assertion of objections by way of motion or demurrer as in other kinds of civil actions. The objections required to be pleaded need not be consistent with one another.

As in the case of answers in civil actions generally, any allegations in the complaint that are not denied in the answer are deemed admitted. Conversely, by describing the interest claimed by the defendant, the answer may place in issue any conflicting or

inconsistent interest in the property alleged or claimed by the plaintiff in the complaint.

The objections that may be asserted by answer are described in broad and flexible terms by paragraph (b). For example, under clause (1), the defendant may place in issue the plaintiff's authority to invoke eminent domain for the purpose described in the complaint, may contend that the purpose is not a lawful public use for which private property may be condemned, or may assert that the property is exempt from condemnation. Under clause (2), defendant may assert that the plaintiff has failed to adopt a legally effective condemnation authorization (as required by section 309), has failed to conduct preliminary purchase negotiations (as required by section 306), or has failed to satisfy some other condition precedent (e.g., promulgation of an environmental impact statement required by an applicable statute; establishment of a required relocation assistance program; etc.). Under clause (3), any procedural defects, including lack of jurisdiction of subject matter or of the defendant, improper venue, insufficiency of the complaint, improper joinder, untimely filing of the complaint, or other procedural omission (e.g., a failure to seek to take an uneconomic remnant under section 208, or to condemn improvements required to be taken under section 209) may be asserted as an objection.

The procedures for determining preliminary objections are provided in sections 509-511.

Reporter's Note: Section 504 has been redrafted to conform to decisions made at the June 1972 meeting. As this section now stands, it includes in substance the provisions of former sections 509 and 510, which describe the kinds of preliminary objections that may be pleaded in the answer. The Comment provides further descriptive detail in this connection.

Section 505. [Disclaimer Statement]

(a) A disclaimer statement need not be in any particular form, may be signed either by the defendant or his attorney, and shall contain a statement in short and plain terms to the effect that the defendant claims no interest in the property which is the subject of the action, or in the compensation that may be awarded.

(b) A disclaimer statement may be filed at any time, and supersedes a statement of appearance of answer previously filed by, or an entry of default of the disclaiming defendant.

(c) Subject to paragraphs (c) and (d), a defendant who has filed a disclaimer statement shall have no right to notice of or to participate in any proceedings, or to share in any award of compensation or damages, in the action.

(d) The court may implement the disclaimer by appropriate orders, including a dismissal of the action as to the disclaiming defendant and an award of authorized costs and disbursements.

(e) Upon duly noticed motion, for good cause shown, the court may permit a defendant to withdraw a disclaimer statement, subject to such terms and conditions as may be just.

Comment

Section 507 provides a simplified method for a defendant to disclaim any interest in the property or award of compensation involved in the action.

Paragraph (a) permits the disclaimer to be an informal document which merely contains a statement "to the effect that" the defendant claims no interest in the property, or the award, or both. A defendant wishing to make a partial disclaimer may do so by filing a statement of appearance or an answer describing only the interest claimed by him. See sections 503(b) and 504(1).

Under paragraph (b), a disclaimer may be filed "at any time," even after an answer or statement of appearance has been filed, or after a default has been entered. The disclaimer supersedes any earlier responses.

The disclaimer, in effect, removes the disclaiming defendant from the action, and ordinarily results in a dismissal as to him. See paragraphs (c) and (d). The court is authorized to make an award of costs where appropriate.

Upon noticed motion and a showing of good cause, the court

may allow a disclaimer to be withdrawn, subject to such time limits and other conditions as the court may prescribe. See paragraph (e). In appropriate cases, a condition of withdrawal may be the filing of a statement of appearance or answer within stated time limits, together with other conditions calculated to prevent undue prejudice to other parties.

Reporter's Note. This section (formerly section 507) has been redrafted pursuant to suggestions made at the June 1972 meeting. The draft assumes that disclaimers should be encouraged and, so far as possible, simplified so that they may be filed without the need for services of counsel.

Section 506. [Amendment of Answer or Statement of Appearance]

(a) Subject to paragraph (b), unless the court otherwise directs, defendant may amend or supplement his answer or statement of appearance, and may substitute either for the other without leave of court at any time within [90] days after service of process upon him, and thereafter with leave of court upon duly noticed motion.

(b) A newly substituted answer, or an amended or supplemental answer, may not assert any preliminary objection that was asserted in the earlier pleading being amended or supplemented, except by leave of court obtained on duly noticed motion for good cause. Leave of

court may be granted only if the court finds that the failure to assert the objection earlier was due to excusable mistake or inadvertence, that the objection is asserted in good faith and not primarily for purposes of delay, and that no party to the action will be substantially prejudiced if leave is granted.

Comment

Section 506(a) authorizes the defendant to freely change his response up to [90] days after he was served with process, and thereafter with leave of court. The changed response is not limited to amendments or supplemental allegations, however, but includes the substitution of an answer for a statement of appearance, or vice versa.

Paragraph (b) qualifies the liberal amendment policy of paragraph (a) by barring the assertion of preliminary objections not pleaded earlier, except by court order based on findings of justification, good faith, and lack of prejudice.

The requirement that a court order be obtained to amend after the end of the [90] day period, and in all cases under paragraph (b), is based upon (1) the need for judicial supervision of amendments introduced after the initial pleading stage of the litigation; (2) the practical need for judicial control over the timing and other procedural consequences of amendments that introduce new objections requring preliminary determi-

nation, and (3) the desirability of assuring the existence of justification and good faith before a party is allowed by amendment or substituted answer to introduce additional issues and produce possible delay in the ultimate disposition of the action.

Reporter's Note: This section has been revised to conform to the discussion at the June 1972 meeting. The Comment explains its rationale. Without a provision of this kind, it seems probable that the usual procedures for amending answers, in state procedural law, might be inadequate to assure that the amending process is not abused or used for dilatory purposes. The procedures for amending responses are now substantially similar to those for amending complaints. See section 411.

Section 507. [Additional Pleadings]

(a) Except as provided in paragraph (b), the plaintiff may not file a reply or other pleading responsive to an answer or statement of appearance. New matter alleged in an answer or statement of appearance is deemed denied by operation of law.

(b) The defendant may file a [counterclaim, cross-complaint, cross-claim, or third-party claim] in the action only with leave of court for good cause shown. Pleadings responsive thereto shall be filed in accordance with applicable provisions of the [Code] [Rules] of Civil Procedure, unless otherwise ordered by the court.

Comment

Section 507 is intended to prevent a condemnation action from becoming unduly complex or unnecessarily delayed through the routine filing of additional pleadings, including various forms of cross-demands.

A desire to introduce additional claims for relief under paragraph (b), expecially as against third persons, should not arise very often, since the typical issues of just compensation and conflicting property claims can be effectively asserted without additional pleadings. On the other hand, a counterclaim for damages caused by the condemnor's entry for suitability studies (see section 305) may, in some cases, be appropriate. In other instances, third-party pleadings presumably may be used to assert claims for relief based on facts extrinsic to the condemnation action. For example, the defendant property-owner might have a claim for damages for trespass against a third person, or a claim against a third person based on actions that affect the value or use of the subject property. Under the present section, claims of these kinds (assuming they satisfy other requirements of local practice codes or rules) may be pleaded as cross-demands in the action upon a proper showing to the satisfaction of the court that they would be in the interests of justice.

This section appears to be necessary to implement judicial control of pleadings subsequent to the answer, since, in its absence, existing authorizations for pleading of replies and of cross-demands

in normal civil litigation, often without leave of court, might be deemed applicable. See section 401. Upon enactment, the appropriate terminology under state law should be inserted within the indicated brackets.

Reporter's Note: This section has been revised as a result of the decisions made at the June 1972 meeting. The previous draft prohibited any form of cross-demand, and was silent on the matter of replies.

Section 508. [Motion to Strike Response]

(a) Within [ten] days after service of a defendant's response, or amended or supplemental response, the plaintiff may move to strike it in whole or in part for illegality, insufficiency, or uncertainty.

(b) Objections to the form or contents of any response that are not asserted by plaintiff by timely motion to strike under subsection (a) are deemed waived.

(c) If a motion to strike is granted, the court shall include in its decision or order a statement of the specific ground or grounds upon which the ruling is based, and shall give the defendant [10] days to amend to correct the defect [unless the defendant, by stipulation made in open court and entered upon the minutes of the court, concedes that

13 the defect cannot be corrected by amendment.]

Comment

Section 508 permits the plaintiff to challenge the form and language of the defendant's original or amended response. A defective, incomplete, or uncertain description of the property interest claimed by the defendant in a statement of appearance (see section 503) or in an answer (see section 504) could unnecessarily complicate the issues in the action. The plaintiff should also have some method available by which to challenge the legal sufficiency of preliminary objections (see section 504) or to assert that their import is not sufficiently clear to enable the plaintiff to prepare to meet them. Similarly, a means of challenge should be available in the event the defendant attempts to amend his response in violation of the limitations prescribed by section 506, or to plead a counterclaim without leave of court. See section 507. A motion to strike seems an appropriate and expeditious remedy for all these purposes.

Under paragraph (b), the failure to challenge defects by a motion to stroke constitutes a waiver only of objections to form or contents that could properly have been made by the motion. The substantive aspects of all allegations in the answer, including all objections pleaded, are deemed controverted as a matter of law. See section 513.

Paragraph (c) is intended to implement the liberal rule of pleading that underlies the present Act by requiring an opportunity for the defendant to amend his pleading to correct any deficiency identified by the court's order ruling on the motion to strike, unless the defendant affirmatively

concedes that the defect cannot be remedied by amendment.

Reporter's Note: This section (formerly section 512) is designed to clarify the issues raised in the formal pleadings, and where possible to simplify them, in advance of their formal determination. The Act contemplates that all basic issues of a preliminary nature (e.g., the plaintiff's right to take, due satisfaction of all conditions precedent, sufficiency of pleadings, etc.) will be adjudicated before the trial on substantive issues such as conflicting property claims, just compensation, etc.

Section 509. [Hearing on Preliminary Objections]

(a) Preliminary objections alleged in the answer may be heard and determined by the court on its own motion, or on noticed motion by any party.

(b) Until all objections have been determined, or have been withdrawn by stipulation of the parties, no proceedings shall be held in the action for the purpose of determining just compensation.

(c) Nothing in this section shall be construed to impair the right to or conduct of discovery proceedings in accordance with applicable law.

Comment

Section 509 provides for the hearing and determination of

defendant's preliminary objections. See section 504(b). No time limits for the hearing are provided, except that it must precede the trial on issues of just compensation. It is assumed that all of the objections pleaded will ordinarily be made the subject of a single hearing, although nothing in the section specifically so requires. If one party notices a hearing on only part of the issues, the court, on its own motion or on motion of the adverse party, may set the balance of them for hearing at the same time and place, subject if need be to a continuance of the date originally set. In the meanwhile, discovery proceedings--which may be an important prelude to resolution of fact issues raised by one or more objections pleaded in the answer--may go forward without interruption under paragraph (c).

It is here assumed that the court has ample authority, either as part of its inherent powers to control the proceedings before it or by affirmative delegation in applicable rules or procedural statutes, to control the order of presentation of the objections and, where factual issues are present, the nature of the evidence (e.g., oral testimony or affidavits) that may be adduced at the hearing. It is further assumed by this section that a determination of all issues properly pleaded by way of objections in the answer may constitutionally be made by the court without a jury.

> Reporter's Note: This section has been redrafted in accordance with discussions at the June 1972 meeting. The changes are mainly aimed at simplifying the wording, consistent with the view that the procedural details for the hearing on determination of objections should be left as flexible as possible, so that they

can more easily be accommodated to existing state procedural systems. This section and the appended Comment attempt to carry out that intent.

Section 510. [Burden of Proof at Hearing on Objections]

(a) Except as provided in subsection (b), the plaintiff has the burden of proof on all issues of fact raised in connection with a preliminary objection.

(b) The defendant has the burden of proof in the following cases:

(1) Whenever fraud, corruption, bad faith, or gross abuse of discretion on the part of the plaintiff or any of its officers, agents, or employees is alleged by a defendant in support of a preliminary objection, the defendant has the burden of proving the facts relative to that particular allegation by clear and convincing evidence.

(2) Whenever a preliminary objection is based on assertions with respect to which a condemnation authorization adopted by the plaintiff does not constitutesconclusive evidence, the

15 defendant has the burden of proving those assertions by a

16 preponderance of evidence.

Comment

Section 510 specifies the allocation of the burden of proof on issues of fact arising in connection with the determination of defendant's preliminary objections. While the defendant has the obligation and burden to raise these objections by appropriate pleading (see section 504(c) providing for waiver of objections not pleaded), the evidence on factual issues thus asserted is generally more readily available to the condemnor. Moreover, as the party that initiated the litigation, seeking to take the defendant's property without his consent, it seems reasonable to require the plaintiff to bear the burden of convincing the trier of fact that it should be permitted to maintain the action. This burden, of course, is ordinarily aided to a large degree by the conclusive effect of the condemnor's recitals of public use and necessity in its condemnation authorization. See section 311(a).

The exceptions set out in paragraph (b) are based upon collateral policies that would be subverted by insistence upon the general rule placing the burden of proof upon the condemnor. For example, fraud, bad faith, corruption and abuse of discretion may be alleged in connection with an objection asserting plaintiff's failure to engage in "good faith" negotiations to purchase, as required by section 306(a), or when a condemnation authorization is attacked as void under section 311(b).

The disfavored nature of these allegations is reflected by placing the burden of proving them, by clear and convincing evidence, upon the defendant. See paragraph (b)(1). If the defendant succeeds in challenging the validity of the authorization by such evidence, the burden of proving the elements of public use and necessity remains upon the plaintiff.

Another traditional policy, which presumes the regularity of official action, supports the position that even when a condemnation authorization is not conclusive evidence of its recitals of public use and necessity (see sections 311(c) and 403(b)) it should still be accorded evidentiary effect. This view is implemented by paragraph (b)(2), which allocates the burden or proving the contrary to the objecting defendant. It should be noted, however, that except as provided in paragraph (b), the burden remains with the plaintiff upon any other fact issues relating to whether the condemnation authorization is conclusive or merely presumptive evidence in the first place.

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

judicial decisions and statutory provisions.

Reporter's Note: This section (formerly section 514) has been redrafted, together with the Comment, based on the June 1972 discussions. The principal changes are in paragraph (b), to clarify the burden of proof on the defendant in the limited situations there described.

Section 511. [Disposition of Defendant's Objections]

The standards provided in this section shall govern the disposition by the court of preliminary objections asserted by the defendant:

(a) If the court determines that plaintiff does not have the right to acquire defendant's property by eminent domain, it shall dismiss the action as to that property. If the court determines that the plaintiff has the right to acquire defendant's property by eminent domain, it shall enter an interlocutory order to that effect.

(b) If the court determines that a preliminary objection other than one governed by paragraph (a) is meritorious, the court shall make an order appropriate to the objection and disposing of it in a just and equitable manner, including, but without limitation thereto,

(1) a disposition consistent with the disposition of

like objections asserted in other civil actions;

(2) dismissal of the action, in whole or in part, if substantial or irreparable injury has been incurred or would otherwise be incurred by the defendant;

(3) directions to the plaintiff to take designated corrective or remedial action as prescribed by the court, including, where appropriate, the adoption of a new or amended condemnation authorization, within a specified period of time;

(4) a determination to the effect that the failure or omission constituting the basis of the objection was the result of excusable mistake, inadvertence, or surprise and did not substantially prejudice the defendant in any material respect.

(c) In addition to any other requirements of an order sustaining a preliminary objection, the court may in the interest of justice require the plaintiff to pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission constituting the basis of the objection.

An award of litigation expenses under this paragraph shall be included in the order if the court finds that the plaintiff acted or failed to act without substantial justification.

Comment

Section 511 provides a flexible range of dispositions that can be ordered by the court upon sustaining objections pleaded by the defendant. While it is probably true that the court, in most states, would have power under existing rules or codes of civil procedure to make most, if not all, of the orders here described, it seems appropriate to spell out the authority of the court in this regard in order to avoid any pre-emptive or restrictive interpretation.

Subsection (a) requires a dismissal when it is decided that plaintiff does not have the right to take the defendant's property, in whole or in part. If the complaint alleges alternative grounds for the taking, a determination of the insufficiency of one ground would not preclude a finding that the right to take exists as to the other. A dismissal may extend only to part of the defendant's property, if the court determines that plaintiff has the right to take the rest.

Since a dismissal, whether in whole or in part, may significantly affect the public improvement project, it is declared to be immediately appealable. On the other hand, a determination that the plaintiff has the right to condemn defendant's property is declared to be an interlocutory judgment. Review must therefore await the conclusion of the action, except to the extent that interlocutory review may be available

in the adopting state under other provisions of law.

Subsection (b) confers broad discretionary authority upon the court to make just and appropriate dispositions of preliminary objections asserted by the defendant. The disposition, however, must be "appropriate" to the objection asserted. Pleading defects, for example, would ordinarily call for a disposition under paragraph (1), as in other civil actions. An objection that the plaintiff had failed to adopt a condemnation authorization (as required by section 309) or had failed to engage in preliminary negotiations for acquisition of the property by purchase (as required by section 306) might call for a different disposition: Under circumstances showing extreme prejudice, a dismissal under paragraph (2) would be possible; more often, a corrective order under paragraph (3), requiring the omitted step to be taken within a specified period of time on pain of dismissal for failure to do so, would be indicated. In still other cases, the court might conclude that the omission was excusable under paragraph (4). The choice of disposition, under this section, is left to the court's sound discretion in light of all of the circumstances of the case.

Subsection (c) authorizes the court to award the defendant all or a part of his litigation expenses in conjunction with an order sustaining an objection, where justice requires. The award is mandatory, however, if the court finds that the plaintiff acted, or failed to act, "without substantial justification." The term, "substantial justification," permits the plaintiff to show that it acted reasonably and in good faith

in failing to take the action in question. For example, the plaintiff may have concluded, on the basis of information available to it, that a preliminary purchase offer was not required because the case was apparently within the provisions of section 308.

The term "litigation expenses" as used in subsection (c) includes reasonable costs and expenses, including attorney's fees and appraisal or engineering fees, necessarily incurred by the defendant. See the definition of this term in section 103(7).