

EMINENT DOMAIN CODE



GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
1964

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as last amended 1959, December 8, P. L. 1740, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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EMINENT DOMAIN LAW

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FOREWORD

In September, 1962, the Joint State Government Commission issued its preliminary report, *Proposed Eminent Domain Law of 1963*, the introduction to which read:

“Introduction

“The Joint State Government Commission is currently engaged in a study to codify, amend, revise and consolidate the laws relating to eminent domain in Pennsylvania, pursuant to House Resolution No. 59 (Serial No. 64), adopted finally in the Senate on October 1, 1959, which provides:

“There is widespread dissatisfaction in this Commonwealth with the present laws relating to the condemnation of private property for public purposes and with the procedure in effect thereunder for determining the amount of damages to be awarded in connection with such takings. This dissatisfaction is increasing because of highway extension programs, suburban expansion, urban redevelopment, municipal growth and public authority activities. It has been heightened further because of the lack of uniformity in law and procedure as evidenced in the multifarious laws under which the various condemnors in this State must now act. The courts have been handicapped in developing satisfactory procedures to aid in arriving at substantial justice between the parties involved because of these statutory variances and because of judicial precedents which originated largely during the agrarian period of the Commonwealth’s history and which fail to take into consideration the problems created by a changing economy, the expanding population and a revised concept of what constitutes public use.

‘A thorough and exhaustive study of all statutes on the subject of eminent domain now in force in this Commonwealth should be made, and, in addition, comparable legislation of other states should be examined, for the purposes of:

'(1) Developing a single procedure, if possible, to provide for a determination of compensation to be paid in all cases regardless of the identity of the condemnor;

'(2) Providing for the use of court-appointed appraisers, but permitting the parties to offer additional testimony if they so desire;

'(3) Providing for payment to condemnees and other interested parties of a percentage of the value of the property taken, as determined by the court-appointed appraisers, within a definite period of time following the filing of their appraisal report in court;

'(4) Developing a more workable and modern definition of "just compensation" which shall be applicable to all condemnors alike;

'(5) Defining "time of taking" so that it shall be uniform in practice for all condemnors;

'(6) Requiring condemnors to institute proceedings for determination of damages payable within a definite period of time following the taking;

'(7) Requiring such damage proceedings to be instituted against the owners of all of the property taken;

'(8) Requiring that notice be given to all owners of property taken within a definite period of time after the taking;

'(9) Requiring that personal or mailed notice of taking be given to tenants, mortgagees and other lienholders of record of the property taken;

'(10) Giving tenants, mortgagees and other lienholders the statutory right to intervene and participate in damage proceedings to protect their respective interests in the damages to be paid;

'(11) Requiring that a description of the property taken be recorded in the Recorder of Deed's office;

'(12) Requiring that a notice of taking be filed in the Recorder of Deed's office, indexing the condemnee's name in the grantor index and the condemnor in the grantee index;

'(13) Requiring that the Commonwealth be made liable, as other condemnors are, for consequential damages;

'(14) Prohibiting condemnors from acquiring base fee interests in the property taken; and

'(15) For making such other improvements in the law and procedure pertaining to this subject as may after such study prove to be equitable and just; therefore be it

'Resolved (the Senate concurring), That the Joint State Government Commission be directed to study and investigate exhaustively the law and procedure relating to the exercise of the right to condemn property for public purposes in Pennsylvania and for the payment of damages therefor, with a view toward proposing a complete revision and codification thereof into one statute in order to eliminate present inconsistencies, produce uniformity in practice and procedure, assure just and equitable treatment between all interested parties and in general improve the administration of justice in this field of law.'

"The Joint State Government Commission appointed a task force to conduct this study. To aid in the inquiry, the Commission appointed an advisory committee giving representation to the judiciary in metropolitan and rural areas, the Pennsylvania Bar Association, the Department of Highways, the Department of Justice, real estate appraisers, municipal government, redevelopment and housing authorities, metropolitan and rural boards of viewers, schools of law, public utilities, and practitioners familiar with the law of eminent domain.

"The purpose of the code is to improve the law and procedure in the exercise of the powers of eminent domain presently invested in condemnors by the Constitution and by statute. The code is not intended to enlarge or abridge the power of condemnation presently possessed by any condemnor, nor to change the method by which a condemnor proceeds to condemn, such as, by ordinance, resolution or

otherwise. The change in the law begins with the actual taking of property and the passage of title thereto. It is believed that the proposed code brings a higher degree of certainty and protection to all parties concerned.

“While substantial work has gone into its preparation, the very nature of the proposal demands that it be critically examined by those possessing the power of eminent domain, by groups having specialized knowledge of the subject as well as owners of property which may be taken, and by practitioners, and that the Commission and its advisors be given the benefit of such criticism.

“Suggestions, criticisms, and recommendations regarding the Proposed Eminent Domain Law of 1963 should be addressed to the Joint State Government Commission, Post Office Box 1361, Harrisburg, Pennsylvania.”

The suggestions, criticisms, and recommendations received pursuant to this invitation were considered and a final draft of a bill embodying the proposed code was prepared and introduced at the 1963 Session of the General Assembly. The following is a history of that bill:

In the House

No. 683. By Messrs. BOWMAN, K. B. LEE, FINEMAN and RUDISILL.

Printer's No. 1689.

Previous Printer's No. 761.

An Act to codify, amend, revise and consolidate the laws relating to eminent domain.

Referred to the Committee on Judiciary, March 20.

Reported as amended, June 18.

Passed first reading, June 19.

Passed second reading, July 8.

Passed third reading and final passage, July 10. (166-29)

In the Senate

Referred to the Committee on Judiciary General, July 11.

On February 4, 1964, the Governor in his proclamation convening the General Assembly in extraordinary session included the Eminent Domain Code as one of the subjects to be considered. The proposed code was introduced at the Special Session of 1964 as House Bill No. 1, was passed by the General Assembly, and approved by the Governor on June 22, 1964, as Act No. 6.

There is submitted herewith the Eminent Domain Code, together with the Joint State Government Commission's explanatory Comments on each section.

BAKER ROYER, *Chairman*

*Joint State Government Commission
Capitol Building
Harrisburg, Pennsylvania
1964*

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IN THE NAME AND BY AUTHORITY OF THE



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
HARRISBURG

PROCLAMATION

By virtue of the authority vested in me by Article IV, Section 12, of the Constitution, I, William W. Scranton, Governor of the Commonwealth of Pennsylvania, do hereby convene the General Assembly in extraordinary session, to meet in the Capitol, at Harrisburg, on Tuesday, February 11, 1964, at 12:00 o'clock noon, to consider legislation upon the following subjects:

1. Codifying, amending, revising and consolidating the laws relating to eminent domain.

* * *

GIVEN under my hand and the Great Seal of the State, at the City of Harrisburg, this fourth day of February, in the year of our Lord one thousand nine hundred sixty-four, and of the Commonwealth the one hundred eighty-eighth.



WILLIAM W. SCRANTON
Governor

By the Governor:

GEORGE S. BLOOM
Secretary of the Commonwealth

Legislative History of Eminent Domain Code

(Special Session of 1964)

HOUSE BILL NO. 1, Printer's No. 14

Previous Printer's Nos. 1, 6, 7, 10, 11, 13

By Messrs. Fineman, A. D. Williams, Jr., Hepford and Butera.

Referred to the Committee on Judiciary, February 24

Reported as amended, March 17.

Passed first reading, March 18.

Passed second reading, May 12.

Passed third reading with Amendments, May 13.

Passed finally, May 14.

(Vote 184-0)

House non-concurred in Senate amendments and appoints Messrs. Auker, Steckel and Fineman, a committee of conference, June 8.

Conference committee report filed, June 10.

Conference committee report recommitted to committee, June 15.

Conference committee report filed, June 15.

House adopted conference committee report, June 16.
(Vote 197-0)

In the Senate

Referred to the Committee on Judiciary General, May 14.

Reported as amended, June 2.

Passed first reading, June 2.

Passed second reading with amendments, June 3.

Passed third reading and final passage, June 8.

(Vote 49-0)

Senate insists on its amendments non-concurred in by the House and appoints Messrs. Scott, Davis and Kalman a committee of conference, June 9.

Conference committee report recommitted to committee, June 15.

Report filed, June 15.

Senate adopted conference committee report, June 16.

(Vote 49-0)

Approved by the Governor, June 22, 1964

Act No. 6

(1964, June 22, P. L. 84)

EMINENT DOMAIN CODE

(1964, June 22, P. L. 84)

With Comments

Special Session of 1964

No. 6

AN ACT

To codify, amend, revise and consolidate the laws relating to eminent domain.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

ARTICLE I

Short Title

Section 101. Short Title.—This act shall be known and may be cited as the “Eminent Domain Code.”

ARTICLE II

Definitions

Section 201. Definitions.—The following words, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) “Condemn” means to take, injure or destroy private property by authority of law for a public purpose.

Comment:

This language is suggested by the Pennsylvania Constitution, Art. XVI, §8.

(2) “Condemnee” means the owner of a property interest taken, injured or destroyed, but does not include a mortgagee, judgment creditor or other lienholder.

Comment:

Mortgagees, judgment creditors and lienholders have been excluded from the definition since, under this act, they do not have such an interest in the property as to be considered condemnees. This is in accord with existing law. It is intended by this definition to include tenants, purchasers under agreements of sale and holders of options as condemnees.

(3) “Condemnor” means the entity, including the Commonwealth of Pennsylvania, taking, injuring or destroying private property under authority of law for a public purpose.

Comment:

The definition of condemnor is intended to include the Commonwealth and all of its agencies and instrumentalities and all the various municipalities, public bodies, authorities, corporations and individuals with the power to condemn property.

(4) “Court” means the court of common pleas.

ARTICLE III

Severability, Effective Date, and Intent

Section 301. Severability.—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act, and the application of such provision to other persons or circumstances, shall not be affected thereby and to this end the provisions of this act are declared to be severable.

Comment:

The inclusion of a severability section is necessary in view of the language of the court in *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581 (1947).

Section 302. Effective Date.—This act shall take effect immediately upon approval, and shall apply to all condemnations effected thereafter, except the provisions of Article IV, which shall not take effect until September 1, 1964 and shall apply to all condemnations effected thereafter. The provisions of Articles V and VII shall also apply to all steps taken subsequent to the effective date of this act in all condemnation proceedings in which the condemnation was effected prior to the effective date of this act.

Section 303. Intent of Act; Exclusions.—It is intended by this act to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefor, except as provided in section 901: Provided, however, That nothing in this act shall be deemed to affect, vary, alter or modify the jurisdiction or power of the Public Utility Commission of the Commonwealth of Pennsylvania, the State Mining Commission created under the act of June 1, 1933 (P. L. 1409), as reenacted and amended, or any act providing for the assessment of benefits for public improvements on the properties benefited. This act is not intended to enlarge or diminish the power of condemnation given by law to any condemnor.

ARTICLE IV

Procedure to Condemn

Section 401. Jurisdiction and Venue.—The court of common pleas shall have exclusive jurisdiction of all condemnation proceedings. All condemnation proceedings shall be brought in the court of common pleas of the county in which the property is located, or, if the property is located in two or more counties, then in the court of common pleas 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.

Comment:

This section gives the court of common pleas exclusive jurisdiction of all condemnation cases. The common pleas court has jurisdiction of condemnation cases under most statutes. Jurisdiction in the court of common pleas is prescribed in: The County Code, 1955, August 9, P. L. 323, §2408 (16 P. S. §2408); The Borough Code, 1927, May 4, P. L. 519, Art. XIV, §1420, as reenacted and amended (53 P. S. §46420); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, §1920, as reenacted and amended (53 P. S. §56920); The Second Class Township Code, 1933, May 1, P. L. 103, Art. X, §1020, as amended (53 P. S. §66020); the turnpike act, 1937, May 21, P. L. 774, No. 211, §6 (36 P. S. §652f), and subsequent turnpike acts; the corporation act of 1874, April 29, P. L. 73, §41, as amended (15 P. S. §481). On the other hand, under the State Highway Law, 1945, June 1, P. L. 1242, Art. III, §304 (36 P. S. §670-304), jurisdiction is in the court of quarter sessions. The purpose of this section is to make the law uniform in the matter of jurisdiction.

Insofar as concerns venue, this section is generally in accord with existing law under which the court of common pleas of the county where the condemned property is located has jurisdiction. This section does, however, change existing law in this regard as to condemnation by a water supply district under The Water Supply District Law, 1931, May 29, P. L. 215, Art. 1, §1 (15 P. S. §1474a), which provides that: “. . . the court of common pleas of the county wherein reside the greater number of consumers and other patrons to be supplied with water by the district . . .” has jurisdiction when the district condemns.

It is not intended by this section to affect jurisdiction and venue of courts as established under interstate compacts which in many cases provide for jurisdiction and venue of eminent domain cases in the Court of Common Pleas of Dauphin County. See, for example, the Act of 1919, May 8, P. L. 148, §4 (36 P. S. §3274).

Section 402. Condemnation; Passage of Title; Declaration of Taking.—(a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a declaration of taking, with such security as may be required under section 403 (a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.

(b) The declaration of taking shall be in writing and executed by the condemnor, shall be captioned as a proceeding in rem, and shall contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute, article and section thereof under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(4) A brief description of the purpose of the condemnation and the need therefor.

(5) A description or plan of the property condemned sufficient for the identification thereof, specifying the city, borough, township or town and the county or counties wherein the property taken is located.

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

(8) A statement of how just compensation has been made or secured.

Comment:

This section changes existing law and represents a distinct trend away from the former concept of condemnation in Pennsylvania, which has always been concerned with the property interest of the person rather than with the property. In other words, condemnation under this provision is now a pro-

ceeding in rem. This section also introduces a new concept in the procedure which a condemnor must follow in order to take property. Under this new procedure the condemnor must file a *declaration of taking* in court in order to condemn. Generally, the section was derived from the Federal *declaration of taking* procedure. Feb. 26, 1931, c.307, §1, 46 Stat. 1421. (40 USCA §258a)

This section is not intended to enlarge or abridge the power of condemnation presently possessed by any condemnor, nor to change the method by which it proceeds to authorize a condemnation, such as by ordinance, resolution, or otherwise. However, this section is intended to specifically provide that the actual condemnation is effectuated only by the filing in court of the *declaration of taking* pursuant to the required action by the condemnor to provide for the condemnation, and that the date of condemnation shall in all cases be the date of filing of the *declaration of taking*.

Where there is an injury without a taking, such as a change of grade, it is intended that a *declaration of taking* be filed with a plan showing the abutting properties. If the condemnor does not file a *declaration of taking*, the condemnee may proceed under Section 502(e).

Subsection (b) (6) is derived from Rule 71A of the Federal Rules of Civil Procedure, added April 30, 1951. (28 USCA 71A)

Subsection (b) (8) is new. Where the condemnor has taxing power, it must state in the *declaration of taking* that it has taxing power which is security for just compensation. Where the condemnor does not have taxing power, it must file a bond with the *declaration of taking*, and state in the declaration that just compensation is secured by a bond. See Section 403 relating to security.

This section also changes existing law by eliminating the requirement that the condemnor try to agree with the owners as to damages.

Section 403. Security Required.—(a) Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

Comment:

This subsection changes existing law. Generally, under existing law when a condemnor is required to give security, the condemnor must tender a bond to the owner and if the bond is not accepted by the owner, the condemnor must file it in court and have it approved. See, e.g., The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, §1903, as reenacted and amended (53 P. S. §56903), and as to corporations, the Act of 1874, April 29, P. L. 73, §41, as amended (15 P. S. §482). It is intended by this subsection to eliminate the necessity of tendering a bond to the condemnee and obtaining court approval thereof; the condemnor merely files an open end bond with the *declaration of taking*. If the condemnee desires to chal-

lunge the bond, he may file preliminary objections thereto after being served with notice. See Sections 405 and 406. It is intended by this subsection that the bond filed shall be an open end bond.

(b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

Comment:

This subsection broadens existing law by exempting all condemnors having the power of taxation from entering security. Under existing law, for example, cities are not required to give bond for security and their taxing power is made security for damages (1927, May 4, P. L. 728, No. 377, §1 (53 P. S. §1204)), but boroughs (1927, May 4, P. L. 519, Art. XIV, §1403, as reenacted and amended (53 P. S. §46403)) are required to give security before possession is taken. There is no logical reason why there should be any distinction in this regard between the various condemnors having the power of taxation. Where, under existing law, a municipality is required to file a bond it need give only its own bond without surety. (See The Borough Code, *supra*, §1405 (53 P. S. §46405).)

(c) Insufficient Security. The court, upon preliminary objections of the condemnee under and within the time set forth in section 406 (a), may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

Comment:

This subsection is necessary in view of the fact that under subsection (a) the security which is given with the *declaration of taking* is merely the bond of the condemnor without surety, and under subsection (b) no bond is required if the condemnor has the power of taxation. This subsection authorizes the condemnee to challenge the sufficiency of the bond or the surety where there is a surety, or the power of taxation where the condemnee contends that the condemnor is not financially strong.

Section 404. Recording Notice of Condemnation.—The condemnor, upon filing its declaration of taking, shall on the same day lodge for record a notice thereof in the office of the recorder of deeds 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 court term 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 reasonably known to the condemnor, and shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor and the condemnor as grantee. The recorder shall receive as a fee the sum of five dollars (\$5) for recording each notice and twenty-five cents (25¢) for each name indexed.

Comment:

This section, which adds another duty on the condemnor, has no counterpart in existing law. Recording is necessary in order to give notice to prospective purchasers from the condemnees. Under existing law, the State Highway Department records a plan, but this recordation is of little, if any, value to title examiners and purchasers. The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, §2801, as reenacted and amended (53 P. S. §37801), requires the city to record its condemnation ordinance and that it be "indexed in the name of the property owner affected thereby."

In those counties which have registry indexes, the condemnor in trying to ascertain the owner, will be acting reasonably if it relies on the ownership as shown in the index.

Section 405. Notice to Condemnee.—(a) Within thirty days after the filing of the declaration of taking, the condemnor shall give written notice of the filing to the condemnee.

(b) The notice shall be served within or without the Commonwealth, by any competent adult, in the same manner as a complaint or writ of summons in assumpsit, or by certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication of a copy of the notice omitting the plot plan required by subsection (c) (8), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

(c) The notice to be given the condemnee shall state:

(1) The caption of the case.

(2) The date of filing of the declaration of taking and the court term and number thereof.

(3) The name of the condemnee or condemnees to whom it is directed.

(4) The name and address of the condemnor.

(5) A specific reference to the statute, article and section thereof under which the condemnation action is authorized.

(6) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(7) A brief description of the purpose of the condemnation.

(8) A statement that the condemnee's property has been condemned and a reasonable identification thereof in the case of a total taking and, in the case of a partial taking, a plot plan showing the condemnee's entire property and the area taken.

(9) A statement of the nature of the title acquired.

(10) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

(11) A statement of how just compensation has been made or secured.

(12) A statement that if the condemnee wishes to challenge the power or the right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the declaration of taking, he shall file preliminary objections within thirty days after being served with notice of condemnation.

(d) Service of a copy of the declaration of taking, together with the information and notice required by subsections (c) (2), (c) (8) and (c) (12) hereof, shall constitute compliance with the notice requirements of this section.

(e) The condemnor shall file proof of service of said notice.

Comment:

Subsection (a) requires that the condemnor give notice of the condemnation. Under existing law, there is no express provision for written notice of the condemnation with the exception of The Third Class City Code, 1931,

June 23, P. L. 932, Art. XXVIII, §2801, as reenacted and amended (53 P. S. §37801), which requires that a copy of the condemnation ordinance be sent by registered mail to each property owner, and the Act of 1855, April 21, P. L. 264, §7 (53 P. S. §16415), relating to the opening of streets in cities of the first class.

Subsection (b) prescribes the manner of giving notice and is in accord with general practice. Where the notice is mailed, the condemnor has the option of using either certified or registered mail.

Subsection (c) provides that the notice must contain generally the same matters which are set forth in the *declaration of taking*. Consequently, where practical to do so, the condemnor, under subsection (d), may comply with subsection (c) by adding to a copy of the *declaration of taking* the additional matters required to be set forth in the notice by subsections (c) (2), (c) (8) and (c) (12) and serving it. In many cases, however, such as where a whole area is condemned and there are many properties and condemnees involved in one *declaration of taking*, it would be burdensome and perhaps confusing to give notice by serving copies of the *declaration of taking* on each condemnee. Accordingly, the condemnor is authorized by this subsection to serve notice on the individual condemnee showing only the property of the condemnee involved in the taking.

For preliminary objections procedure see Section 406 and Comment.

Section 406. Preliminary Objections.—(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same.

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific declaration of taking.

Comment:

This section simplifies and clarifies the procedure for challenging a condemnation effectuated by a *declaration of taking* by providing an exclusive method which must be utilized within the prescribed time. Existing law is unclear as to whether the condemnee who wishes to challenge the condemnation must sue in equity. *Frank Mashuda Co. v. County of Allegheny*, 256 F. 2d 241 (1958) (W. D. Pa.); *Englehart v. Westmoreland Water Co.*, 165 Pa. Superior Ct. 156 (1949); or raise the question in vieweers' proceedings, *Schwab v. Pottstown Borough*, 407 Pa. 531 (1962).

These matters which the condemnee may raise by preliminary objections should be disposed of as soon as possible after the condemnation. Procedurally, it is better to have these matters raised in the condemnation proceeding rather than in a separate suit.

Subsections (b), (c) and (e) were derived from the Pennsylvania Rules of Civil Procedure, Rule 1028, relating to preliminary objections in an action in assumpsit.

Subsection (d) which requires service of the preliminary objections within seventy-two (72) hours after filing was deemed necessary so that the matter could be brought to the attention of the court as quickly as possible.

It is intended by this section to provide, where a *declaration of taking* is filed, that the exclusive method of challenging the power to condemn, the sufficiency of the security, the *declaration of taking* and procedure shall be by preliminary objections.

Section 407. Possession; Entry; Payment of Compensation.—

(a) The condemnor after filing the declaration of taking, shall be entitled to possession or right of entry upon payment of, or a written offer to pay to the condemnee, the amount of just compensation as estimated by the condemnor. If a condemnee thereafter refuses to deliver possession or permit right of entry the prothonotary upon praecipe of the condemnor shall issue a rule, returnable in five days after service upon the condemnee, to show cause why a writ of possession should not issue, upon which the court may issue a writ of possession conditioned upon payment to the condemnee or into court of such estimated just compensation and on such other terms as the court may direct.

(b) If within sixty days from the filing of the declaration of taking, the condemnor has not paid just compensation as provided in subsection (a) of this section, the condemnee may tender possession or right of entry in writing and the condemnor shall thereupon make payment of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon petition of the condemnee, may compel the condemnor to file a declaration of estimated just compensation or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such just compensation. The court may, after hearing, enter judgment for the amount of the estimated just compensation.

(c) The compensation paid under subsections (a) and (b) of this section shall be without prejudice to the rights of either the condemnor or the condemnee to proceed to a final determination of the just compensation and the payments heretofore made shall be considered only as payments pro tanto of the just compensation as finally determined.

Comment:

This section changes existing law which generally does not require any payment by the condemnor until final award or judgment and which generally entitles the condemnor to possession upon the filing of security. The purpose of this section is to prevent hardship which occurs in many cases when the condemnor takes possession and the condemnee, who is not satisfied with the offer of the condemnor, must give up possession and relocate elsewhere. In such cases, the condemnee may have difficulty in obtaining other property because of lack of funds.

Right of entry provided for in this section does not mean the precondemnation entry to make surveys, appraisals, etc. What is meant by right of entry in this section is the case, for example, where an easement is condemned and the condemnor actually does not get possession of the property but merely the right to enter for his easement.

Even though the condemnor does not desire immediate possession after the condemnation, the condemnee, who may want to move immediately, has the right under this section, if the condemnor has not asked for possession within sixty days after the filing of the *declaration of taking*, to deliver possession to the condemnor and take the condemnor's estimate of just compensation without prejudice to his right to prosecute his claim for damages. See the Act of 1957, July 10, P. L. 632 (53 P. S. §§18001-18004), which authorizes first class cities to deposit the estimated amount of compensation into court for the use of the person entitled thereto.

If the money is not accepted by the condemnee and is deposited in court, the money may be withdrawn from court in accordance with the provisions of Section 522 of this act.

Payments to condemnees under this section are subject to the provisions set forth in Section 521 for distribution of the damages to the parties entitled thereto.

Section 408. Revocation of Condemnation Proceedings.—The condemnor, by filing a declaration of relinquishment in court within one year from the filing of the declaration of taking, and before having made the payment provided for in section 407 (a) or (b), or as to which the condemnee has not tendered possession of the condemned property as provided in section 407, may relinquish all or any part of the property condemned that it has not taken actual possession of for use in the improvement, whereupon title shall revert in the condemnee as of the date of the filing of the declaration of taking, and all mortgages and other liens existing as of such date shall be reinstated. Notice of said relinquishment shall be recorded in the office of the recorder of deeds of the county in which the property taken is located, with the condemnor as the grantor and the condemnee as the grantee, and the notice of said relinquishment shall be served on the condemnee in the same manner as provided for service of the declaration of taking. Where condemned property is relinquished, the condemnee shall be entitled to the damages sustained by him including costs, expenses and reasonable attorney's fees and such damages shall be assessed by the court, or the court may refer the matter to viewers to ascertain and assess the damages sustained by the condemnee, whose award shall be subject to appeal as provided in this act. The condemnor and the condemnee, without the filing of a declaration of relinquishment provided herein, may by agreement effect a reversion of title in the condemnee.

Comment:

This section changes and clarifies existing law, which is somewhat unclear as to when or whether the condemnor may discontinue the proceedings and the condemnation. In *Philadelphia Appeal*, 364 Pa. 71 (1950), the city by ordinance condemned property for a park and later petitioned for viewers; prior to the viewers' hearing to fix the value of one of the properties condemned, the city amended its condemnation ordinance by deleting the property in question; the court held that it was too late for the city to abandon or discontinue the proceeding as to this property since the original ordinance actually condemned the property. On the other hand, in *Reinbold*

v. Commonwealth, 319 Pa. 33 (1935), the court indicated that the condemnation may be abandoned or discontinued at any time "until the proceedings are ended."

It is intended by this section to clarify existing law by specifically authorizing condemnors to discontinue or abandon the condemnation by filing in court a *declaration of relinquishment* within one year from the date the property was condemned and before possession of the property or the part to be relinquished was tendered or payment made on account thereof. Otherwise the condemnor may not discontinue or abandon the proceeding.

The condemnor must record the *declaration of relinquishment* in order to clear the records, since a notice of condemnation has previously been recorded. See Section 404.

Where the condemnation is abandoned, the condemnee should be compensated for any damages which he sustained since his land has been "tied up"; there may have been an entry by the condemnor, etc. In the *Reinbold* case, *supra*, the court, at page 46, stated that the condemnee is entitled to ". . . the amount of costs, expenses and damages expended and suffered by . . . (him) . . . by reason of the intended condemnation of his land . . ." In *Long v. Commonwealth*, 37 D. & C. 702 (1940), the court allowed the condemnee expenses incurred for plans, photographs, real estate experts and attorney's fees. Expenses incurred for these items would, of course, be recoverable as damages under this section.

See also on this subject the Act of 1891, May 16, P. L. 75, §7 (53 P. S. §1092), which authorizes municipal corporations to discontinue proceedings prior to entry upon, taking, appropriation or injury to property within thirty (30) days after filing of viewers' report, but the municipality must pay the costs and actual damages, loss or injuries sustained by the owner. A similar provision is in The Borough Code, 1927, May 4, P. L. 519, Art. XIV, §1451, as reenacted and amended (53 P. S. §46451); The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, §2847, as reenacted and amended (53 P. S. §37847); The County Code, 1955, Aug. 9, P. L. 323, §2433 (16 P. S. §2433); the Second Class County Code, 1953, July 28, P. L. 723, §2633 (16 P. S. §5633).

Upon relinquishment of the property by the condemnor, title is revested in the condemnee as of the date of the filing of the *declaration of taking*. The property is then in the same position as if there had been no condemnation.

Section 409. Right to Enter Property Prior to Condemnation.—Prior to the filing of the declaration of taking, the condemnor or its employes or agents, shall have the right to enter upon any land or improvement which it has the power to condemn, in order to make studies, surveys, tests, soundings and appraisals, provided that the owner of the land or the party in whose name the property is assessed has been notified ten days prior to entry on the property. Any actual damages sustained by the owner of a property interest in the property entered upon by the condemnor

shall be paid by the condemnor and shall be assessed by the court or viewers in the same manner as provided in section 408.

Comment:

This section is derived from existing statutes which authorize condemnors to enter upon any lands in order to make surveys. See the State Highway Law, 1945, June 1, P. L. 1242, Art. II, §205 (36 P. S. §670-205); the Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, §2603 (16 P. S. §5603). This section broadens the powers of condemnors by authorizing preliminary entry for studies, tests, soundings and appraisals as well as for surveys. The provision making the condemnor liable for any actual damages sustained by the owner by reason of the entry is new. It is intended that the condemnor should pay for any such damages where entry is made.

Section 410. Abandonment of Project.—If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise: Provided, however, That if the property has not been substantially improved, it may not be disposed of within three years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor. The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in subsection (b) of section 405 of this act, and shall have ninety days after receipt of such notice to make written acceptance thereof.

Comment:

Under existing law if the condemnor condemns a fee and then abandons the purpose for which the property was condemned, the condemnee has no reversionary interest in the property. *Starkey v. Philadelphia*, 397 Pa. 512 (1959). This section continues and clarifies existing law in this regard but goes further and sets forth exactly what alternatives are available to the condemnor if the original purpose of condemnation is abandoned. The property must be offered to the condemnee under the conditions specified and only if the condemnee then refuses to repurchase the property can the condemnor otherwise dispose of it.

This section is not intended to restrict a Redevelopment Authority from amending a Redevelopment or Urban Renewal Plan after an area has been acquired, nor to restrict a Redevelopment Authority from selecting alternative redevelopers, all of which actions are done with councilmanic approval. See Urban Redevelopment Law, 1945, May 24, P. L. 991, as amended (35 P. S. §1701, *et seq.*).

ARTICLE V

Procedure for Determining Damages

Section 501. Agreement as to Damages.—At any stage of the proceedings, the condemnor and the condemnee may agree upon all or any part or item of the damages, and proceed to have those parts or items thereof not agreed upon assessed as herein provided. The condemnor may make payment of any part or item thereof so agreed upon.

Comment:

This section authorizes a condemnor to agree with any condemnee at any stage in the condemnation proceedings as to all or any item of damages, and thereby eliminate the necessity for the continuance or completion of the proceedings as they relate to the item agreed upon. It is intended to make it clear that a condemnor has the authority to compromise and pay any agreed item of damage even though other parts or items have to be litigated.

Section 502. Petition for the Appointment of Viewers.—(a) The condemnee may file a petition requesting the appointment of viewers setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in declaration of taking, with an identification of the petitioner and his property.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed.

(3) The name of the condemnor.

(4) The names and addresses of all condemnees known to the petitioner to have an interest in his property and the nature of their interests.

(5) A brief description of his property which may include any or all of his properties included in the declaration of taking.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) The condemnor may file a petition requesting the appointment of viewers, setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of taking.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed.

(3) The names and addresses of all condemnees known to the petitioner to have an interest in the property which is the subject of the petition and the nature of their interests.

(4) A brief description of the property which is the subject of the petition and the interest condemned.

(5) A request for the appointment of viewers to ascertain just compensation.

(c) The condemnor may include in its petition any or all of the property included in the declaration of taking.

(d) The court appointing the viewers may direct them to determine, at the request of either party, the damages for any property included in a declaration of taking.

(e) If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury.

(f) A copy of any petition for the appointment of viewers filed by a condemnee shall be served promptly on the condemnor named therein.

Comment:

It is intended that all proceedings subsequent to the *declaration of taking*, including the petition for viewers, shall be filed at the same court term and number as the *declaration of taking*.

There is now no statutory or rule requirement regulating the form of the petition for viewers, but the suggested averments follow substantially the practice now prevailing throughout the Commonwealth, except that averments as to liens now required by statute are omitted. See, for example, the Act of 1915, April 14, P. L. 122, §1, as amended (26 P. S. §121). To this extent, the suggested form of petition departs from present practice as imposed by statutes which require that the petition for the appointment of viewers specify the names and addresses of mortgagees, judgment creditors and lienholders. It is intended that the rights of these parties should be determined at the time of distribution of the fund.

In the caption of the case it is deemed desirable to use an *in rem* designation rather than the names of the parties in order to conform to the *declaration of taking* caption. See Section 402. This represents a distinct change from the condemnation theory in Pennsylvania where the emphasis has been on the property interest of the person rather than on the property

itself. The change in emphasis brings Pennsylvania closer to the Federal concept of condemnation.

Mortgagees, judgment creditors and other lienholders are not condemnees and, therefore, have no standing to file a petition for viewers. Under Section 506(b) mortgagees may be permitted to intervene.

Subsection (e) is necessary to cover the situation where there is in fact a compensable injury but the condemnor has not filed a *declaration of taking* with reference thereto. It is intended to cover the case where there is an injury to property not included in the *declaration of taking* or where, as in the case of a change of grade, no *declaration of taking* has been filed. It is not intended to affect the right of the condemnor, under existing law, to challenge the appointment of viewers in such case.

Section 503. View.—In every proceeding at least one of the viewers appointed shall be an attorney at law who shall be chairman of the board, who shall attend the view, and at least two of the three viewers appointed shall view the property in question.

Comment:

The requirement that at least two of the viewers view the property in every case is taken from existing law. See the Act of 1911, June 23, P. L. 1123, §9 (16 P. S. §9485).

The requirement that one attorney view the property is new and deemed desirable.

Section 504. Appointment of Viewers; Notice.—Upon the filing of a petition for the appointment of viewers, the court, unless preliminary objections to the validity of the condemnation or jurisdiction, warranting delay, are pending, shall promptly appoint three viewers, who shall view the premises, hold hearings, and file a report.

The viewers shall promptly give written notice of their appointment to all persons named as condemnors or condemnees in the petition for the appointment of viewers and of the place and time of the view, which shall not be less than twenty days from the date of said notice.

If notice of the view does not include notice of a time and place of subsequent hearings and a time and place is not agreed upon by the parties at the view, notice of the hearing shall be given by not less than ten days' written notice.

Comment:

This section is a departure from the statutes which require the court in its order of appointment to designate the time of the view and hearings

and the return day of the report. Generally, under existing statutes, the view must be held not less than twenty nor more than thirty days after the appointment of viewers. See The County Code, 1955, Aug. 9, P. L. 323, §2408 (16 P. S. §2408); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, §1920, as reenacted and amended (53 P. S. §56920). As for hearings, see the Act of 1911, June 23, P. L. 1123, §6 (16 P. S. §9482). Where the court fixes the return day of the report this necessitates continual applications to the court for extensions, and the fixing of arbitrary time limits interferes with the necessary flexibility of the proceedings. For this reason the fixing of the time for views and hearings is left to the viewers with the caution, however, that they must act promptly. It is contemplated that should the viewers fail to perform their duties promptly, the parties could informally bring this to the attention of the court without the necessity of formal pleadings and this in most cases should be sufficient to remedy any dereliction on the part of the viewers.

Section 505. Service of Notice of View and Hearing.—Notice of the view and hearing shall be served, within or without the Commonwealth, by any competent adult in the same manner as a complaint or writ of summons in *assumpsit*, or by certified or registered mail, return receipt requested, to the last known address of the condemnee and condemnor. If service cannot be made in the manner so provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication, at the cost of the condemnor, once in a newspaper of general circulation and once in the legal publication, if any, designated by rule or order of court for publication of legal notices, published in the county. Proof of service and the manner of same shall be attached to the viewers' report.

Comment:

This section resolves the conflicting provisions of the various codes and also simplifies the method of service. Section 2414 of The County Code, 1955, Aug. 9, P. L. 323 (16 P. S. §2414), now authorizes notice to be given in the manner provided for service of summons in a personal action, if the parties can be found within the county, or upon an adult person residing on the premises and by publication in all other cases. The county and other political subdivision codes also require that notice of the appointment of the viewers must in all cases be made by publication and posting and apparently under present practice a second notice by publication is required as to those owners who cannot personally be served with notice of the hearing itself. The proposed section does away with the requirement of double publication and requires actual notice without publication where this is possible and where this is not possible by posting the premises and by newspaper publication.

Section 506. Additional Condemnees; Mortgagees.—(a) The condemnee, at or before the hearing at which his claim is presented, shall furnish the viewers and the condemnor the names and addresses of all other condemnees known to him to have an interest in his property and the nature of such interests and the names and addresses of all mortgagees known to the condemnee. The viewers shall thereupon notify by written notice all persons who are so disclosed as having an interest in the property and mortgagees, of the pendency of the proceedings and of subsequent hearings. If the additional condemnees and mortgagees have not received twenty days' notice of the hearing, the viewers shall, upon request, adjourn the hearing to allow such notice.

(b) The court may permit a mortgagee to intervene in the proceedings where his interest is not adequately protected, but he shall not be a party to the proceedings unless he has intervened.

Comment:

There is no counterpart in existing statutory law requiring the condemnee to furnish the viewers with the names and addresses of additional condemnees. The purpose of this section is first, to implement the statutory requirements that the claims of landlord and tenants are to be adjudicated in one proceeding. In addition, other types of interests subject to condemnation should also be tried in one proceeding and disclosed at an early stage of the proceedings and not as under the practice in which the first knowledge of such interests may be disclosed during the hearings. It is intended that the claims of a vendee under an agreement of sale, a tenant with an option to purchase, and the owner of an easement or similar interests should all be joined at the earliest possible moment and their rights adjudicated in one proceeding. The question of whether the additional claimants or condemnees have any interest entitling them to damages should be determined as part of the entire proceeding with the order of evidence left to the discretion of the viewers and their findings as to the matter included in their final report. The burden imposed on the viewers should not be an onerous one and does not extend the scope of the statutory practice which requires the viewers to make findings as to law and fact as to who are the owners of the property and of the interest condemned.

The condemnee is also required to furnish the names and addresses of all mortgagees. Only mortgagees have been included since their rights in the property are purely contractual.

Subsection (b) is new. It authorizes the court to permit a mortgagee to intervene, but only if his interest is not adequately protected. The mortgagee should not be permitted to intervene if the owner is proceeding with due diligence and the value of the property appears adequate to secure the mortgage debt. Judgment creditors and other lienholders have not been

included since they had an immediate right to execution whereas the mortgagee's rights are strictly contractual. In addition, the proceedings would be cluttered if lienholders, in general, were permitted to intervene.

Section 507. Joint Claims Required; Apportionment of Damages.—The claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, and all others having an interest in the property, and the claims of all tenants, if any, of the property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall first fix the total amount of damages for the property, and second, apportion the total amount of damages between or among the several claimants entitled thereto.

Comment:

This section is derived from the Act of 1937, July 1, P. L. 2667, No. 528 (26 P. S. §44), which requires that the claims of the owner and lessee be tried together. This concept has been broadened to require also that the claims of tenants in common, life tenants, etc., and all others having an interest in the property be tried together. Except as to owner and tenant, existing law does not require the owners of other interests in the condemned property to join in a single suit. See *Adams v. New Kensington*, 374 Pa. 104 (1953); *Railroad v. Boyer*, 13 Pa. 497 (1850). The purpose of this section is to avoid several suits for damages for the same property. On appeal to the court, the claim of one of the parties may be tried separately without trying the claims of all, if the other claimants are satisfied with their awards and the condemnor has not appealed the entire award.

Section 508. Appointment of Trustee Ad Litem.—The court, on its own motion may, or on petition of any party in interest shall, appoint a trustee ad litem to represent the interests of minors, persons under a disability, unborn or unascertained parties, or parties whose whereabouts are unknown.

Comment:

This section is derived from such acts as the Act of 1929, April 17, P. L. 531, §2 (15 P. S. §485), which provide for the appointment of trustees and guardians ad litem in eminent domain proceedings.

Section 509. Furnishing of Plans to Viewers.—The condemnor shall furnish the viewers at or before the view with a plan showing the entire property involved, the improvements thereon, the extent and nature of the condemnation and such

other physical data, including grades, as may be necessary for the proper determination of just compensation. If, in the opinion of the viewers, the plans are insufficient, they may require the submission of supplemental plans. Copies of the plans shall be furnished at the same time, without cost, to the condemnee upon written request therefor. If the condemnor does not furnish a plan or the condemnor's plans are insufficient, the court, on application of the condemnee, may tax to the condemnor as costs reasonable expenses for plans furnished by the condemnee.

Comment:

This section changes existing law. Most of the statutes specifically provide for the inclusion of many details in the plans such as topography, the incline of the slope, the cubic content of buildings and other similar matters. See, for example, the Act of 1925, April 27, P. L. 310, No. 173, §1 (26 P. S. §1). Since conditions in each type of condemnation and in different types of properties are so dissimilar, it is deemed preferable to state the requirements as to plans in general terms and with limited requirements, leaving to the viewers and the parties the determination of what is essential in any given case.

The requirement that copies of plans be furnished without charge to condemnees is in accord with existing law. Act of 1925, April 27, P. L. 310, No. 173, §2 (26 P. S. §2); The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, §1909, as reenacted and amended (53 P. S. §56909). The provision that if the condemnor does not furnish a plan, the court may tax as costs the expenses incurred by the condemnee for plans, is new. If the condemnor neglects to furnish a plan, it is contemplated that the court, upon petition, will permit the condemnee to have plans made and the costs thereof charged to the condemnor. *Rush v. Allegheny County*, 159 Pa. Superior Ct. 163 (1946).

Section 510. Powers of Viewers.—The viewers shall have power to administer oaths and affirmations, to compel the attendance of witnesses, the production of books and documents, and to adjourn the proceedings from time to time. All the viewers shall act, unless prevented by sickness or other unavoidable cause; but a majority of the viewers may hear, determine, act upon and report all matters relating to the view for which they were appointed.

Comment:

The power of the viewers to administer oaths and affirmations is in accord with existing law. The County Code, 1955, Aug. 9, P. L. 323, §1105 (16 P. S. §1105); the Second Class County Code, 1953, July 23, P. L. 723, Art. XI, §1105 (16 P. S. §4105).

The power of the viewers to compel the attendance of witnesses, the production of books and to adjourn the proceedings is new. The Act of 1905, April 10, P. L. 125, §3 (53 P. S. §2203), gives the viewers the power to issue subpoenas “. . . at the instance of either party, to compel the attendance of witnesses . . .” where cities enter land for sewer purposes. The various turnpike acts provide that if any person refuses to appear and testify before the viewers or refuses to produce books and papers when required, the court on application of the viewers shall make any necessary orders. There does not seem to be any statute generally authorizing viewers to issue subpoenas. However, in *Wheeler Avenue Sewer*, 214 Pa. 504 (1906), the court indicated that the viewers had the authority to call witnesses. The viewers should have this power so that they can, if necessary, call a person as a witness even though the condemnor or condemnee does not call the person.

The second sentence of the section follows substantially the provisions of Section 2408 of The County Code, 1955, Aug. 9, P. L. 323 (16 P. S. §2408), and also similar provisions in the Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, §2608 (16 P. S. §5608). There are, however, some minor variations in these codes and related statutes as to the power of viewers and these are made uniform by this section.

Section 511. Report of Viewers.—The viewers shall file a report which shall include in brief and concise paragraph form:

- (1) The date of their appointment as viewers.
- (2) A reference to the notices of the time and place of view and hearing with proof of service of notices, which shall be attached to the report.
- (3) A copy of the plan showing the extent of the taking or injury upon which the viewers' award is predicated and a statement of the nature of the interest condemned.
- (4) The date of the filing of the declaration of taking or of the injury where no declaration of taking has been filed.
- (5) A schedule of damages awarded and benefits assessed, to and by whom payable, and for which property, separately stated as follows: general damages, moving and removal expenses, business dislocation damages and other items of special damages authorized by this act, and the date from which damages for delay shall be calculated.
- (6) In case of partial taking, a statement as to the amount of the general damages attributable as severance damages to

the part of the property not taken, if such apportionment has been requested in writing by the condemnee.

(7) Where there are several interests in the condemned property, a statement of the total amount of damages and the distribution thereof between or among the several claimants therefor.

(8) If there are other claimants to any interest or estate in the property condemned, and the viewers' determination of the extent if any of each interest in the property and in the award.

(9) Their rulings on any written requests for findings of fact and conclusions of law submitted to them.

(10) Such other matters as they may deem relevant.

Comment:

This section seeks to harmonize statutory provisions and practice. The statutory requirements as to what must be included in the report under existing law now relate to only a limited number of matters such as the assessment of damages and benefits and the apportionment of damages between landlord and tenant. For example, see *The Third Class City Code*, 1931, June 23, P. L. 932, Art. XXVIII, §2823, as reenacted and amended (53 P. S. §37823) (Assessment of damages and benefits); Act of 1937, July 1, P. L. 2667, No. 528, §1 (26 P. S. §44) (Apportionment of damages between landlord and tenant). There are also a number of statutes requiring the viewers to make findings as to the necessity of a private road or the location of utility lines, etc. (Finding as to necessity of private roads, see Act of 1836, June 13, P. L. 551, §12 (36 P. S. §2732)). These statutes are not repealed or affected by this act. This preliminary procedure is covered in Article IV. Where there are conflicting or adverse claims, the viewers are required to make specific findings on these matters and may not evade the issue, as is possible under some statutes, by stating that they are unable to determine who are the owners of the property or their interest therein. See, for example, *The County Code*, 1955, Aug. 9, P. L. 323, §2428 (16 P. S. §2428). This requirement cannot prejudice any of the parties since they will have a right of appeal to the common pleas court from the viewers' report. The form of report required by this section also omits the statutory requirement that the viewers make findings as to all liens upon the property. See *The County Code*, 1955, Aug. 9, P. L. 323, §2411 (16 P. S. §2411); *The First Class Township Code*, 1931, June 24, P. L. 1206, Art. XIX, §1911, as reenacted and amended (53 P. S. §56911).

Clause (5) does not affect those laws which permit municipalities to assess upon the properties benefited the costs, damages and expenses for public improvements such as sewers. See, e.g., *The First Class Township Code*, 1931, June 24, P. L. 1206, Art. XXIV, §2425, as reenacted and amended (53 P. S. §57425). In such cases, benefits may exceed damages. The benefits to be assessed under subsection (5) are only such as are assessable under Section 606 of this act.

Clause (6) is new. It has been included because of the tax ramifications involved where there is a partial taking. The tax aspects which arise in connection with condemnation can have serious consequences to a condemnee, as severance damages have more favorable tax consequences than general damages. The Internal Revenue Service has taken the position that unless the award specifically indicates what portion of it is severance damages the entire award will be considered general damages. Rev. Ruling 59-173; *Allaben v. Commissioner*, 35 B.T.A. 327 (1937).

Note. See Rev. Ruling 64-183:

26 CFR 1.1033(a)—1: Involuntary conversion; Rev. Rul. 64-183 non-recognition of gain.

The amount of severance damages paid in connection with the purchase of property by a condemning authority is considered stipulated between the parties and clearly shown, although the contract executed by the parties does not refer to severance damages as such, if the property owner is furnished an itemized statement or closing sheet at the time of settlement and payment by the condemning authority which indicates the specific amount of the total contract purchase price which is for severance damages.

Section 512. Disagreement.—If a majority of the viewers do not agree on a decision, three new viewers shall be appointed by the court upon application of any interested party.

Comment:

This section is derived from a portion of Section 9 of the Act of 1911, June 23, P. L. 1123 (16 P. S. §9485).

Section 513. Notice of Filing of Report of Viewers.—Ten days before the filing of their report, the viewers shall mail a copy thereof to all parties or their attorneys of record, with notice of the date of the intended filing and that the report shall become final unless an appeal therefrom is filed within thirty days from the date the report is filed. Prior to the filing of their report they may correct any errors therein and give notice thereof to the persons affected.

Comment:

As it stands, this section substantially follows the provisions of the county codes and the codes of other political subdivisions but omits the requirement of publication and posting. The County Code, 1955, Aug. 9, P. L. 323, §2416 (16 P. S. §2416), for example, requires notice by publication after the filing of the report. Similar provisions appear in statutes covering other condemners. Under this section notice need be given only to

those parties who have appeared before the viewers, since publication will have been made of the original taking and of the viewers' proceedings.

This section eliminates the procedure of filing exceptions to the report with the viewers before the report is filed with the court. A remnant of the exception procedure is, however, retained by the last sentence which permits the viewers to correct any errors in their report. While the errors which are contemplated consist of typographical and possibly administrative errors such as the misspelling of a name, any matter brought to the viewers' attention prior to filing the report may be corrected.

Section 514. Reports.—The viewers may include in one report one or more properties referred to them under the same or separate petitions provided such properties are included in the same declaration of taking. Each such report shall be final as to the property or properties included therein and subject to separate appeal.

Comment:

The filing of reports as to one or more of the properties involved in a condemnation is authorized in order to expedite the proceedings since there may be a considerable number of properties involved in one condemnation (for example, a condemnation by an urban redevelopment authority). It should not be necessary to have all the condemnees wait until all the cases have been heard and awards made by viewers. Where a report is filed as to a property, all interests in that property must be included in the report. In other words, separate interests in one property cannot be covered by separate reports. The appeal time begins to run from the date the report covering the property is filed. It does not begin to run from the date the last report covering the last property or properties is filed.

Where there is a multiple condemnation there may be many separate petitions filed for the appointment of viewers. This section authorizes the viewers in such case, if the properties have been included in the same *declaration of taking*, to include in their report one or more of the properties submitted to them under separate petitions. This, too, is desirable in order to expedite and simplify the proceedings.

Section 515. Appeals; Time of Taking; Consolidation.—Any party aggrieved by the decision of the viewers may appeal to the court of common pleas within thirty days from the filing of the report. The appeal shall raise all objections of law or fact to the viewers' report. The appeal shall be signed by the appellant or his attorney or his agent and no verification shall be required. Any award of damages or assessment of benefits, as the case may be, as to which no appeal is taken within thirty days, shall become final as of course and shall constitute a final judgment.

The court, on its own motion, or on application of any party in interest, may consolidate separate appeals involving only common questions of law as one proceeding.

If a condemnee having less than the entire interest in the condemned property appeals the award to him, the condemnor shall have an additional fifteen days to appeal the entire award.

Comment:

This section differs from the statutes which in most cases provide for a confirmation *nisi* of the viewers' report followed by an absolute confirmation where no objections are filed. The County Code, 1955, Aug. 9, P. L. 323, §2423 (16 P. S. §2423), provides that when the report is filed, the prothonotary is to mark the same "confirmed *nisi*" and if no exceptions thereto are filed within thirty (30) days, the prothonotary is to enter a decree confirming the report absolutely. This confirmation *nisi* procedure has been omitted as an unnecessary procedural step.

The provision of this section authorizing the court on its own motion to consolidate appeals is taken from Pa. R. C. P. 213. (Under existing law a party is entitled to a separate trial on appeal. *Comly v. Phila.*, 153 Pa. Superior Ct. 539 (1943); *Edgmont Ave.*, 28 Dist. Rep. 256 (1918), where the court indicated that this right is guaranteed by the Pennsylvania Constitution, Art. XVI, §8). This section, then, changes present law where the cases are consolidated by the court. There would be no separate jury trial when the consolidated cases present only a question of law.

The last paragraph giving the condemnor an additional fifteen days to appeal is new. The additional time is necessary so that the condemnor may protect itself where a part owner or tenant of the condemned property appeals when the normal thirty-day appeal time is about to expire.

Verification of the appeal required under existing statutes has been eliminated as unnecessary.

Exceptions to viewers' reports are abolished and matters formerly raised by exceptions are now included in the appeal, as provided by Section 516.

The limitation on appeals from assessment of benefits is intended to apply only to benefits assessed in a Board of View report filed under this act assessing benefits assessable under Section 606 of this act and not to benefits assessed under other statutes not superseded by this act.

Section 516. Appeals.—(a) The appeal shall set forth:

- (1) The name of appellant.
- (2) A brief description or identification of the property involved and the condemnee's interest therein.
- (3) A reference to the proceedings appealed from and the date of the filing of the viewers' report.

(4) Objections, if any, to the viewers' report, other than to the amount of the award.

(5) A demand for jury trial, if desired. If the appellant desires a jury trial, he shall at the time of filing the appeal, endorse thereon, or file separately, a written demand for jury trial, signed by him or counsel. If no demand for jury trial is made by the appellant, any other party may file a written demand for jury trial within fifteen days after being served with a copy of the appeal. If no party makes a demand for a jury trial as set forth herein, the right to jury trial shall be deemed to have been waived and the court shall try the case without a jury.

(b) The appellant shall serve a copy of the appeal on all other parties within five days after filing the same. Proof of service of a copy of the appeal shall be filed by the appellant.

(c) No other pleadings shall be required and the cause shall be deemed at issue.

Comment:

This section makes a change in procedure by combining in one proceeding, designated as an appeal, the practice of exceptions as to questions of law and the filing of a separate appeal as to questions of fact. There was confusion in many of the lower courts and even appellate courts as to whether exceptions or appeal was the proper procedure, and often as a matter of course to protect the record, attorneys made a practice of filing both. In *Lakewood Memorial Gardens, Inc. Appeal*, 381 Pa. 46 (1955), the court, at page 51, stated that exceptions "are properly limited to procedural matters or questions of law basic to the inquiry . . ."; and in *Urban Redevelopment Authority of Pittsburgh Appeal*, 370 Pa. 248 (1952), the court held that questions pertaining to the elements of property involved in the condemnation and the relevant measure of damages could not be adjudicated by exceptions but should be raised by appeal.

Subsection (a) (4) is intended to cover what formerly were exceptions. "Objections" is not intended to mean objections to rulings on evidence, competency, etc.; it means objections to the report. Under existing law, an appeal on the merits as to damages is considered a trial *de novo* and neither the viewers' report nor any of their findings nor the amount of the award are admitted for the appeal, nor can they be introduced into evidence. *Sweeney v. City of Scranton*, 74 Pa. Superior Ct. 348 (1920) (trial *de novo*); *Berger v. Public Parking Authority of Pittsburgh*, 380 Pa. 19 (1954) (viewers' report not admissible). Therefore, on the appeal the appellant-condemnee must, for example, introduce proof of ownership and interest, and the record without such proof is defective; this practice is continued.

No other pleadings are required and the local rules of practice, many of which require the condemnee to file a complaint followed by an answer,

are abandoned. Rule 47 of the Allegheny County Common Pleas Court requires the filing of a petition to appeal and an answer, and states that the condemnee shall be the plaintiff and the condemnor the defendant. The issues involved in a condemnation case are generally so comparatively simple and clear as to damages that no pleadings or framing of an issue are considered necessary. Where the appeal raises questions of law, since they must be set forth explicitly in separate paragraphs, there should be no necessity for any further pleadings.

Subsection (a) (5) changes existing law, which provides that the trial is by jury unless waived. Unless a jury trial is demanded, the trial will be nonjury. This subsection is derived from the act creating the County Court of Allegheny County, 1911, May 5, P. L. 198, §8, as amended (17 P. S. §634).

It is contemplated that the form of caption will be established by the rules of the Supreme Court or by local court rule, but the proceedings are nevertheless put under the same court term and number as the *declaration of taking*.

Under subsection (c) the case will automatically be at issue on appeal and it will not be necessary to file a praecipe to have the case placed at issue.

Section 517. Disposition of Appeal.—All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order.

The amount of damages shall be determined by the court unless a jury trial has been demanded.

At the trial of the case, the condemnee shall be the plaintiff and the condemnor shall be the defendant.

Comment:

The first paragraph of this section follows substantially the statutory practice under the various codes which provide that the court on exceptions can modify or change the report or refer it back to the viewers. See, for example, The County Code, 1955, Aug. 9, P. L. 323, §2423 (16 P. S. §2423), and The Borough Code, 1927, May 4, P. L. 519, Art. XIV, §1435, as reenacted and amended (53 P. S. §46435). The confirmation *nisi* procedure provided for in most of these codes has been omitted (See Comments to Sections 515 and 516), and the order of court will constitute a final, appealable judgment.

The second paragraph changes existing law. See Comment to Section 516.

The last paragraph is generally in accord with existing practice.

Section 518. Severance and Special Damages; Allocation.—
(a) Upon appeal from an award of viewers, the court, upon the request of the plaintiff, shall, after the jury or the court, if the trial is without jury, has returned its general verdict, make a

specific finding and allocation of the amount of the general verdict attributable to severance damages to the part of the property not taken.

(b) The jury, or the court, in a trial without a jury, shall make specific findings as to the portion of the verdict allocated to general damages, moving and removal expenses, business dislocation damages and other items of special damages authorized by this act.

Comment:

Subsection (a) of this section is new and is designed to permit, upon request of the condemnee, the allocation of a general award between severance damages to the part of the property not taken and the damages for the part taken. Such allocation may result in definite advantages under the Federal income tax laws by permitting postponement or avoidance of Federal income taxes. The allocation is to be made by the court rather than by the jury as a special finding. The allocation made by the court would be at a special hearing, if necessary, at which the evidence would be restricted solely to the amount allocable to severance damages.

As to the items of special damages such as moving expenses and relocation costs, the Federal urban renewal and redevelopment program permits reimbursement and payment of these costs up to fixed limited amounts separate and apart from the general damages in connection with the taking. It may therefore be helpful in connection with the Federal urban renewal program and also for Federal income tax purposes to require these special items of damages to be separately allocated. The allocation of these special items of damages is also necessary for situations where Federal funds are used for highways since some of these items of damages are not compensable from Federal funds and unless such items are separately stated the Federal Government will not contribute funds toward any part of the award. Under subsection (b) these special damages are to be specifically apportioned by the jury or the court in a trial without a jury.

Section 519. Costs of Proceedings.—All taxable costs, including filing fees, jury fees, statutory witness fees and mileage, expense of preparing plans under section 509, the expense of transporting the judge and jury to view the condemned property, and such other costs as the court in the interests of justice may allow, shall be paid by the condemnor unless the court in a proper case shall otherwise direct.

Comment:

This section attempts to clarify case law by providing that generally all costs are to be paid by the condemnor.

This section also changes some existing statutory law which provides that the costs be paid by the condemnor except that where the condemnee takes an appeal from the viewers' award, the condemnee must pay all costs of appeal if he does not recover an amount greater than the viewers' award. The County Code, 1955, Aug. 9, P. L. 323, §2425 (16 P. S. §2425); the Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, §2625 (16 P. S. §5625). On the other hand, The Third Class City Code, 1931, June 23, P. L. 932, Art. XXVIII, §2830, as reenacted and amended (53 P. S. §37830), and The First Class Township Code, 1931, June 24, P. L. 1206, Art. XIX, §1931, as reenacted and amended (53 P. S. §56931), for example, provide that the costs of the proceedings, including court costs, shall be paid by the city or township, without exception. The purpose of this section is to make it clear that the costs shall be borne by the condemnor unless the circumstances warrant the court in directing otherwise.

Section 520. Waiver of Viewers' Proceedings.—The condemnor and condemnee may, by written agreement filed with and approved by the court, waive proceedings before viewers and proceed directly to the said court on agreed issues of law or fact. The proceedings thereafter shall be the same as on appeal from a report of viewers.

Comment:

This section follows substantially the statutory practice authorizing waiver of viewers in certain cases. See, e.g., the Act of 1895, May 21, P. L. 89, §1 (26 P. S. §81), and The Borough Code, 1927, May 4, P. L. 519, Art. XIV, §1414, as reenacted and amended (53 P. S. §46414). However, the requirement of some of the statutes that the owner file a statement of claim and rule the defendant to plead is omitted as unnecessary. In eminent domain cases the issues involved are so relatively simple that no pleadings should be required.

Section 521. Distribution of Damages; Liens.—Damages payable to a condemnee under any provision of this act shall be subject to a lien for all taxes and municipal claims assessed against and all mortgages, judgments and other liens of record against the property for which the particular damages are payable, existing at the date of the filing of the declaration of taking, and said liens shall be paid out of the damages in order of priority before any payment thereof to the condemnee, unless released.

It shall be the obligation of the condemnor to properly distribute the damages. If the condemnor is unable to determine proper distribution of the damages, it may, without payment into court, petition the court to distribute the damages and shall furnish the court with a schedule of proposed distribution.

Notice of the filing of the petition and schedule of proposed distribution shall be given to all condemnees, mortgagees, judgment creditors and other lienholders, as shown in the proposed schedule, in such manner as the court may by general rule or special order direct. The court may hear the matter or may appoint a master to hear and report or may order any issue tried by the court and jury as may appear proper under all the circumstances. The court shall thereafter enter an order of distribution of the fund.

Comment:

This section is intended to cover all damages, including damages agreed upon and damages payable under Section 407. It is intended that the liens shall attach only to the damages payable for the property on which the mortgage, judgment or other charge existed. For example, a mortgage on real estate will not be a lien on damages for moving or removal expenses or business dislocation damages.

The procedure for distribution is new. Since there will no longer be any requirement under this act that liens be set forth in the petition for viewers or that findings be made as to lienholders and their priority, some procedure is necessary in order that proper distribution be made. It is contemplated that in most cases the condemnor will have obtained the necessary information through his title search and that distribution can safely be made on the basis of such search. Where there is any question as to lienholders or priority, this section permits payment to be made at the direction of the court, thus relieving the condemnor from liability.

Section 522. Payment into Court; Distribution.—Upon refusal to accept payment of the damages, or if the party entitled thereto cannot be found, or if for any other reason the damages cannot be paid to the party entitled thereto, the court upon petition of the condemnor which shall include a schedule of proposed distribution, may direct payment of the damages and costs into court or as the court may direct in full satisfaction thereof.

The court thereafter upon petition of any party in interest shall distribute such funds or any funds deposited in court under section 407 to the persons entitled thereto in accordance with the procedure in section 521, but if no petition is presented within a period of five years of the date of payment into court, the court shall order the fund or any balance remaining to be paid to the Commonwealth without escheat. No fee shall be charged against these funds.

Comment:

The first paragraph follows substantially existing law. See, e.g., Act of 1891, June 2, P. L. 172, §1 (26 P. S. §42); The County Code, 1955, Aug. 9, P. L. 323, §2430 (16 P. S. §2430); the Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, §2630 (16 P. S. §5630).

The second paragraph is new. If the funds are not claimed by the person entitled thereto within five (5) years of the date of payment into court, the court must order the money paid to the Commonwealth without escheat. It is contemplated that after the money has been paid to the Commonwealth the person entitled thereto may apply for a refund in accordance with existing statutes. See Section 10 of the Act of 1937, June 25, P. L. 2063, No. 403, as amended (27 P. S. §443).

Section 523. Appeal to Supreme or Superior Court.—Either party may appeal to the Supreme or Superior Court as the case may be, from any final order or judgment of the court of common pleas within forty-five days from the entry thereof.

Comment:

This section is included in order to provide a complete procedure in one act. Sections 521 and 522, providing for distribution, are not intended to affect the right to appeal a final judgment in favor of a condemnee.

Section 524. Limitation Period.—A petition for the appointment of viewers for the assessment of damages for a condemnation or compensable injury may not be filed after the expiration of six years from the date on which the condemnor made payment in accordance with section 407 (a) or (b) of this act where the property or any part thereof has been taken, or from the date of injury where the property has been injured but no part thereof has been taken. If such petition is not filed before the expiration of such period, such payment shall be considered to be in full satisfaction of the damages.

Comment:

This section distinguishes between takings and injury or consequential damage without taking. In the latter situation the condemnor may not be aware of the injury and therefore not in a position to petition itself. Also it is necessary that the final costs of the improvement be established within a reasonable period.

Section 525. Power of Supreme Court to Promulgate Rules.—Nothing herein contained shall be interpreted so as to prevent the Supreme Court of Pennsylvania from promulgating rules of civil procedure under provisions of the act of June 21, 1937

(P. L. 1982), entitled, "An act authorizing the Supreme Court of Pennsylvania to prescribe rules of practice and procedure in civil actions at law and in equity in certain courts of this Commonwealth, to prescribe rules and regulations for the conduct of any general business, either civil or criminal, by judges of any court of record; authorizing the courts of common pleas to prescribe and adopt local rules, not inconsistent with such general rules of the Supreme Court of Pennsylvania; authorizing the Supreme Court of Pennsylvania to appoint a procedural rules committee, and to fix and define its powers and duties; imposing duties on judges and other officers of every court of record," with respect to matters of procedure set forth in this act.

Comment:

The procedural provisions of Article V, *which preferably should be governed by rules rather than by statute*, are included so that there will be no possible hiatus in practice and procedure between the effective date of this act and the promulgation of Rules of Civil Procedure which it is contemplated will be promptly promulgated by the Supreme Court and the procedural provisions of this act suspended.

ARTICLE VI

Just Compensation and Measure of Damages

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

Comment:

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

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

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

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

Comment:

This section sets forth what damages the condemnee is entitled to when his property is condemned. The first paragraph of this section codifies existing case law by adopting the "before and after rule," which is firmly entrenched in the law, *Brown v. Commonwealth*, 399 Pa. 156 (1960), and adds other items of damages as provided in Sections 608, 609, 610, 611, 612, 613 and 614.

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

- (1) The present use of the property and its value for such use.
- (2) The highest and best reasonably available use of the property and its value for such use.
- (3) The machinery, equipment and fixtures forming part of the real estate taken.
- (4) Other factors as to which evidence may be offered as provided by Article VII.

Comment:

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

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

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

Clause (1) will permit consideration of any special value the property may have for its existing use, including improvements uniquely related to that use and, in conjunction with the provisions of Section 705(2) (iv), will provide for proper valuation of special use properties, such as churches, which have no normal market, because it presupposes a buyer who would purchase it for its existing use.

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

Clause (3) is in accord with existing law since it assumes that the machinery, equipment and fixtures are part of the real property taken. See *Diamond Mills Emory Co. v. Philadelphia*, 8 Dist. R. 30 (1898), and also *Philadelphia & Reading Railroad Co. v. Getz*, 113 Pa. 214 (1886).

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

It is not intended by this section to repeal statutes providing for the consideration of additional factors or criteria. See, for example, Second Class County Port Authority Act, 1956, April 6, P. L. (1955) 1414, as amended (55 P. S. §551 et seq.).

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

Comment:

This section is new. Although it has no counterpart in existing law, the language of this section is based on the language in *Olson & French, Inc. v. Commonwealth*, 399 Pa. 266 (1960), at page 272, where the court used the phrase "general knowledge of the imminence of . . . condemnation. . . ." In many cases, condemnees suffer an economic loss because of an announcement of the proposed condemnation by the condemnor prior to the actual condemnation. Where such announcement is made and publicized, which may be several years before the actual condemnation, the tenants of the condemnee move out or fail to renew their leases and new tenants cannot be obtained because of the proposed condemnation. Under these condi-

tions, the property which is to be condemned is economically deteriorated through no fault of the owner-condemnee, and as a consequence, at the time of actual condemnation, the amount of damages may be affected to the detriment of the innocent condemnee because of lack of tenants or because the condemnee was forced to rent at lower rentals for short terms. This section permits the condemnee to show these economic circumstances in order to prove what his damages actually are at the date of taking. On the other hand, in many cases an announcement of the proposed condemnation causes an inflation of property values and as a result the condemnor may have to pay more for the condemned property. The condemnor may show this increase in the value of the condemned property. Any decline or increase in the fair market value caused by the general knowledge of the imminence of the condemnation is to be disregarded.

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

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

Comment:

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

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

Comment:

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

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

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

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

Comment:

If the machinery, equipment and fixtures are a part of the real estate, they, of course, are condemned with the real estate. See Comment to Section 603. In many cases the condemnor is not interested in the machinery, equipment and fixtures. In such cases, this section requires the condemnor to so notify the condemnee and the condemnee, if he so elects, may remove them. The condemnee of course is not required to remove the machinery, etc., but if he does, his damages are reduced by the fair market value thereof

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

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

Comment:

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

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

Section 609. Business Dislocation Damages.—The condemnee shall be entitled to damages, as provided in this section, for dislocation of a business located on the condemned property, but only where it is shown that the business cannot be relocated without substantial loss of patronage. Compensation for such dislocation shall be the actual monthly rental paid for the business premises, or if there is no lease, the fair rental value of the business premises, multiplied by the number of months remain-

ing in the lease, not including unexercised options, not to exceed twenty-four months or multiplied by twenty-four if there is no lease. The amount of such compensation paid shall not exceed five thousand dollars (\$5000) and shall not be less than two hundred fifty dollars (\$250). A tenant shall be entitled to recover for such business dislocation even though not entitled to any of the proceeds of the condemnation.

Comment:

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

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

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

Comment:

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

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

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

Comment:

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

This changes the existing law which states that the condemnee is *prima facie* entitled to damages for delay except where the delay is the fault of the condemnee (e.g., unreasonable demand by the condemnee). *Moffat Appeal*, 400 Pa. 123 (1960). The courts, however, have been reluctant to find that the delay was the fault of the condemnee. In the absence of evidence of the commercial rate of interest, the condemnee is entitled to 6% for delay compensation. *Lehigh Valley Trust Co. v. Pennsylvania Turnpike Commission*, 401 Pa. 135 (1960). This section sets the figure in all cases at 6%.

Under this section the condemnee is entitled to delay compensation as a matter of right. However, he is not entitled to such compensation on the

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

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

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

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

Comment:

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

Section 613. Damages for Vacation of Roads.—Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken.

Comment:

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

enacted and amended (53 P. S. §46650); the Act of 1905, March 21, P. L. 46, §§1, as amended, 2 (53 P. S. §§1943, 1945). The purpose of this section is to have a general provision applicable to all condemnors relating to and allowing damages for the vacation of public roads.

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

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

Comment:

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

ARTICLE VII

Evidence

Section 701. Viewers' Hearing.—The viewers may hear such testimony, receive such evidence, and make such independent investigation as they deem appropriate, without being bound by formal rules of evidence.

Comment:

This is to make it clear that viewers may consider everything they deem appropriate, including facts which they have discovered by their own investigation and view, in order to arrive at their decision as to just compensation. Apparently, some viewers have and presently do consider themselves bound by the formal rules of evidence. This section settles the matter by stating that the viewers are not so bound. The purpose is to make viewers' proceedings informal. This is considered desirable since many condemnées appear at viewers' hearings without counsel.

Section 702. Condemnor's Evidence Before Viewers.—The condemnor shall, at the hearing before the viewers, present expert testimony of the amount of damages suffered by the condemnee.

Comment:

Under existing law, the condemnor is not required to present testimony before the viewers. In some instances, condemnors have refused to present testimony. This is deemed unfair to the condemnee who has disclosed his figures but does not hear the condemnor's figures until the time of trial on appeal.

It is not intended by this section to require the condemnor to present all its evidence at the viewers' hearing. The condemnor may present additional evidence at the trial in court. As long as the condemnor has one expert testify as to the damages, this is sufficient.

Section 703. Trial in the Court of Common Pleas on Appeal.—At the trial in court on appeal:

(1) Either party may, as a matter of right, have the jury, or the judge in a trial without a jury, view the property involved, notwithstanding that structures have been demolished or the site altered, and the view shall be evidentiary. If the trial is with a jury, the trial judge shall accompany the jury on the view.

Comment:

This clause changes existing law in several respects. First, under existing law, the matter of view by the jury in court is left to the discretion of the judge. *Sebastian A. Rudolph v. The Pa. Schuylkill Valley R.R. Co.*, 186 Pa. 541 (1898); *Frazee v. Manufacturers Light & Heat Co.*, 20 Pa. Superior Ct. 420 (1902); Pa. R.C.P. 219.

Under the Act of 1895, May 21, P. L. 89, §§1, 2 (26 P. S. §§81, 82), either party is entitled to have the trial jury view the premises when viewers have been waived.

The provision in this clause that the view shall be evidentiary also changes existing Pennsylvania law. It is well established under existing law that the only purpose of the view is to enable the trier of the facts to understand the testimony; the view is not evidence and is not to be substituted for the evidence. *Avins v. Commonwealth*, 379 Pa. 202 (1954); *Roberts v. Philadelphia*, 239 Pa. 339 (1913). This position is apparently the minority position, the majority of the states holding that the view is evidence along with the other evidence in the case. *People v. Al. G. Smith Co. Ltd.*, 194 P. 2d 750 (Calif., 1948); 5 *Nichols on Eminent Domain*, §18.31. It is the purpose and intent of this clause to change existing case law by providing, in accordance with the majority view, that the view is evidence along with the other evidence in the case.

There is no requirement under existing law that the trial judge go on the view. This clause makes it mandatory for the trial judge to go on the view with the jury.

(2) If any valuation expert who has not previously testified before the viewers is to testify, the party calling him must disclose his name and serve a statement of his valuation of the property before and after the condemnation and his opinion of the highest and best use of the property before the condemnation and of any part thereof remaining after the condemnation, on the opposing party at least ten days before the date when the case is listed for pre-trial or trial, whichever is earlier.

Comment:

This clause introduces a new concept in eminent domain cases. Existing law does not require disclosure of the names of valuation experts at any time. The purpose of this provision is to eliminate the surprise element in many cases when one expert is used before the viewers and another, with a different valuation and opinion of the highest and best use of the property, is called at the trial.

(3) The report of the viewers and the amount of their award shall not be admissible as evidence.

Comment:

This clause is in accord with the existing law. *Berger v. Public Parking Authority of Pittsburgh*, 380 Pa. 19 (1954).

Section 704. Competency of Condemnee as Witness.—The condemnee or an officer of a corporate condemnee, without further qualification, may testify as to just compensation.

Comment:

The portion of this section permitting the condemnee to testify as to just compensation is in accord with existing law. *Hencken v. Bethlehem Municipal Water Authority*, 364 Pa. 408 (1950). But see *Sgarlat Estate v. Commonwealth*, 398 Pa. 406 (1960), where the court, at page 414, stated "In general he is competent, since he has at least a general knowledge of what he owns. . . . But he is subject to the current rules and occupies no special position as a witness." This section makes it clear that the owner is always competent to express an opinion as to damages.

The provision of this section permitting an officer of a corporate condemnee to testify as to value when the corporation property is condemned changes existing law which does not permit the testimony unless the officer qualifies as an expert. *Westinghouse Air Brake Co. v. Pittsburgh*, 316 Pa. 372 (1934).

The words "without further qualification" are used to emphasize that the condemnee or officer of a corporate condemnee is not required to qualify as an expert witness. The mere fact that he is a condemnee or an officer of a corporate condemnee automatically qualifies him to testify.

Section 705. Evidence Generally.—Whether at the hearing before the viewers, or at the trial in court on appeal:

(1) A qualified valuation expert may, on direct or cross-examination, state any or all facts and data which he considered 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.

Comment:

As under existing law, the viewers or the trial judge, as the case may be, determine whether the witness is qualified to express an opinion, except in the case of a condemnee.

The primary purpose and intent of this clause, however, is to change and broaden existing law which unduly limits the examination and cross examination of an expert witness, so as to permit the expert witness to testify on direct, as well as cross examination, to any and all matters which he considered (not necessarily "relied on") in arriving at his opinion of damages. Under existing law, as noted before, the expert is unduly limited as to what he may testify to, and as a consequence, he cannot show his competence or what perhaps is more important, his lack of competence. See *McSorley v. Avalon Borough School District*, 291 Pa. 252 (1927).

(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:

Comment:

It is intended by this clause to change existing law which severely restricts the testimony of the expert witness on the ground that "collateral issues" are introduced. This change is intended to take cognizance of and permit testimony of all modern appraisal methods.

(i) The price and other terms of any sale or contract to sell the condemned property or comparable property made within a reasonable time before or after the date of condemnation.

Comment:

The purpose of this subclause is to emphasize that any sale of or contract or agreement to sell the condemned property or comparable property, if not too remote in time, is admissible in evidence, both on direct and cross examination, as both impeaching evidence and as evidence of value.

As for sales of the condemned property, existing law apparently limits evidence pertaining thereto to cross examination of the condemnee or his expert witness and only as impeaching evidence affecting credibility. *Berkley v. Jeannette*, 373 Pa. 376 (1953); *Greenfield v. Philadelphia*, 282 Pa. 344 (1925); *Rea v. Pittsburgh and Connellsville R.R. Co.*, 229 Pa. 106 (1910).

Evidence of sales of similar property is not admissible on direct examination and is not evidence of market value under existing Pennsylvania law; such evidence is admissible on cross examination, if the witness relied on the sale, for the purpose of testing his good faith and credibility. *Berkley v. Jeannette*, 373 Pa. 376 (1953). It is the purpose of this subclause to allow such evidence on both direct and cross examination of valuation witnesses regardless of whether they "relied on" or "based their opinion on" the sale. Furthermore, it is intended that such evidence be admissible as evidence of market value as well as for credibility purposes.

(ii) 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.

Comment:

Under existing law, the rent received from the condemned property is admissible in evidence as an element to be considered in ascertaining market value, although it cannot be shown as a separate item of damages. *Westinghouse Air Brake Co. v. Pittsburgh*, 316 Pa. 372 (1934). This subclause, then, is declaratory of existing law on this point.

As for the other terms of a lease, their admission under existing law is forbidden. *Olson & French, Inc. v. Commonwealth*, 399 Pa. 266 (1960), where the court held that the admission of the lease was error, but not prejudicial under the circumstances of the case; *Ogden v. Pa. R.R. Co.*, 229 Pa. 378 (1911). This subclause changes existing law in this regard.

As for the rent and other terms of any lease of comparable property, this subclause changes existing law which does not permit the introduction of rentals and rental values of comparable property.

This subclause also changes existing law which does not allow evidence of the rent or other terms of any lease made after the date of taking.

It is intended that all these matters should be allowed in evidence since they are matters which the modern appraiser considers in appraising property.

(iii) The capitalization of the net rental or reasonable net rental value of the condemned property, including reasonable net

rental values customarily determined by a percentage or other measurable portion of gross sales or gross income of a business which may reasonably be conducted on the premises, as distinguished from the capitalized value of the income or profits attributable to any business conducted thereon.

Comment:

One of the basic methods of appraising property is to capitalize income attributable to the property. This method is generally not accepted by the courts, including the Pennsylvania courts, and consequently evidence thereof is excluded even though an expert appraiser insists that this approach is the only approach to ascertaining market value in a specific case. In many cases, this method of valuation would certainly be a factor which a willing, well-informed purchaser and seller would consider in reaching an agreement on a sales price. If an expert used this method, he should be permitted to so state and give his reasons therefor and a breakdown thereof. Only the reasonable net rental value of the property itself may be capitalized. The income or profits of any business conducted on the property may not be capitalized to show the value of the property; this is in accord with existing Pennsylvania law.

(iv) The value of the land together with the cost of replacing or reproducing the existing improvements thereon less depreciation or obsolescence.

Comment:

Under existing law, evidence of reproduction costs is not admissible to fix damages unless the circumstances are such as to render the admission of such testimony absolutely essential in the interest of justice. *McSorley v. Avalon Borough School District*, 291 Pa. 252 (1927).

The reproduction approach is another basic approach to valuing property. If an expert has used such method in a particular case, evidence thereof should be allowed together with any explanation.

This approach to value will be particularly helpful in valuing special use properties, such as churches, which have no normal market price.

(v) The cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.

Comment:

These matters, in keeping with the liberalization of the examination of the expert, should properly be considered since they affect fair market value. This is generally in accord with existing law. *Puloka v. Commonwealth*, 323 Pa. 36 (1936), where the court stated that estimates of the cost of rebuilding

specific items of property or injury are not recoverable as distinct items of damages but are useful as bearing on the market value.

(3) Either party may show the difference between the condition of the property and of the immediate neighborhood at the time of condemnation and at the time of view, either by the viewers or jury.

Comment:

A considerable time may elapse from the condemnation to the time of view either by the viewers or by the jury. Possession of the condemned property may have been given up by the owners after the condemnation and as a result the property may have become run down or even demolished. On the other hand, the owner may improve the property after the condemnation in the hope of getting more compensation. The purpose of this provision is to make it clear that either the condemnor or the condemnee may show the difference in condition of the property at the time of taking and at the time of view. Of course, just compensation is to be based on the condition of the property at the time of condemnation. This clause is essentially a declaration of existing law.

(4) The assessed valuations of property condemned shall not be admissible in evidence for any purpose.

Comment:

This changes existing statutory law which provides that the assessed valuation is admissible against the condemnor when the condemnor is a county, city, borough, township or town. See the Act of 1915, April 21, P. L. 159 §2 (26 P. S. §102); The County Code, 1955, August 9, P. L. 323, §2418 (16 P. S. §2418), and the various other municipal codes. The assessed valuation is of no real probative value since it relates to an entirely different matter. Consequently, it should not be admissible against the public condemnor. This clause also continues existing law which does not permit the condemnor to introduce the assessed valuation against the condemnee. *Berger v. Public Parking Authority of Pittsburgh*, 380 Pa. 19 (1954).

(5) A qualified valuation expert may testify that he has relied upon the written report 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 ten days in advance of the trial.

Comment:

If, in arriving at his opinion, an expert has relied upon the written estimate, for example, of a contractor as to the cost to repair part of the

property damaged by the condemnation, the party using such expert is required by this clause to furnish a copy of the contractor's written estimate to the other party in advance of trial. There is no similar provision in existing law.

(6) If otherwise qualified, a valuation expert shall not be disqualified by reason of not having made sales of property or not 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.

Comment:

There is nothing in existing law which requires that an expert, in order to testify, must have made sales of property. Apparently, however, some viewers have been disqualifying experts for this reason. The purpose of this clause is to clarify that point. Many highly competent appraisers do not make sales and have not made sales of property.

Under existing law an expert may be disqualified because he did not know of or examine the condemned property prior to the condemnation. See *Shimer v. Easton Railway Co.*, 205 Pa. 648 (1903) (trespass case). But see *Hasenflu v. Commonwealth*, 406 Pa. 631 (1962). The purpose of this clause is to provide that an otherwise qualified expert may still testify even though he has not examined the property prior to the condemnation since this is seldom possible under present condemnation practices. However, as the clause states, the expert must have acquired knowledge of the property and its condition at the time of taking; this can be done through the use of photographs and other data available to him.

Section 706. Use of Condemned Property.—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.

Comment:

This section is necessary in view of the fact that the use to which the condemned property is put may have a very material bearing upon the value of the remaining property in cases of partial condemnations. This does not represent a substantial change in the law.

ARTICLE VIII

Board of Viewers

Section 801. Board of Viewers.—There shall be in each county a board of viewers to consist of not less than three nor more than nine members who shall be appointed by the judges

of the court of common pleas for a term of not less than three nor more than six years, whether such appointment be for an original or partly expired term. In counties of the first class the board of viewers may be appointed from among the members of the board of revision of taxes of such counties. The judges shall, in each case, determine within the aforesaid limits, the total number of members of which the board shall be composed, fixing and determining such number as shall be necessary for the proper performance of the duties imposed upon the board. The judges may change the total number of members within the above limits.

Comment:

This section is derived from The County Code, 1955, Aug. 9, P. L. 323, §1101 (16 P. S. §1101), and from the Second Class County Code, 1953, July 28, P. L. 723, Art. XI, §1101 (16 P. S. §4101). In the interest of uniformity the minimum number of viewers has been reduced to three for second class counties instead of six.

Section 802. Appointment of Board Members; Vacancies.— In counties having more than one court of common pleas, the judges of all courts of common pleas shall meet as a body and make the appointments. In judicial districts which comprise more than one county, the appointment for each county shall be made by the judge or judges of the judicial district in which the county is situate. All vacancies happening from any cause shall be filled by appointment by the judges of the court of common pleas. All appointments shall be subject to the power of the court of common pleas, at its pleasure, to remove members of said board before the expiration of their terms of office, and to appoint successors.

In case of a vacancy in the viewers appointed in any specific case or proceeding before final action has been taken by them, the court may fill such vacancy by appointing another member of the board of viewers.

Comment:

The first paragraph is derived from Sections 1103 and 1104 of The County Code, 1955, Aug. 9, P. L. 323 (16 P. S. §§1103-1104). Similar provisions appear in the Second Class County Code, 1953, July 28, P. L. 723, Art. XI, §§1103-1104 (16 P. S. §§4103-4104).

The second paragraph is taken without substantial change from Section 5 of the Act of 1911, June 23, P. L. 1123, as amended (16 P. S. §9481).

Section 803. Qualifications.—At least one-third of the members of the board of viewers shall be attorneys. Each member of the board of viewers shall be a resident of the county: Provided, however, That if by reason of existing conditions it becomes necessary or the judges are unable to complete the membership of the board from residents of the county, they may appoint residents of adjacent counties. The judges may by general rule or special order establish additional qualifications.

No member of the board shall represent a client or testify as an expert witness before the board.

Comment:

This section changes existing law in several respects. Under existing law one-third of the board may be attorneys; this section requires that one-third of the board be attorneys. The reason for this change is because of the legal problems and questions which dominate every viewers' proceeding. Secondly, under existing law a viewer must be a resident of the county. In some of the smaller counties it is difficult to obtain viewers. Consequently, the change is made to authorize the court to appoint viewers from another county where the court cannot complete the board from residents of the county. In addition, this section eliminates, as being unnecessary, the prohibition in the county codes against a viewer being engaged in any public employment for profit.

The second paragraph is taken without change from Section 1103 of The County Code, 1955, Aug. 9, P. L. 323 (16 P. S. §1103).

Section 804. Oath of Viewers.—Viewers shall be sworn to discharge the duties of their appointment as viewers with impartiality and fidelity and according to the best of their learning and ability, upon their initial appointment to the board of viewers, and thereafter need not be sworn in any proceeding referred to them.

Comment:

There is some conflict of opinion among the lower courts as to the necessity of swearing the viewers for each individual proceeding, and the practice apparently varies from county to county. *Drum, The Law of Viewers in Pa.*, §11, indicates that the viewer must be sworn for each separate case. The Second Class County Code, 1953, July 28, P. L. 723, Art. XXVI, §2613 (16 P. S. §5613), and The County Code, 1955, Aug. 9, P. L. 323, §2413 (16 P. S. §2413), can be construed to require that the viewers be sworn for each case. The purpose of this section is to make it clear that the swearing of the viewers for each case is not required. The form of oath was included so that there would be uniformity.

Section 805. Compensation of Viewers.—In counties of the first class, the compensation of viewers shall be fixed by the city council. In counties of the second class, compensation shall be established by the salary board. In all other classes of counties, the minimum fee per day for services rendered shall be thirty-five dollars (\$35) or in such other amount in excess thereof as may be fixed by the salary board or their compensation shall be such annual salary as may be fixed by the salary board.

Comment:

In Philadelphia, the only city and county of the first class, existing law now specifically provides that the salaries of all county or city officials which are paid by the City of Philadelphia shall be determined by the City Council of Philadelphia. 1945, May 2, P. L. 375, §1, as amended (53 P. S. §13401). This is consonant with the Philadelphia Home Rule Amendment and the Philadelphia Home Rule Act. In other counties, legislation now provides that the county salary boards establish the compensation of county employes. Second Class County Code, 1953, July 28, P. L. 723, Art. XVIII, §1820 (16 P. S. §4820); The County Code, 1955, Aug. 9, P. L. 323, §1620 (16 P. S. §1620). The compensation of viewers which is fixed by statute is much too low and does not permit the court to attract competent and qualified viewers. For example, the various turnpike acts (1937, May 21, P. L. 774, No. 211 §6 (36 P. S. §652f), and subsequent turnpike acts) provide that the viewers shall receive a sum not exceeding \$10 per day for performing their duties. This section recognizes that each county through its county salary board should be authorized to establish adequate compensation. The minimum salary of \$35 per day has been set with leave on the part of the county salary board to establish higher compensation if this is necessary to attract qualified persons as viewers.

For the purpose of compensation, the viewers are to be considered as employes of the court.

Section 806. Viewers' Hearings; Facilities.—All hearings of viewers shall be held publicly in a suitable place within the county designated by the court. The proper county authorities shall prepare and furnish the hearing place, provide for proper lighting, heating and care of same, and furnish such facilities and do such things as shall be proper to enable the viewers to fully discharge their duties.

Comment:

This section is derived from Section 7 of the Act of 1911, June 23, P. L. 1123 (16 P. S. §9483).

Section 807. Stenographic Notes of Hearings.—Whenever in the opinion of the board of viewers, it shall be desirable, accurate stenographic notes of hearings shall be taken and copies of such notes shall be furnished to the parties interested when desired upon payment of such sum as shall be fixed by the rules and regulations of the respective courts of common pleas.

Comment:

This section is derived from existing law. See the Act of 1911, June 23, P. L. 1123, §8 (16 P. S. §9484). The condemnor or condemnee is not required to pay the original expense of a stenographer.

Section 808. Clerks and Stenographers.—The board of viewers may employ such stenographers and clerical assistants as shall be authorized by the county salary board in counties of the second to eighth class or by city council in counties of the first class.

Comment:

This section is derived from the Second Class County Code, 1953, July 28, P. L. 723, Art. XI, §1106 (16 P. S. §4106), and The County Code, 1955, Aug. 9, P. L. 323, §1106 (16 P. S. §1106). The provision that stenographic and clerical help be paid by city council in counties of the first class was added so that all statutory matters on this point would be consolidated, conveniently, in one section.

ARTICLE IX

Repeals

Section 901. Saving Clause.—This act shall not repeal or modify Articles XXVII, XXVIII and XXIX of the "Second Class County Code," act of July 28, 1953 (P. L. 723), as amended, applicable to procedures in the court of quarter sessions with respect to bridges, viaducts, culverts and roads or section 412 of the State Highway Law, act of June 1, 1945 (P. L. 1242), as amended, nor, except as to the measure of damages prescribed by Article VI hereof, shall it repeal, modify or supplant any law insofar as it confers the authority or prescribes the procedure for condemnation of rights-of-way or easements for occupation by water, electric, gas, oil and/or petroleum products, telephone or telegraph lines used directly or indirectly in furnishing service to the public. If the condemnation for occupation by water, electric, gas, oil and/or petroleum products, telephone or telegraph

lines consists of the taking of a fee, all the provisions of this act shall be applicable.

Section 902. Specific Repeals.—The following acts and parts of acts are repealed absolutely :

(1) Act of June 8, 1874 (P. L. 280), entitled “An act providing a mode by which the title to all estates and interests in lands in the state of Pennsylvania may be vested in the United States when no agreement can be made with the owners of the same for the purchase thereof.”

(2) Act of May 23, 1891 (P. L. 109), entitled “An act to limit the period within which petitions for the assessment of damages for the opening or widening of any street, road or highway, may be filed in the court of quarter sessions.”

(3) Act of May 23, 1891 (P. L. 109), entitled “An act to provide for the security to be entered by municipal corporations for the taking of land for the opening or widening of roads, streets and highways.”

(4) Act of May 26, 1891 (P. L. 116), entitled “An act to provide for an appeal to the court of common pleas, from the decree of the court of quarter sessions confirming any award of viewers in proceedings to assess damages for the opening, widening or changing of grade of any street, road or highway.”

(5) Act of June 2, 1891 (P. L. 172), entitled “A supplement to an act, entitled ‘An act for further regulations of appeals from assessment of damages to owners of property taken for public use,’ approved the thirteenth day of June, one thousand eight hundred and seventy-four.”

(6) Act of May 21, 1895 (P. L. 89), entitled “An act relating to actions brought to ascertain or recover damages for appropriation of rights of way or easements in lands by corporations invested with the right of eminent domain, and empowering and authorizing owners of lands and corporations, municipal or otherwise, desiring to exercise the right of eminent domain in such lands, to waive the assessment of damages by viewers, and granting the right to either party to demand and have the jury engaged in trying such action visit and view said land and premises.”

(7) Act of June 8, 1895 (P. L. 188), entitled "An act providing for the manner of ascertaining, determining, awarding and paying compensation and damages in all cases where municipalities of this Commonwealth may hereafter be authorized by law to take, use and appropriate private property for the purpose of making, enlarging and maintaining public parks within the corporate limits of such municipality."

(8) Act of March 18, 1903 (P. L. 28), entitled "An act regulating the filing of reports of viewers, or juries of view, appointed by the courts of this Commonwealth to assess damages and benefits for the taking, injury or destruction of private property in the construction or enlargement of public works, highways or improvements."

(9) Act of March 27, 1903 (P. L. 83), entitled "An act to provide for the confirmation of the reports of viewers, or juries of view, appointed by the courts of quarter sessions to assess damages and benefits, and for the collection of damages in such proceedings."

(10) Act of April 18, 1905 (P. L. 198), entitled "An act supplementary to an act, entitled 'An act in relation to the laying out, opening, widening, straightening, extending or vacating streets and alleys, and the construction of bridges, in the several municipalities of this Commonwealth, the grading, paving, macadamizing or otherwise improving streets and alleys, providing for ascertaining the damages to private property resulting therefrom, the assessment of the damages, costs and expenses thereof upon the property benefited, and the construction of sewers and the payment of the damages, costs and expenses thereof, including the damages to private property resulting therefrom,' approved the sixteenth day of May, Anno Domini one thousand eight hundred and ninety-one; relating to exceptions and to the confirmation of the reports of viewers and of parts thereof, and of appeals to the Superior and Supreme Court from the confirmation of viewers' reports or parts thereof, the manner of taking the same, and the effect thereof."

(11) Act of June 7, 1907 (P. L. 461), entitled "An act providing a method to secure possession of lands, buildings or other property acquired under the power of eminent domain."

(12) Act of May 15, 1913 (P. L. 215), entitled "A supplement to an act, entitled 'An act in relation to the laying out, opening, widening, straightening, extending, or vacating streets and alleys, and the construction of bridges, in the several municipalities of this Commonwealth; the grading, paving, macadamizing, or otherwise improving, streets and alleys, providing for ascertaining damages to private property resulting therefrom; the assessment of the damages, costs, and expenses thereof upon the property benefited; and the construction of sewers, and payment of the damages, costs and expenses thereof, including damages to private property resulting therefrom,' approved the sixteenth day of May, Anno Domini one thousand eight hundred and ninety-one (Pamphlet Laws, seventy-five); by providing that, in proceedings to assess damages and benefits arising from improvements under the act to which this is a supplement, if property benefited and damaged by such improvements, the excess of damages over benefits, or the excess of benefits over damages, or nothing in case the benefits and damages are equal, shall be awarded to or assessed against the owners of property, and providing that the report thereof made by the Board of Viewers shall show the net result only."

(13) Act of April 14, 1915 (P. L. 122), entitled "An act providing for the payment of judgments and mortgages, and other claims, which are liens on property affected by public improvements or appropriated by the exercise of the right of eminent domain."

(14) Act of April 21, 1915 (P. L. 159), entitled "An act relating to the competency of witnesses and to the rules of evidence in proceedings arising from the exercise of the right of eminent domain."

(15) Act of May 10, 1921 (P. L. 428), entitled "An act fixing the time for the confirmation of the reports of viewers, or portions thereof, in proceedings to assess damages or benefits incident to public improvements, where no exceptions are filed or appeals taken."

(16) Act of April 27, 1925 (P. L. 310), entitled "An act to provide for the preparation of plans for the use of viewers, owners, tenants, and occupiers of property, and all other parties affected in proceedings for the assessment of damages for the

taking, injury, or destruction of private property for public use, and the furnishing of copies thereof to parties affected thereby.”

(17) Act of May 4, 1927 (P. L. 728), entitled “An act making the power of taxation of cities of this Commonwealth security for the taking, injury, or destruction of private property for public use, without the entry of a bond.”

(18) Act of April 25, 1929 (P. L. 777), entitled “An act fixing the time when interest shall begin to run on the amounts fixed in reports of viewers for the taking, injury and destruction of property by the right of eminent domain.”

(19) Act of July 1, 1937 (P. L. 2667), entitled “An act regulating the hearing before boards of view and jury trials, and the awards and verdicts in cases arising from the taking, injury, or destruction of private property under the right of eminent domain, where both the owner of the fee, and any lessee or lessees under such owner, shall claim damages.”

(20) Act of June 21, 1939 (P. L. 651), entitled “An act authorizing the courts of common pleas to make orders relative to the payment of costs in road cases.”

(21) Act of April 3, 1956 (P. L. 1366), entitled “An act limiting the period within which petitions for the assessment of damages may be filed or actions for damages commenced for injury to or taking of private land, property or material or any interest therein by political subdivisions or by authorities created by political subdivisions in the exercise of their power of eminent domain.”

(22) Act of July 10, 1957 (P. L. 632), entitled “An act authorizing cities of the first class to file declarations of valuation with respect to property condemned for public purposes, and for the deposit in court of the estimated value of the property taken, and authorizing the courts to pay said sums to parties in interest under certain terms and conditions.”

Section 903. General Repeal.—All other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved the 22nd day of June, A. D. 1964.

WILLIAM W. SCRANTON
Governor

