Eminent Domain Code

Eminent Domain Code

as Amended
with Comments and Notes

EMINENT DOMAIN CODE

Act of 1964, June 22, P.L. 84, Special Session, Act No. 6

AMENDMENTS

Act of 1967, October 19, P.L. 460, Act No. 217

Act of 1969, December 5, P.L. 316, Act No. 137

Act of 1969, December 5, P.L. 326, Act No. 138

Act of 1971, December 29, P.L. 635, Act No. 169

Act of 1972, September 1, First Special Session, Act No. 3

General Assembly of the Commonwealth of Pennsylvania

JOINT STATE GOVERNMENT COMMISSION

Harrisburg, Pennsylvania

1972

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as amended, 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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Letter of Transmittal

To the Members of the General Assembly
of the Commonwealth of Pennsylvania:

The Joint State Government Commission is pleased to present this comprehensive reference work relating to eminent domain law.

Reflecting the thorough work of the Commission's Advisory Committee on Eminent Domain Law, this volume presents the Eminent Domain Code with all amendments to date along with the official Comments and Notes. The appendix includes related Pennsylvania laws and the Attorney General's Regulations on Uniform Relocation Assistance, promulgated to implement Article VI-A of the Code added by the most recent 1971 amendments.

In view of the widespread use of the Commission's previous reports on eminent domain, the Executive Committee of the Joint State Government Commission determined that the Code be published to bring all relevant materials within the covers of one reference.

Respectfully submitted,

FRED J. SHUPNIK, *Chairman*

Joint State Government Commission
Capitol Building
Harrisburg, Pennsylvania
December, 1972

EMINENT DOMAIN LAW

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Introduction

The Eminent Domain Code, as enacted in 1964, was the culmination of two years of intensive and thorough research conducted by the Joint State Government Commission Task Force on Eminent Domain Law, ably assisted by an advisory committee of experts representing diverse governmental and public interests in the law of eminent domain.

The task force, appointed pursuant to 1959 House Concurrent Resolution No. 59 (Serial No. 64), began its work in June 1960 under the co-chairmanship of (then) Senator Raymond P. Shafer and Representative George X. Schwartz. Realizing that the task force and Commission staff—under the direction of Counsel and Director Guy W. Davis, Esquire—would benefit from the experience and knowledge of recognized experts, the task force recommended to the Executive Committee the appointment of an advisory committee, which was subsequently appointed and supplemented from time to time. Initial chairman was B. Graeme Frazier, Jr., Esquire, who served from 1961 to 1969. He was succeeded by David McNeil Olds, Esquire, who served from 1969 to 1972. A list of the distinguished members of this committee over the last dozen years may be found on page viii.

Representative Herbert Fineman was designated co-chairman of the task force in 1961 by the Executive Committee and has served since as the Executive Committee's appointee.

In September 1962 the Joint State Government Commission issued and distributed for critical review and recommendations a preliminary report entitled, "Proposed Eminent Domain Law of 1963." A revised draft of the proposed code was introduced in the 1963 Session of the

General Assembly as House Bill No. 683. Although the bill passed the House with amendments (Printer's No. 1689), sufficient time was not available for final action in the Senate before the session's adjournment. The code was included in the Governor's call as a subject for consideration during the Special Session of 1964. After undergoing various amendments, the legislation passed both houses unanimously and was approved by the Governor on June 22, 1964 as Act No. 6.

In 1965, recognizing the significant changes in Pennsylvania law brought about by the 1964 Code and its continuing importance to Pennsylvanians faced with the public's need for highways, municipal redevelopment, enlarged institutions and other capital improvements requiring the condemnation of their homes, farms and businesses, the Executive Committee, acting under legislative resolution,[1] authorized the continuance of the advisory committee to work with its appointed representatives to review proposed amendments and initiate improvements to the Code.

As a result of the work of this group, an omnibus bill (House Bill 2275, Pr. No. 3047) incorporating recommended changes to the Code was introduced under the sponsorship of Representatives Fineman, Lee and J. F. Clarke on December 8, 1965, but was not enacted into law. Again in 1966 and 1967 revisions to the Code were introduced but legislative action was not completed. The Code was, however, amended in 1967 to exclude flood damage in determining the market value of condemned property.

In 1969 recommendations of the advisory group were incorporated into House Bill 367, Pr. No. 429, under the sponsorship of Representatives Fineman, Butera, Prendergast, Englehart, Bonetto, Gelfand, Kaufman and Schmitt. This bill was approved by the Governor on December 5, 1969, P.L. 316, Act No. 137.

In the same session, amendments were made to the Code incorporating provisions previously added in 1968 to the State Highway Law of 1945, June 1, P.L. 1242, Act No. 428. The Federal Highway Act of 1968 had required reimbursement of relocation costs for persons displaced as a result of acquisition of property by the Department of Highways for highway purposes. The 1969 amendments to the Code were designed to consolidate all the laws relating to eminent domain within the purview of the Code. As amended, the Code made available to *all* condemnees the benefits previously available only to persons displaced for highways.

During 1969 and 1970, the advisory committee was aware of pending Congressional action to enlarge benefits payable under federally funded

[1] 1965 House Resolution No. 38 (Serial No. 41); 1967 House Resolution No. 17 (Serial No. 17).

projects. This legislation, which required State legislative implementation to maximize the Commonwealth's participation in available Federal monies, culminated in the enactment by Congress of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91—646, Stat. 1894, effective January 2, 1971.

The Federal relocation act expanded the traditional concept of "just compensation" for the loss of real estate to encompass payment of damages and the provision of services to persons previously not entitled under Pennsylvania law. This concept had been initiated in Pennsylvania by the 1968 amendments to the State Highway Law which in turn had been suggested by Federal legislation of the same year.

The 1971 Federal act made available up to $25,000 in Federal financial assistance per condemnation to any State agency receiving Federal funds and authorized by State law to pay benefits and provide services conforming to Federal standards and minimums. This provision applied to all condemnations occurring after January 2, 1971 and before July 1, 1972. Thereafter, Federal financial participation would be based on the Federal-to-State funding ratio of the program or project involved.

Concurrent with the consideration of this Federal legislation, the advisory committee undertook the drafting of the necessary legislation to enable the affected agencies of the Commonwealth to qualify for the full Federal participation.

With the invaluable assistance of Henry H. Krevor, Esquire, former chief counsel to the Select Subcommittee on Real Property Acquisition of the Public Works Committee of the U.S. House of Representatives, and draftsman of the 1971 Federal act, the advisory committee in May 1971 completed comprehensive drafts of implementing legislation incorporating Federal law, subsequent amendments and changes in the Pennsylvania law, and improvements suggested since the 1969 enactments.

These drafts were introduced in 1971 as House Bill 1095, Pr. No. 1220 (amending the Eminent Domain Code to provide the basic implementing legislation to the Federal act and revisions and changes to the Code); House Bill 1096, Pr. No. 1221 (providing for payments to persons not eligible for payments under the Eminent Domain Code); and House Bill 1630, Pr. No. 2013 (authorizing condemnors to acquire, construct or contract for the construction of replacement housing for displaced persons in cases where replacement housing is not available).

House Bills 1095 and 1096 were introduced on June 2, 1971 and finally enacted on December 29, 1971, P.L. 635 and 646, Acts Nos. 169 and 170 respectively. House Bill 1630, introduced on November 8, 1971,

was enacted on December 6, 1972, Act No. 304. The appendix of this book includes the text of Acts Nos. 170 and 304 on pages 69–71.

It should be noted that—unlike the Federal legislation—the sections of Act No. 169 complying with the requirements of the Federal law are not limited solely to condemnors receiving Federal participation funds. The advisory committee recognized the undesirability of a double standard—Federal and State—for the payment of damages and benefits and recommended as a minimum the payment of the same damages and benefits to all.

It would be inappropriate to conclude this foreword without acknowledging the invaluable and tireless participation of Representative Fineman and members of the advisory committee, particularly that of the current Chairman, David McNeil Olds, Esquire, and the assistance in drafting both the legislation and comments of Michael R. Deckman, Esquire, Deputy Chief Counsel, Department of Transportation; Robert J. Barr, Chief, Housing and Redevelopment Division, Department of Community Affairs; and Howard L. Bozarth, Esquire, of the Commission staff.

It is with pride and satisfaction that this revised edition of the Eminent Domain Code, as amended, with the advisory committee's official 1964 Comments edited to reflect subsequent changes, its official 1971 Comments, staff notes, implementing regulations and related legislation, is submitted for the information of the members of the General Assembly and the public.

Joint State Government Commission
Capitol Building
Harrisburg, Pennsylvania
1972

Contents

Page

INTRODUCTION ix

EMINENT DOMAIN CODE, AS AMENDED, WITH COMMENTS AND NOTES 4

ARTICLE I—Section 101. Short Title 4

ARTICLE II—Section 201. Definitions 4

ARTICLE III—Severability, Effective Date, and Intent 7
Section 301. Severability 7
Section 302. Effective Date 7
Section 303. Intent of Act; Exclusions 7

ARTICLE IV—Procedure to Condemn 8
Section 401. Jurisdiction and Venue 8
Section 402. Condemnation; Passage of Title; Declaration of Taking 8
Section 403. Security Required 10
Section 404. Recording Notice of Condemnation 11
Section 405. Notice to Condemnee 12
Section 406. Preliminary Objections 14
Section 407. Possession; Entry; Payment of Compensation 15
Section 408. Revocation of Condemnation Proceedings 16
Section 409. Right to Enter Property Prior to Condemnation 18
Section 410. Abandonment of Project 18

ARTICLE V—Procedure for Determining Damages 19
Section 501. Agreement as to Damages 19

Section 502. Petition for the Appointment of Viewers 19
Section 503. View 22
Section 504. Appointment of Viewers; Notice; Objections 22
Section 505. Service of Notice of View and Hearing 23
Section 506. Additional Condemnees; Mortgagees 23
Section 507. Joint Claims Required; Apportionment of Damages; Separate Hearings Allowed 24
Section 508. Appointment of Trustee or Guardian Ad Litem 25
Section 509. Furnishing of Plans to Viewers 25
Section 510. Powers of Viewers 26
Section 511. Report of Viewers 27
Section 512. Disagreement 28
Section 513. Filing of Report of Viewers 29
Section 514. Reports 29
Section 515. Appeals; Time of Taking; Consolidation 30
Section 516. Appeals 31
Section 517. Disposition of Appeal 32
Section 518. Severance and Special Damages; Allocation 33
Section 519. Costs of Proceedings 33
Section 520. Waiver of Viewers' Proceedings; Termination by Stipulation 34
Section 521. Distribution of Damages; Liens 34
Section 522. Payment into Court; Distribution 36
Section 523. Repealed 37
Section 524. Limitation Period 37
Section 525. Power of Supreme Court to Promulgate Rules 37

ARTICLE VI—Just Compensation and Measure of Damages 38
Section 601. Just Compensation 38
Section 602. Measure of Damages 38
Section 603. Fair Market Value 39
Section 604. Effect of Imminence of Condemnation 40
Section 605. Contiguous Tracts; Unity of Use 41
Section 606. Effect of Condemnation Use on After Value 41
Section 607. Removal of Machinery, Equipment or Fixtures 42
Section 608. Expenses Incidental to Transfer of Title 43
Section 609. Condemnee's Costs Where No Declaration of Taking Filed 44
Section 610. Limited Reimbursement of Appraisal, Attorney and Engineering Fees 44
Section 610.1 Payment on Account of Increased Mortgage Costs. 45
Section 611. Delay Compensation 46

Section 612. Consequential Damages.......................... 47
Section 613. Damages for Vacation of Roads.................. 47

ARTICLE VI-A—Special Damages for Displacement............. 47
Section 601-A. Moving and Related Expenses of Displaced Persons.. 47
Section 602-A. Replacement Housing for Homeowners.......... 50
Section 603-A. Replacement Housing for Tenants and Others... 52
Section 604-A. Issuance of Regulations to Implement this Article. 53
Section 605-A. Payments Not to be Considered as Income or Resources.. 54
Section 606-A. Rights of Certain Displaced Persons Defined.... 54

ARTICLE VII—Evidence 55
Section 701. Viewers' Hearing................................ 55
Section 702. Condemnor's Evidence Before Viewers............ 55
Section 703. Trial in the Court of Common Pleas on Appeal.... 56
Section 704. Competency of Condemnee as Witness............ 57
Section 705. Evidence Generally.............................. 57
Section 706. Use of Condemned Property..................... 61

ARTICLE VIII—Board of Viewers............................. 61
Section 801. Board of Viewers................................ 61
Section 802. Appointment of Board Members; Vacancies....... 62
Section 803. Qualifications.................................. 62
Section 804. Oath of Viewers................................. 63
Section 805. Compensation of Viewers 63
Section 806. Viewers' Hearings; Facilities.................... 63
Section 807. Stenographic Notes of Hearings.................. 64
Section 808. Clerks and Stenographers....................... 64

ARTICLE IX—Repeals.. 64
Section 901. Saving Clause.................................. 64
Section 902. Specific Repeals................................ 65
Section 903. General Repeal.................................. 68

APPENDIXES—RELATED PENNSYLVANIA LAWS AND REGULATIONS 69

Appendix A—Act No. 170 (Act of 1971, December 29, P.L. 646)... 69
Appendix B—Act No. 304 (Act of 1972, December 6, P.L.___) 69
Appendix C—Attorney General's Regulations on Uniform Relocation Assistance.............................. 72

Eminent Domain Code, as Amended, with Comments and Notes

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.

> **1964 Comment:** This language is suggested by the Pennsylvania Constitution [Article X, §4].

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

> **1964 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.
>
> **Note:** Also see "displaced person," clause (8), *infra*. The authorization for a mortgagee to intervene with court permission was extended in 1969 to include a judgment creditor or other lienholder. See Section 506(b), *infra*.

(3) "Condemnor" means the acquiring agency, including the Commonwealth of Pennsylvania, taking, injuring or destroying private

property under authority of law for a public purpose. (As amended 1971, December 29, P.L. 635, Act No. 169.)

1964 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.

Note: Also see "acquiring agency," clause (5), *infra.*

(4) "Court" means the court of common pleas.

(5) "Acquiring agency" means any entity vested with the power of eminent domain by the laws of the Commonwealth, including the Commonwealth. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Acquiring agency is used throughout Article VI-A and in Sections 608, 610 and 610.1 to clarify that the special damages provided therein are payable whether property is condemned or acquired amicably in lieu of condemnation. An acquiring agency becomes a condemnor upon the exercise of its power of condemnation. See "condemnor," clause (3), *supra.*

(6) "Acquisition cost" means general damages, or in the event of amicable acquisition, the price paid by the acquiring agency in lieu thereof. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Acquisition cost—used to compute the replacement housing payment in subsection (a)(1) of Section 602-A—is the full amount of damages attributable to fair market value as set forth in Section 603.

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

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

(ii) for the sale of services to the public;

(iii) by a nonprofit organization; or

(iv) solely for the purpose of qualification for damages under subsections (a) and (b)(1) and (b)(4) of section 601-A for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays whether or not such displays are located on the premises on which any of the above activities are conducted. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: This definition is taken without substantive change from the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law No. 91-646, §101(7); 42 U.S.C. 4601(7).

(8) "Displaced person" means any condemnee or other person not illegally in occupancy of real property who moves or moves his personal property as a result of the acquisition for a program or project of such real property, in whole or in part, or as the result of written notice from the acquiring agency of intent to acquire or order to vacate such real property; and solely for the purpose of subsections (a) and (b)(1) and (b)(4) of section 601-A, as a result of such acquisition or written notice of intent to acquire or order to vacate other real property on which such person conducts a business or farm operation. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: To qualify as a displaced person under this definition, one must be in legal occupancy of the property at the time it is acquired or have moved after receiving from the acquiring agency either written notice of its intent to acquire the property or order to vacate it. In addition, one can qualify as a displaced person for certain enumerated purposes if he moves from his dwelling because his business or farm is acquired and he wishes to relocate his dwelling as well as his business or farm. This definition derives from the Federal act, 42 U.S.C. 4601(6).

(9) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contribution materially to the operator's support. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: This term is taken verbatim from the Federal act, 42 U.S.C. 4601(8). Under the definition, a farm which does not contribute materially to the operator's support does not qualify as a "farm operation."

(10) "Personal property" means any tangible property not considered to be real property for purposes of general damages under the laws of the Commonwealth. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Property converted to real estate under the doctrine of *Singer v. Redevelopment Authority of Oil City*, 437 Pa. 55 (1970), is not personal property under this definition.

(11) "Program or project" means any program or project undertaken by or for an acquiring agency as to which it has the authority to exercise the power of eminent domain. (Added 1971, December 29, P.L. 635, Act No. 169.)

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.

1964 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.

Note: The amendatory Act of 1969, December 5, P.L. 316, Act No. 137, took effect ". . . immediately and [applied] to all condemnations effected thereafter except that the provisions of sections 502, 504, 506, 507, 508, 510, 513, 514, 516, 520, 522, 703(2) and 704 of the Eminent Domain Code as [therein amended applied] to all steps taken subsequent to the effective date of the [1969] act in all condemnation proceedings in which the condemnation was effected prior to the effective date of the [1969] act."

The amendatory Act of 1971, December 29, P.L. 635, Act No. 169, took effect immediately and is thus applicable to all condemnations on or after that date. For its retroactive applicability to certain displaced persons under Article VI-A, see Section 606-A, *infra*.

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.

1964 Comment (in part): This section gives the court of common pleas exclusive jurisdiction of all condemnation cases. . . . 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 [53 P.S. §3001], 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).

Note: With regard to jurisdiction and venue under interstate compacts, the former authority of the Dauphin County Court of Common Pleas has been transferred to the Commonwealth Court. See, for example, Section 508(a)(20) of the Appellate Court Jurisdiction Act of 1970, July 31, P.L. 673, Act No. 223 (17 P.S. §211.508(a)(20)).

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.

(5) A description 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, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in such county in accordance with section 404 of this act.

(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.

(c) The condemnor may include in one declaration of taking any or all of the properties specified in the action by which the declaration of taking was authorized. The prothonotary shall charge one fee for filing each declaration of taking, which shall be the same regardless of the number of properties or condemnees included therein.

(d) The condemnor shall file within one year of the action authorizing the declaration of taking, a declaration or declarations of taking covering all properties included in such authorization not otherwise acquired by the condemnor within such time.

(As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 proceeding 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.

Note: Section 402 was amended by the Act of 1969, December 5, P.L. 316, Act No. 137, to delete in subsection (b)(4) the requirement of a description of the need for a condemnation and to add in subsection (b)(5) two alternate methods of identifying the condemned property. The 1969 act also added subsections (c) and (d).

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.

1964 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. §3022]. 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 challenge 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.

1964 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 [since repealed]), but boroughs (1927, May 4, P.L. 519, Art XIV, §1403, as reenacted and amended [since repealed]) 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 [since repealed].)

(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.

1964 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. If plans are to be recorded as part of the notice they shall be submitted on standard legal size paper. If plans are to be filed as part of the notice they shall be in legible scale and filed in a condemnation book or file or microfilmed, with a notation as to the condemnation book and page number, file number or microfilm number

to be made by the recorder on the margin of the notice. The recorder shall receive as a fee for recording each notice the sum of five dollars ($5) plus one dollar ($1) for each page recorded after the first, and for filing plans two dollars and fifty cents ($2.50) for each page or sheet of plan filed and twenty-five cents (25¢) for each name indexed. Upon the notice being assigned a book and page number by the recorder of deeds the condemnor shall file with the prothonotary under the caption of the declaration of taking a memorandum of the book and page number in which the notice is recorded. (As last amended 1971, December 29, P.L. 635, Act No. 169.)

1964 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 [Department of Transportation] 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.

1971 Comment: The 1971 amendment clarifies language added by the Act of 1969, December 5, P.L. 316, Act No. 137.

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.

1964 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 preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 viewers' 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.

Note: See *Faranda Appeal*, 420 Pa. 295 (1966) and *Valley Forge Golf Club v. Upper Merion Twp.*, 422 Pa. 227 (1966), with respect to the legislative intent that the filing of preliminary objections shall be the sole and exclusive remedy available to condemnees to challenge the condemnation. Cf. *Avery v. Commonwealth*, 2 Commonwealth Ct. 105 (1971).

Section 407. Possession; Entry; Payment of Compensation.—(a) The condemnor after the expiration of the time for filing preliminary objections by the condemnee to 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, unless preliminary objections warranting delay are pending, 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. However, in no event shall the condemnee be compelled to pay back to the condemnor the compensation paid under subsections (a) and/or (b), even if the amount of just compensation as finally determined shall be less than the compensation so paid. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 [since repealed], 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.

Note: Subsections (a) and (c) were amended by the Act of 1969, December 5, P.L. 316, Act No. 137, to clarify their provisions.

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 revest 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. The fees payable to the recorder for recording the notice of relinquishment shall be in the same amounts as provided in section 404 for the recording of notices of condemnation. Where condemned property is relinquished, the condemnee shall be reimbursed by the condemnor for reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceedings. 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 as provided herein, may by agreement effect a revesting of title in the condemnee, which agreement shall be properly recorded. (As last amended 1971, December 29, P.L. 635, Act No. 169.)

1964 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 [since repealed]; 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.

1971 Comment: The Act of 1971, December 29, P.L. 635, Act No. 169, substitutes for the term "damages" an explicit mandate for reimbursement of reasonable costs and expenses actually incurred, such as appraisal, attorney and engineering fees. The language describing the costs recoverable under this section is identical to that in Section 609 and is based on the requirements of the Federal act, 42 U.S.C. 4654.

Note that this change also affects recovery under Section 406(e) which refers to Section 408 for the procedure to recover damages.

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.

1964 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.

1964 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.

1964 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 the declaration of taking, with an identification of

the petitioner and his property. The petitioner shall be designated as the plaintiff. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same court term and number as the declaration of taking.

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

(3) The name of the condemnor.

(4) The names and addresses of all condemnees and mortgagees 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 in the same county taken, injured or destroyed for the same purpose by the condemnor, whether by the same or separate declarations or without a 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, to which shall be added the name of the condemnee as plaintiff as to whose property the petition is filed and the name of the condemnor as defendant. If there is more than one condemnee it shall be sufficient to designate the name of the first condemnee as the plaintiff with appropriate indication of other condemnees. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same term and number as the declaration of taking.

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

(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, on its own motion or at the request of a party, direct them to determine the damages for any or all of the properties included in the declaration of taking or any or all properties taken, injured or destroyed for the same purpose by a condemnor without 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 sent promptly by registered or certified mail, return receipt requested, to the adverse party.

(g) The court, in furtherance of convenience or to avoid prejudice, may on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 [since repealed]. 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.

Note: Judgment creditors or other lienholders now may be permitted to intervene in the proceedings. See Section 506(b), *infra.*

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.

1964 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; Objections.—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 prothonotary shall promptly notify the viewers of their appointment unless a local rule provides another method of notification.

The viewers shall promptly give written notice by registered or certified mail, return receipt requested, 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 by registered or certified mail, return receipt requested.

Any objection to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualification of the viewers are waived unless included in preliminary objections. The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. If an issue of fact is raised, evidence may be taken by deposition or otherwise as the court shall direct. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 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 a 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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, judgment creditor or other lienholder 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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.

Note: The last paragraph of the 1964 Comment must be read in light of the 1969 amendment to subsection (b) which added "judgment creditor or other lienholder" as a party permitted to intervene with court permission.

Section 507. Joint Claims Required; Apportionment of Damages; Separate Hearings Allowed.—(a) The claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, or ground rents, 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.

(b) Claims for removal expenses, business dislocation damages and moving expenses may be heard or tried separately. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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.

Note: The above Comment must be read in light of the 1969 amendment which specifically authorizes separate hearings or trials for certain special damages for displacement (Section 601-A, *infra*) which are in addition to the damages for the property.

Section 508. Appointment of Trustee or Guardian Ad Litem.—The court, on its own motion may, or on petition of any party in interest shall, appoint a trustee ad litem or guardian ad litem, as may be appropriate, in accordance with the Rules of Civil Procedure. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 Comment: This section is derived from such acts as the Act of 1929, April 17, P.L. 531, §2 [since repealed in part and suspended, see 15 P.S. §116], 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 fur-

nish 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.

1964 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, and to adjourn the proceedings from time to time. Upon request of the viewers or a party, the court which appointed the viewers shall issue a subpoena to testify or to produce books and documents. 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 28, 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 [third] 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.

Note: The second paragraph of the 1964 Comment, which refers to the viewers' power to issue subpoenas, should be read in light of the 1969 amendment which specifies that the court shall issue such subpoenas.

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.

1964 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 (Apportionment of damages between landlord and tenant) [repealed by the Eminent Domain Code, Section 902(19), *infra*]. 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 assessible 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). 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.

1964 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. Filing of Report of Viewers.—The viewers shall file their report within thirty days of their final hearing or within thirty days from the filing of the transcription of the stenographic notes of testimony, which transcription shall be filed within thirty days of the final hearing. 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 condemnors. 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 or claims under sections 608, 609 and 610 referred to them under the same or separate petitions provided such properties are included in the same declaration of taking. The viewers may file a separate report for removal expenses, business dislocation damages and moving expenses. Each such report shall be final as to the property or properties included therein and subject to separate appeal. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 sepa-

rate 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.

Note: Sections 608, 609 and 610 referenced in this section were repealed in 1971 and their substance incorporated into Section 601-A, *infra.*

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.

1964 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 [since repealed] 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. X, §4]. 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 and appellee. (As amended 1969, December 5, P.L. 316, Act No. 137.)

(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.

1964 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. . . . 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 non-jury. 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.

Note: With respect to subsection (b) see *Langhorne Springs Water Co. Appeal*, 437 Pa. 298 (1970), which holds that the five-day period is directory and not mandatory. Also see *Miller Estate v. Dept. of Highways*, 424 Pa. 477 (1967), which holds that the filing of proof of service of a copy of the appeal must be accomplished within a reasonable time subsequent to the filing of the appeal.

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.

1964 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 [since repealed], and The Borough Code, 1927, May 4, P.L. 519, Art XIV, §1435, as reenacted and amended (53 P.S. [§46531]). The confirmation *nisi* procedure provided for in most of these codes has been omitted (see Comments to Sec-

tions 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, except reasonable appraisal, attorney and engineering fees recoverable under sections 406 (e), 408, 609 and 610, which shall be determined by the court in an appropriate case. (As amended 1971, December 29, P.L. 635, Act No. 169.)

1964 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 [and other federally reimbursed projects as well as State programs now permit] 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.

1971 Comment: It is believed that the court can more expeditiously determine the reasonableness of appraisal, attorney and engineering fees, especially since the jury is required to make the many other findings specified in this subsection.

Section 519. Costs of Proceedings.—All taxable costs, including filing fees, jury fees, statutory witness fees and mileage, expense of pre-

paring plans under section 509, the expense of transporting the judge and jury to view the condemned property, transcripts of the stenographic notes of the trial in court on appeal, 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. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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; Termination by Stipulation.—(a) 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.

(b) At any time after the filing of a petition for the appointment of viewers, the parties may by stipulation filed with the prothonotary terminate the viewers' proceedings as to all or part of the properties involved and stipulate that judgment may be entered for the amount of damages agreed on for each property interest covered by the stipulation. A copy of the stipulation shall be filed with the viewers. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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 [since repealed]. 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 sections 601 through 607, 611, 612 and 613, in-

clusive, and clauses (1) and (2) of subsection (b) of section 601-A 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.

In the case of a partial taking, or of damages under sections 612 and 613, the lienholder shall be entitled only to an equitable pro rata share of the damages lienable under this section.

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. (As amended 1971, December 29, P.L. 635, Act No. 169.)

1964 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.

1971 Comment: The rationale of the 1971 amendments is that liens should not attach to the special damages for displacement under Article VI-A (except special damages payable under subsection (b)(1) and (2) of Section 601-A) and to special damages under Sections 608, 609, 610 and 610.1, since these damages are not based on the value of the property to which liens attached, and because the monies will be required for relocation of the condemnee to a new dwelling or business and for payment of incurred expenses.

The second paragraph was added to limit the lienholder's recovery to a portion of the damages measured by the effect of the condemnation upon his security.

Section 522. Payment into Court; Distribution.—Upon refusal to accept payment of the damages, or of the estimated just compensation under section 407, or if the party entitled thereto cannot be found, or if for any other reason the same 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 thereof and costs into court or as the court may direct in full satisfaction thereof.

The condemnor shall give twenty days notice of the presentation of such petition, including a copy of the schedule of the proposed distribution, to all parties in interest known to condemnor, in such manner as the court may by general rule or special order direct. If the court shall be satisfied in a particular case that condemnor failed to use reasonable diligence in giving notice, the court may upon petition of any party in interest adversely affected by the failure to give notice order that compensation for delay in payment be awarded to such party for the period after deposit in court by the condemnor under this section until such time as such party in interest shall have received a distribution of funds under this section.

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. (As last amended 1971, December 29, P.L. 635, Act No. 169.)

1964 Comment: The first paragraph follows substantially existing law. See, e.g., Act of 1891, June 2, P.L. 172, §1 [repealed by the Eminent Domain Code, Section 902(5), *infra*]; 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 [third] 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 [since repealed].

1971 Comment: The second paragraph of this section requires that notice be given of the condemnor's intention to pay funds into court, and provides a sanction where reasonably effective notice is not given.

Note: The five-year period and other provisions set forth in the third paragraph would appear to be modified by Sections 10 and 29(b) of the Disposition of Abandoned and Unclaimed Property Act, 1971, August 9, P.L. 286, Act No. 74.

Section 523. (Repealed by Section 509(a)(169) of the Appellate Court Jurisdiction Act of 1970, added 1971, June 3, P.L. 118, Act No. 6, §1.)

Note: Appellate jurisdiction formerly set forth in Section 523 is now covered by Sections 402(6) and 204(a) of the Appellate Court Jurisdiction Act of 1970, July 31, P.L. 673, Act No. 223 (17 P.S. §§402(6), 204(a)) which transferred appeals to the Commonwealth Court with a further appeal to the Supreme Court upon the allowance of two justices.

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.

1964 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.

Note: See *Weigand Appeal*, 214 Pa. Superior Ct. 371 (1969), which holds that this section does not operate to revive a claim barred prior to the adoption of the 1964 Code. See also *Upper Montgomery Joint Authority v. Yerk*, 1 Commonwealth Ct. 269 (1971), which holds that a claim not barred by the statute of limitations in effect prior to the effective date of the 1964 Code becomes subject to the new limitation, which runs from the date of payment.

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.

1964 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.

Note: The 1964 legislative grant of authority to "promptly promulgate" procedural rules to replace the provisions of Article V of the Code has been supplanted by the constitutional authority contained in the 1968 revision, Article V, §10(c), which, in part, provides:

> The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

Neither the constitutional authority to promulgate rules for eminent domain procedures which took effect January 1, 1969, nor the 1964 legislative authority have to date been implemented.

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.

1964 Comment: This section is derived from the Pennsylvania Constitution, Article I, §10, and [Article X, §4] 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 code.

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.

In case of the condemnation of property in connection with any flood control project or highway project which property is damaged by floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation; provided such damage has occurred within three years of the date of taking and during the ownership of the property by the condemnee. The damage resulting from floods to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement. (As last amended 1972, September 1, First Sp. Sess., Act No. 3.)

1964 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.

1971 Comment: The reference to "article" in the first paragraph of the section was changed to "code" because damages are now provided for in both Articles VI and VI-A. The traditional damages determined by the difference between the before value and after value are denoted "general damages" in Sections 511(5) and 518(b). The term "other damages" of course means the special damages referred to in the same paragraphs.

Note: Sections 608, 609, 610 and 614 referred to in the 1964 Comment were repealed by the Act of 1971, December 29, P.L. 635, Act No. 169. The damages formerly provided by those sections are now covered in Sections 608 and 601-A. The present Section 608 covers the subject matter of former Section 614.

The 1972 amendment included highway projects within the provisions of the third paragraph relating to property damaged by floods. The amendment is specifically applicable to "all highway projects damaged by the storm and flood of June, 1972, whether or not property acquisition had commenced prior to June, 1972."

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.

1964 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.).

Note: With regard to clause (3) of this section, for further discussion of "machinery, equipment and fixtures" under the Assembled Economic Unit Doctrine, see *Singer v. Redevelopment Authority of Oil City*, 437 Pa. 55 (1970).

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.

1964 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 conditions, the property which is to be condemned is economically deteriorated through no fault of the owner-condemnee, and as a consequence, at the time of actual condemnation, the amount of damages may be affected to the detriment of the innocent condemnee because of lack of tenants or because the condemnee was forced to rent at lower rentals for short terms. This section permits the condemnee to show these economic circumstances in order to prove what his damages actually are at the date of taking. On the other hand, in many cases an announcement of the proposed condemnation causes an inflation of property values and as a result the condemnor may have to pay more for the condemned property. The condemnor may show this increase in the value of the condemned property. Any decline or increase in the fair market value caused by the general knowledge of the imminence of the condemnation is to be disregarded.

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

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

1964 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.

1964 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.

1964 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.

Note: This section and the Comment must be read in light of *Singer v. Redevelopment Authority of Oil City*, 437 Pa. 55 (1970), which appears to restrict the option of the condemnee to remove the machinery, equipment and fixtures.

Sections 608, 609 and 610. (As originally enacted, repealed 1971, December 29, P.L. 635, Act No. 169.)

Note: The substance of former Sections 608, 609 and 610 is incorporated in Section 601-A, *infra*, and the 1964 Comments pertinent thereto are appended to that section.

Section 608. Expenses Incidental to Transfer of Title.—Any acquiring agency shall, on the date of payment of the purchase price of amicably acquired real property or of payment or tender of estimated just compensation in a condemnation proceeding to acquire real property, whichever is the earlier, or as soon thereafter as is practicable, reimburse the owner for expenses he necessarily incurred for:

(1) Recording fees, transfer taxes and similar expenses incidental to conveying such real property to the acquiring agency;

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

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring agency, or the effective date of possession of such real property by the acquiring agency, whichever is the earlier; and

(4) The pro rata portion of water and sewer charges paid to a taxing entity or a municipal authority allocable to a period subsequent to the effective date of possession of such real property by the acquiring agency. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Clauses (1) and (2) are virtually identical to the provisions of the first sentence of former Section 616.

Clause (3) is taken from former Section 614 except that the acquiring agency's liability for real property taxes now begins at the earlier of the two given dates, in accordance with the Federal relocation act, 42 U.S.C. 4653(3).

Clause (4) is also based on former Section 614 except that the acquiring agency's liability for water and sewer charges now begins when it obtains possession.

This section also supersedes the similar benefits contained in Section 304.4 of the State Highway Law, added 1968, December 12, P.L. 1212, Act No. 381. Section 304.4 was repealed in 1971, see Section 902(23), *infra.*

Note: As indicated in the above Comment, the substance of clauses (3) and (4) of the section was contained in former Section 614. The 1964 Comment to former Section 614 stated:

> 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.

Section 609. Condemnee's Costs Where No Declaration of Taking Filed.—Where proceedings are instituted by a condemnee under section 502(e), a judgment awarding compensation to the condemnee for the taking of property shall include reimbursement of reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: This is one of the three sections under which the condemnee is entitled to recover full reimbursement of reasonable appraisal, attorney and engineering fees, as required by Section 304 of the Federal relocation act, 42 U.S.C. 4654. The other two sections are Section 406(e) where a declaration of taking is voided by a court upon preliminary objections of a condemnee and Section 408 where a condemnation is revoked by a condemnor. The instant section is applicable only where a condemnor is found by the court to have taken property without the filing of a declaration of taking; it does not apply to consequential damage claims under Section 612 or to damages for vacation of roads under Section 613, since there is no "taking" in such cases.

Section 610. Limited Reimbursement of Appraisal, Attorney and Engineering Fees.—The owner of any right, title, or interest in real property acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees under sections 406(e), 408 or 609 of this act, shall be reimbursed in an amount not to exceed five hundred dollars ($500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: It is believed that this contribution toward appraisal, attorney and engineering fees will, in many cases, materially assist the owner of a property interest acquired or injured in making an informed judgment regarding the acquiring agency's offer. The reimbursement provided in this section is not intended to establish a limit on the condemnee's expenditures

for such services and is in addition to any costs taxable under Sections 509 and 519 for reasonable expenses of preparing viewers' plans where the condemnor fails to provide satisfactory ones. Cf. *Kling Appeal*, 433 Pa. 118 (1969), which holds that appraisal and attorney fees are not taxable as costs under Section 519.

Section 610.1. Payment on Account of Increased Mortgage Costs.—Whenever the acquisition of property by an acquiring agency results in the termination of an installment purchase contract, mortgage or other evidence of debt on the acquired property, thereby requiring the legal or equitable owner to enter into another installment purchase contract, mortgage or other evidence of debt on the property purchased for the same use as the acquired property, a legal or equitable owner who does not qualify for a payment under section 602-A(a)(2) shall be compensated for any increased interest and other debt service costs, which he is required to pay for financing the acquisition of the replacement property. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount on the principal of the installment purchase contract, mortgage or other evidence of debt on the replacement property which is equal to the unpaid balance of the installment purchase contract, mortgage or other evidence of debt on the acquired property over the remaining term of the installment purchase contract, mortgage or other evidence of debt on the acquired property reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement property is located. Such amount shall be paid only if the acquired property was subject to an installment purchase contract or encumbered by a bona fide mortgage or other evidence of debt secured by the property which was a valid lien on such property for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of such property. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: This section is based on former Section 617 and differs principally in that the payment is based on the remaining term of the existing mortgage rather than on the entire term of the new mortgage.

Note that owners displaced from dwellings recover damages for increased mortgage costs under Section 602-A(a)(2) rather than under this section.

Under Section 602-A(a)(2), damages for increased mortgage costs are included within the limit of $15,000 for all Section 602-A damages.

Other changes are the inclusion of installment purchase contracts as well as conventional mortgages, removal of the 6% limit on debt interest and imposition of the requirement that the security instrument be at least 180 days old prior to the initiation of negotiations for the acquisition of the encumbered real estate.

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.

1964 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.

1964 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 X, §4]. 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.

1964 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 reenacted and amended [since repealed]; 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*.

ARTICLE VI-A

SPECIAL DAMAGES FOR DISPLACEMENT

Section 601-A. Moving and Related Expenses of Displaced Persons.—(a) Any displaced person shall be reimbursed for reasonable expenses incurred in moving himself and his family and for the removal, transportation, and reinstallation of personal property.

(1) Receipts therefor shall be prima facie evidence of incurred reasonable moving expenses.

(2) Any displaced person who is displaced from a dwelling may elect to receive, in lieu of reimbursement of incurred moving expenses, a

moving expense allowance, determined according to a schedule established by the acquiring agency, not to exceed three hundred dollars ($300), and a dislocation allowance of two hundred dollars ($200).

(b) Any displaced person who is displaced from his place of business or from his farm operation shall be entitled, in addition to any payment received under subsection (a) of this section, to damages for dislocation of such business or farm operation as follows:

(1) Actual direct losses with reference to personal property, but not to exceed the greater of (i) the reasonable expenses which would have been required to relocate such personal property, or (ii) the value in place of such personal property as cannot be moved without substantially destroying or diminishing its value, whether because of the unavailability of a comparable site for relocation or otherwise, or without substantially destroying or diminishing its utility in the relocated business or farm operation.

(2) In lieu of the damages provided in clause (1) hereof, at the option of the displaced person, an amount not to exceed ten thousand dollars ($10,000) to be determined by taking fifty per cent of the difference if any, between the original cost of the personal property to the displaced person or the replacement cost of equivalent property at the time of sale, whichever is lower, and the net proceeds obtained by the displaced person at a commercially reasonable private or public sale. If this option is selected, the displaced person shall give the acquiring agency not less than sixty days notice in writing of his intention to seek damages under this option. The displaced person shall not, directly or indirectly, purchase any of the personal property at private sale. Inventory shall be paid for under this option only if the business is not relocated.

(3) In addition to damages under clauses (1) or (2) of this subsection, damages of not more than ten thousand dollars ($10,000) nor less than twenty-five hundred dollars ($2,500), in an amount equal to either (i) forty times the actual monthly rental, in the case of a tenant, or forty times the fair monthly rental value, in the case of owner-occupancy; or (ii) the average annual net earnings, whichever is greater. For the purposes of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation before Federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period. The regula-

tions promulgated under section 604-A may designate another period determined to be more equitable for establishing average annual net earnings, provided the designation of such period does not produce a lesser payment than would use of the last two taxable years. In the case of a business, payment shall be made under this subsection only if the business (i) cannot be relocated without a substantial loss of its existing patronage, and (ii) is not a part of a commercial enterprise having at least one other establishment not being acquired by the acquiring agency, which is engaged in the same or similar business.

(4) In addition to damages under clauses (1) or (2) and (3) of this subsection, actual reasonable expenses incurred in searching for a replacement business or farm. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Subsection (a) contains substantially the same provisions as former Sections 608 and 610 of the Code and Section 304.2(a) and (b) of the State Highway Law, added in 1968 and since repealed. The former requirement that moving costs may not exceed the value of the property moved has been deleted.

Note that the $200 dislocation allowance payable under clause (2) is available only to a displaced person who elects to have his moving costs determined according to the acquiring agency's fixed schedule.

Under subsection (b)(1) or alternatively (b)(2), additional damages are payable for personal property used in a business or farm operation which is not moved to a new location. Clause (1) is based on the Federal relocation act, 42 U.S.C. 4622(a)(2), but allows the greater of the two measures of damages rather than the lesser as in the Federal act. Clause (2) is entirely new and is not found in the Federal act. The notice required under clause (2) must be given at least 60 days in advance of the sale, which must be "commercially reasonable." See Section 9—504(3) of the Uniform Commercial Code, 12A P.S. §9—504(3). Inventory which is not compensable under clause (2), if the business is relocated, nonetheless qualifies for reimbursement of moving costs under subsection (a). The displaced person must choose damages for all unmoved personal property only under either clauses (1) or (2).

Clause (3) of subsection (b) is based on former Section 609. The maximum and minimum figures have been increased. An alternate formula has been added, which was derived from the Federal act and Section 304.2(c) of the State Highway Law, added in 1968 and since repealed.

Clause (4) is new and taken verbatim from the Federal act, 42 U.S.C. 4622(a)(3).

Note: As indicated in the above Comment, subsection (a) reflects provisions contained in former Sections 608 and 610. The 1964 Comments to those sections follow:

[Section 608] 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.

The second paragraph of the 1964 Comment must be read in light of the 1971 amendment which omitted the requirement that removal costs not exceed the value of the personalty involved.

[Section 610] 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 [601-A]. 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.

Clause (3) of subsection (b) of this section is based on former Section 609. The 1964 Comment to that section follows:

[Section 609] 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 602-A. Replacement Housing for Homeowners.—(a) In addition to payments otherwise authorized, the acquiring agency shall make an additional payment not in excess of fifteen thousand dollars ($15,000) to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the property or the receipt of written notice from the

acquiring agency of intent to acquire or order to vacate. Such additional payment shall include the following elements:

(1) The amount, if any, which, when added to the acquisition cost of the acquired dwelling, equals the reasonable cost of a comparable replacement dwelling which is a decent, safe, and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and his place of employment and available to such displaced person on the private market.

(2) The amount, if any, as hereinafter provided, which will compensate such displaced person for any increased interest and other debt service costs, which such person is required to pay for financing the acquisition of any such comparable replacement dwelling. Such amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount on the principal of the installment purchase contract, mortgage or other evidence of debt on the replacement dwelling which is equal to the unpaid balance of the installment purchase contract, mortgage or other evidence of debt on the acquired dwelling over the remaining term of the installment purchase contract, mortgage or other evidence of debt on the acquired dwelling reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located. Such amount shall be paid only if the acquired dwelling was subject to an installment purchase contract or encumbered by a bona fide installment purchase contract, mortgage or other evidence of debt secured by the dwelling which was a valid lien on such dwelling for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of such dwelling.

(3) Reasonable expenses incurred by such displaced person for evidence of title, recording and attorney fees, real property transfer taxes, and other closing and related costs incident to the purchase and financing of the replacement dwelling, but not including prepaid expenses.

(b) The additional payment authorized by this section shall be made only to such a displaced person who purchases and occupies a replacement dwelling, which is decent, safe, sanitary, and adequate to accommodate such displaced person, not later than the end of the one-year period beginning on the date on which he receives final payment of his full acquisition cost for the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is the later date. Regulations issued pursuant to section 604-A may prescribe situations when such one-year period may be extended.

(c) The person entitled under this section shall have the right to elect the benefits available under section 603-A in lieu of those provided by this section. (Added 1971, December 29, P.L. 635. Act No. 169.)

1971 Comment: Subsections (a) and (b) are based on the Federal relocation act, 42 U.S.C. 4623. The $15,000 limit for all damages under this section replaces the $5,000 limit contained in former Section 615(a) of the Code and Section 304.3(a) of the State Highway Law, added in 1968 and since repealed. The prior limitation to "single, two-or three-family dwellings" has been eliminated, and the prior requirement that a displaced person must have been an owner-occupant for a full year prior to condemnation has been reduced to 180 days prior to the initiation of negotiations for the acquired dwelling or receipt of written notice of intent to acquire or order to vacate.

Clause (1) of subsection (a) replaces former Section 615(a) of the Code and Section 304.3(a) of the State Highway Law. The formula for determining the payment remains the same as before. The comparable replacement dwellings must now be reasonably accessible to the displaced person's place of employment rather than to "places of employment" as in prior law.

Clause (2) replaces former Section 617 and is substantially identical thereto. As in Section 610.1, *supra*, the payment is based on the remaining term of the existing mortgage rather than on the full term of the new mortgage. The interest-rate limit has been removed, installment purchase contracts included, and a 180-day eligibility clause added.

Clause (3), derived from the second sentence of former Section 616, is limited to replacement dwellings. "Prepaid expenses" refers to monies deposited in escrow with the lending institution for payment of taxes, insurance, etc., as they become due in the future.

Subsection (b) changes the prior requirement of purchase and occupancy of the replacement dwelling within a year subsequent to the date on which the condemnee is required to move from the acquired dwelling to one year from the date on which he receives final payment of his full acquisition cost or from the date of the move, whichever is later.

Subsection (c), new and broader than the Federal act, makes available to long-term homeowners the same benefits available to tenants and short-term homeowners, namely, payment up to $4,000 toward rent or a down payment.

Section 603-A. Replacement Housing for Tenants and Others. —(a) In addition to amounts otherwise authorized, an acquiring agency shall make a payment to or for any displaced person displaced from a dwelling not eligible to receive a payment under section 602-A which dwelling was actually and lawfully occupied by such displaced person for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling or the receipt of written notice from the acquiring agency of intent to acquire or order to vacate. Such payment shall be either:

(1) The amount determined to be necessary to enable such displaced person to lease for a period not to exceed four years a decent, safe, and sanitary dwelling adequate to accommodate such person in areas not

generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to his place of employment. Such amount shall be the additional amount, if any, over the actual rental or fair rental value of the acquired dwelling as determined in accordance with regulations promulgated under section 604-A but not to exceed four thousand dollars ($4,000); or

(2) The amount necessary to enable such person to make a down payment, which shall mean the equity payment in excess of the maximum amount of conventional financing available to such displaced person, plus those expenses described in section 602-A(a)(3), on the purchase of a decent, safe, and sanitary dwelling adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities, but not to exceed four thousand dollars ($4,000), except that if such amount exceeds two thousand dollars ($2,000) such person must equally match such amount in excess of two thousand dollars ($2,000) in making the down payment.

(b) The additional payment authorized by this section shall be made only to such a displaced person who occupies a replacement dwelling which is decent, safe, sanitary, and adequate to accommodate such displaced person. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: This section replaces former Section 615(b) of the Code and Section 304.3(b) added by the 1968 amendment to the State Highway Law and, in accordance with the Federal relocation act, 42 U.S.C. 4624, substantially increases the amounts payable.

Subsection (a)(1) clarifies the rental-payment formula as the difference between the old and new rentals. As in Section 602-A(a)(1), the comparable replacement dwelling must now be reasonably accessible to the displaced person's place of employment rather than to "places of employment," as in prior law.

Section 604-A. Issuance of Regulations to Implement this Article.—The Attorney General shall promulgate such rules and regulations as may be necessary to assure:

(1) That the payments authorized by this article shall be made in a manner which is fair and reasonable, and as uniform as practicable;

(2) That a displaced person who makes proper application for a payment authorized for such person by this article shall be paid promptly after a move or, in hardship cases, be paid in advance;

(3) That any person aggrieved by a determination as to eligibility for a payment authorized by this article, or the amount of a payment,

may elect to have his application reviewed by the head of the acquiring agency or his designee;

(4) That each displaced person shall receive the maximum payments authorized by this article; and

(5) That each acquiring agency may obtain the maximum Federal reimbursement for relocation payment and assistance costs authorized by any Federal law. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: Because of the desirability of uniform interpretation and application of special damages for relocation by all acquiring agencies throughout the Commonwealth, the power to promulgate regulations is given to the Attorney General rather than to each acquiring agency.

The Attorney General is directed in subsection (5) to take into consideration the regulations of the various Federal funding agencies, such as the Federal Highway Administration (FHWA), Department of Housing and Urban Development (HUD), Urban Mass Transit Administration (UMTA), etc., so that the State regulations will be sufficiently flexible to allow each acquiring agency to operate freely within its particular Federal requirements and provide the maximum allowable benefits to displaced persons.

Note: The Attorney General's regulations, promulgated pursuant to the authorization of this section, took effect on July 15, 1972 (2 Pa. B. 1333–1337). The regulations may be found in the appendix hereto, page 72.

Section 605-A. Payments Not to be Considered as Income or Resources.—No payment received by a displaced person under this article shall be considered as income or resources for the purpose of determining the eligibility or extent of eligibility of any person for assistance under any State law, or for the purposes of the State or local personal income or wage tax laws, corporation tax laws, or other tax laws. No payments under this article except those provided for in section 601-A(b) shall be subject to attachment or execution at law or in equity. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: The rationale behind this section is substantially the same as that governing the amendment to Section 521, namely, that the monies payable under Article VI-A (except for Section 601-A(b)) are required for relocation of the displaced person and should not diminish the amount of any assistance being received by him or be taxable or subject to attachment or execution.

Section 606-A. Rights of Certain Displaced Persons Defined.—The provisions of this Article VI-A of this amending act shall apply to all persons who have become displaced persons on or after January 2, 1971 without regard to any final disposition heretofore made of any claim for special damages for displacement: Provided, however, That anyone

displaced on or after January 2, 1971 and prior to the effective date of this Article VI-A and this amending act, shall be entitled to the greater of any item of special damages for displacement as provided in this Article VI-A or as provided in any prior law. (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: The provisions of Article VI-A were made effective January 2, 1971—the effective date of the Federal relocation act—to make persons displaced on or after that date eligible for any increased benefits, even if such displaced persons had been previously paid and had released their claims under the prior law.

In addition, any greater benefits accruing under the 1968 amendment to the State Highway Law or the former provisions of the Code are preserved to persons displaced prior to December 29, 1971, the effective date of these amendments.

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.

1964 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 condemnees 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.

1964 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.

Note: See *Harris v. Pittsburgh Urban Redevelopment Authority*, 212 Pa. Superior Ct. 232 (1968), which holds that the viewers should require the intro-

duction by the condemnor of expert testimony of the amount of damages suffered by the condemnee, or a stipulation by the condemnor that no such evidence is to be offered; this stipulation is then binding at all subsequent stages of the proceeding.

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.

1964 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 [repealed by the Code, Section 902(6), *infra*] 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 commencement of the trial. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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.

1964 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, without compliance with the provisions of section 703(2). (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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.

1964 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:

1964 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.

1964 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. *Berkeley 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.

1964 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.

1964 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.

1964 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.

1964 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.

1964 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.

1964 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 [repealed by the Code, Section 902(14), *infra*]; 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.

1964 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.

1964 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.

1964 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 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 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 limit. (As amended 1969, December 5, P.L. 316, Act No. 137.)

1964 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.

Note: The original maximum of nine viewers was deleted by the 1969 amendment.

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.

1964 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).

Note: The first sentence of this section must be read in light of the 1968 constitutional unification of the courts of common pleas of Philadelphia. See Pennsylvania Constitution, Art. V, §5.

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.

1964 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.

1964 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.

1964 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.

1964 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.

1964 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.

Note: The 1969 amendment to Section 519 which included the cost of "transcripts of the stenographic notes of the trial in court on appeal" as a "taxable cost," payable by the condemnor, does *not* affect this section.

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.

1964 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.

Note: The reference to "court of quarter sessions" must be read in light of the abolition of that court by the 1968 revision of the Pennsylvania Constitution; Pa. Const., Art. V, §1, Sch. §4.

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."

(23) Sections 304.1 through 304.7, act of June 1, 1945 (P.L. 1242), known as the "State Highway Law." (Added 1971, December 29, P.L. 635, Act No. 169.)

1971 Comment: The repealed provisions of the State Highway Law have been incorporated into the Eminent Domain Code by the 1971 amendments. Anyone displaced prior to January 2, 1971, but on or after August 23, 1968, is entitled to the benefit of the repealed provisions of the State Highway Law (or the prior provisions of the Code) if a greater amount of damages would be payable thereunder.

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

Appendixes—Related Pennsylvania Laws and Regulations

Appendix A

No. 170

AN ACT

To allow for the provision of relocation assistance and the payment of relocation benefits under federally assisted programs to persons who would not qualify for such payments under the Eminent Domain Code of the Commonwealth of Pennsylvania.

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

Section 1. A person who moves or discontinues his business or moves other personal property, or moves from his dwelling on or after January 2, 1971, as the direct result of code enforcement activities, or a program of voluntary rehabilitation of buildings, or other improvements conducted pursuant to a federally assisted governmental program for which Federal law and regulations provide relocation assistance and payments, shall be entitled to such payments. Payments shall be made in accordance with Federal law and regulation even though a person does not qualify for similar payments provided under the Eminent Domain Code of the Commonwealth of Pennsylvania.

Section 2. This act shall take effect immediately and shall apply to all persons who have become displaced persons on or after January 2, 1971.

APPROVED—The 29th day of December, A. D. 1971.

MILTON J. SHAPP

Appendix B

No. 304

AN ACT

Authorizing entities vested with the power of eminent domain to acquire replacement housing and to exercise their power of eminent domain

therefor and to encourage and facilitate construction or rehabilitation of replacement housing by making loans and grants for planning and obtaining mortgage financing.

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

Section 1. Short Title.—This act shall be known as the "Housing Replacement Authorization Act."

Section 2. Definitions.—As used in this act:

(1) "Acquiring agency" means any entity vested with the power of eminent domain by the laws of the Commonwealth, including the Commonwealth.

(2) "Displaced person" means any condemnee or other person not illegally in occupancy of real property who moves or moves his personal property as a result of the acquisition for a program or project of such real property, in whole or in part, or as the result of written notice from the acquiring agency of intent to acquire or order to vacate such real property.

(3) "Program or project" means any program or project undertaken by or for an acquiring agency as to which it has the authority to exercise the power of eminent domain.

Section 3. Housing Replacements by Acquiring Agency as Last Resort.—(a) If comparable replacement sale or rental housing is not available in the neighborhood or community in which a program or project is located and such housing cannot otherwise be made available, as so certified by the county commissioners or, in cities of the first class, by the city council, the acquiring agency may purchase, construct, reconstruct or otherwise provide replacement housing by use of funds authorized for such program or project and for such purpose may exercise its power of eminent domain to acquire property in fee simple or such lesser estate as it shall deem advisable.

(b) Replacement housing provided under this act may be sold, leased, or otherwise disposed of by the acquiring agency for or without consideration, to displaced persons or to nonprofit, limited dividend or cooperative organizations or public bodies, on such terms and conditions as the acquiring agency shall deem necessary and proper to effect the relocation of persons displaced by a program or project.

(c) The acquiring agency may contract with other public agencies, private individuals, partnerships, corporations and unincorporated asso-

ciations for the financing, planning, acquisition, development, construction, management, sale, lease or other disposition of replacement housing provided under this act.

Section 4. Planning and Other Preliminary Expenses for Replacement Housing.—In order to encourage and facilitate the construction or rehabilitation of housing to meet the needs of displaced persons, any governmental acquiring agency is authorized to make loans and grants to nonprofit, limited dividend or cooperative organizations or public bodies for necessary and reasonable expenses, prior to construction, for planning and obtaining mortgage financing for the rehabilitation or construction of housing for such displaced persons. Such loans and grants shall be made prior to the availability of financing, for such items as preliminary surveys and analyses of market needs, preliminary site engineering, preliminary architectural fees, legal, appraisal and organizational fees, site acquisition, application and mortgage commitment fees, construction loan fees and discounts, and similar items. Loans to an organization established for profit shall bear interest at market rate determined by the acquiring agency. All other loans and grants shall be without interest. The acquiring agency shall require repayment of loans and grants made under this section, under such terms and conditions as it may require, upon completion of the project or sooner; however, except in the case of a loan to an organization established for profit, the acquiring agency may cancel any part or all of a loan and may cancel the repayment provisions of a grant if it determines that a permanent loan to finance the rehabilitation or the construction of such housing cannot be obtained in an amount adequate for repayment of such loan.

Section 5. Availability of Funds.—Funds, including motor license funds and other special funds, appropriated or otherwise available to any acquiring agency for a program or project, which results in the displacement of any person on or after January 2, 1971, shall be available also for obligation and expenditure to carry out the provisions of this act.

Section 6. Effective Date.—This act shall take effect immediately.

APPROVED—The 6th day of December, A. D. 1972

MILTON J. SHAPP

Appendix C

Attorney General's Regulations on Uniform Relocation Assistance

(Promulgated to implement Article VI-A of the Eminent Domain Code, as amended. Effective July 15, 1972.)

Title 37—LAW

DEPARTMENT OF JUSTICE

Uniform Relocation Assistance

The Attorney General of the Commonwealth of Pennsylvania by this order adopts Regulations on Uniform Relocation Assistance.

Notice of proposed rule making was published in the *Pennsylvania Bulletin*, 2 Pa. B. 773, on Saturday, April 29, 1972 with a request for written comments within 30 days of publication. Comments and suggestions have been received in response thereto and changes and modifications have been made to the originally proposed regulations as indicated. . . .

CHAPTER 100

§101. Purpose and Scope of Regulations.

§101.1. These Regulations are promulgated for the purpose of insuring that

(a) Payment of Special Damages for Displacement authorized by Article VI-A of the Eminent Domain Code shall be made in a manner which is fair and reasonable, and as uniform as practicable;

(b) A displaced person who makes proper application for a payment authorized for such person by Code Article VI-A shall be paid promptly after a move or, in hardship cases, be paid in advance;

(c) Any person aggrieved by a determination as to eligibility for a payment authorized by Code Article VI-A, or the amount of a payment, may elect to have his application reviewed by the head of the acquiring agency or his designee;

(d) Each displaced person shall receive the maximum payments authorized by Code Article VI-A, and

(e) Each acquiring agency may obtain the maximum Federal reimbursement for relocation payment and assistance costs authorized by any Federal law.

(§604-A, Act 169 of 1971)

§101.2. Except as provided in §108.1(a) and (b), damages for dislocation are recoverable only under Code Article VI-A and these Regulations, which, together, are intended to implement the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646. Damages are not recoverable under the Federal Uniform Relocation Act.

§101.3. References to Federal Regulations and the Eminent Domain Code are indicative of the sources of particular portions of these Regulations. While such references may aid in explaining the intention and purpose of these Regulations, they are not intended to incorporate such Federal Regulations herein, nor to change the clear meaning of these Regulations.

§102. Definitions (Code §201).

§102.1. "*Acquired dwelling*" means a dwelling which has been acquired for a program or project by an acquiring agency.

§102.2. "*Acquiring agency*" means any entity vested with the power of eminent domain by the laws of the Commonwealth.

§102.3. "*Acquisition cost*" means general damages, or in the event of amicable acquisition, the price paid by the acquiring agency in lieu thereof.

§102.4. "*Business*" means any lawful activity, excepting a farm operation, conducted primarily:

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

(ii) for the sale of services to the public;

(iii) by a nonprofit organization; or

(iv) solely for the purpose of qualification for damages under subsections (a) and (b)(1) and (b)(4) of Code §601-A, for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays whether or not such displays are located on the premises on which any of the above activities are conducted.

§102.5. "*Comparable Replacement Dwelling*" means a dwelling which is:

(a) Decent, safe and sanitary;

(b) Functionally equivalent and substantially the same as the acquired dwelling with respect to number of rooms, area of living space, age and state of repair;

(c) Adequate in size to accommodate the family or individual;

(d) Located in a neighborhood or area not generally less desirable than that in which the acquired dwelling was located;

(e) Reasonably accessible to public services and the displaced person's place of employment;

(f) Available on the private market;

(g) Open to all persons regardless of race, color, religion, or national origin in a manner consistent with Title VIII of the Federal Civil Rights Act of 1968 and the Pennsylvania Human Relations Act and regulations promulgated thereunder; and

(h) Within the financial means of the displaced person.

(FHWA IM 80-1-71, Para. 4g; HUD Reg. 1371.1, Chap. 1, Appendix 2, Para. 2)

§102.6. "*Displaced person*" means any condemnee or other person not illegally in occupancy of real property who moves his personal property as a result of the acquisition for a program or project of such real property, whole or in part, or as the result of written notice from the acquiring agency of intent to acquire or order to vacate such real property; and solely for the purpose of subsections (a) and (b)(1) and (b)(4) of Code §601-A, as a result of such acquisition or written notice of intent to acquire or order to vacate other real property on which such person conducts a business or farm operation. For the purpose of computing payments under Code Article VI-A and these Regulations, all members of a family shall be collectively regarded as a single displaced person.

§102.7. "*Dwelling*" means a single-family building, a single-family unit in a multifamily building, a unit of a condominium or cooperative housing project, a mobile home or other residential unit.

(FHWA IM 80-1-71, Para. 4f; HUD Reg. 1371.1, Chap. 1, Appendix 2, Para. 4)

§102.8. "*Existing patronage*," except in the case of a non-profit organization, means the average annual dollar volume of business transacted during the two taxable years immediately preceding the taxable year in which the business is dislocated, or, where applicable, the period provided for in §103.6.

(FHWA IM 80-1-71, Para. 4g)

§102.9. "*Family*" means two or more displaced persons, one of whom is the head of a household, plus all other individuals regardless of blood or legal ties who live with and are considered a part of the family unit. Where two or more individuals occupy the same dwelling with no identifiable head of a household, they shall be treated as one family for replacement housing payment purposes.

(FHWA IM 80-1-71, Para. 46; HUD Reg. 1371.1, Chap. 1, Appendix 2, Para. 6 and Chap. 6, §4, Para. 54)

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

§102.11. "*Personal property*" means any tangible property not considered to be real property for purposes of general damages under the laws of the Commonwealth.

§102.12. "*Program or project*" means any program or project undertaken by or for an acquiring agency as to which it has the authority to exercise the power of eminent domain.

§102.13. "*Reasonable Cost of a Comparable Replacement Dwelling*" means the actual amount paid by a displaced person for a decent, safe and sanitary replacement dwelling or the amount determined to be necessary for the purchase of a comparable replacement dwelling, whichever is the lesser.
(FHWA IM 80-1-71, Para. 24b(1); HUD Reg. 1371.1, Chap. 6, §3, Para. 34c(2))

§102.14. "*Replacement Dwelling*" means a dwelling purchased or rented and occupied by a displaced person as a result of the acquisition for a program or project of an acquired dwelling occupied by the displaced person, or as the result of written notice from the acquiring agency of intent to acquire or order to vacate such acquired dwelling.
(Code §201(8))

§103. Moving and Related Expenses (Code §601-A)

§103.1. Any acquiring agency may adopt the moving expense allowance schedule of the Pennsylvania Department of Transportation for the purposes of Code subsection (a)(2).

§103.2. Damages payable under Code subsection (a) are attributable to personal property which a displaced person moves from the acquired premises.

(a) The distance of a move of 50 miles or less shall be presumed to be reasonable.

(b) A displaced person shall have the burden of proving the reasonableness of a move of more than 50 miles.
(FHWA IM 80-1-71, Para. 17b; HUD Reg. 1371.1, Chap. 6, §1, Para. 8a)

§103.3. Damages payable under code subsection (b)(1) and (b)(2) are attributable to personal property which a displaced person does not move from a business or farm which is acquired or dislocated.

(a) A displaced person may claim damages for some items of such personal property based on the cost which would have been incurred if the property had been moved ((b)(1)(i)) and damages for other items based on their value in place ((b)(1)(ii)), but only if the latter items cannot be moved without substantially destroying or diminishing their value, whether because of the unavailability of a comparable site for relocation or otherwise, or without substantially destroying or diminishing their utility in the relocated business or farm operation.

(b) If the displaced person chooses to forego all damages under Code subsection (b)(1), he may claim damages for the unmoved personal property under Code subsection (b)(2), determined as follows:

(1) The displaced person has the responsibility of selling the personal property at a "commercially reasonable," public or private sale, which sale may not be held until after 60 days notice to the acquiring agency.

(2) The original cost of each item of personal property is compared with the cost of replacing it with equivalent property in the marketplace to determine which is the lower figure.

(3) The net sale proceeds are subtracted from the sum of the lower figures determined in step (2).

(4) The total damages payable under this subsection is the lesser of

(i) one-half of the result obtained in step (3) or (ii) $10,000.

(c) Personal property for which damages are paid under Code subsection (b)(1) becomes the property of the acquiring agency and may be disposed of by the acquiring agency by sale or otherwise.

§103.4. Damages under Code subsection (b)(3) are payable to a displaced person whose business cannot be relocated without a substantial loss of existing patronage, based on a consideration of all pertinent circumstances including such factors as the type of business conducted, the nature of the clientele, and the relative importance to the displaced business of its present and proposed location.

(a) To be eligible for payment under this subsection, the business must contribute materially to the income of the displaced owner.

(b) Separate legal entities will not each be entitled to a payment under this subsection, if they actually constitute only one business. In determining whether two or more legal entities constitute a business, the following factors, among others, shall be taken into consideration:

(1) The extent to which the same premises and equipment are shared.

(2) The extent to which substantially identical or intimately interrelated business functions are pursued and business and financial affairs are commingled.

(3) The extent to which the entities are held out to the public, and to those customarily dealing with such entities, as one business.

(4) The extent to which the same person or closely related persons own, control, or manage the affairs of the entities.

(c) In the case of a non-profit organization, the term "existing patronage" includes the membership, persons, community and/or clientele served or affected by the activities of the non-profit organization.

(d) In the case of a business conducted primarily for the lease or rental of real property, payment under Code subsection (b)(3) shall be limited to the average annual net earnings (subparagraph (ii)).

(e) To be eligible for payment under this subsection, a displaced person shall make available to the acquiring agency copies of applicable Federal, State and local tax returns, and shall allow the acquiring agency to examine all applicable books and records.

(HUD Reg. 1371.1., Chap. 6, §5, Para. 88c, e, f and h)

§103.5. A displaced farm operation is eligible for damages under Subsection (b)(3) of §601-A if

(a) the farm operator has discontinued (or relocated) his entire farm operation at the acquired property, and

(b) in the case of a partial taking, the property remaining after the acquisition is no longer capable of supporting a farm operation having substantially the same economic production.

(FHWA IM 80-1-71, Para. 20b(i); (HUD Reg. 1371.1, Chap. 6, §5, Para. 88d)

§103.6. In determining whether damages are payable under Code subsection (b)(3) and the amount of such damages, a period other than the two years immediately preceding the taxable year in which a business or farm operation moves from the acquired property may be used to determine the existing patronage and average annual net earnings of the business or farm operation in the following circumstances:

(a) If a business or farm has not been in continuous operation at the acquired property for two full years immediately preceding the taxable year in which such business or farm operation moves therefrom, but has been in continuous operation there for at least one year, the existing patronage and average annual net earnings may be determined by dividing the existing patronage and net earnings for such lesser period by the number of months in such period and multiplying the quotient by 12.

(FHWA IM 80-1-71, Para. 19e(3); (HUD Reg. 1371.1, Chap. 6, §5, Para. 88f (2))

(b) If, due to the general knowledge of the imminence of condemnation, the existing patronage and average annual net earnings of the business or farm operation were substantially lower than normal during the two years immediately preceding the taxable year in which such business or farm operation moves from the acquired property, the existing patronage and average annual net earnings shall be based on the two years immediately preceding the taxable year in which knowledge of the imminence of condemnation became general. If the business or farm was not in operation at the acquired property for two full years preceding such latter taxable year, but was in continuous operation there for at least one year, the existing patronage and average annual net earnings shall be determined by dividing the earnings for such lesser period by the number of months in such period and multiplying the quotient by 12. (Cf. Code §604)

§103.7.

(a) In proving damages for reasonable expenses incurred in searching for a replacement business or farm under Code subsection (b)(4), a displaced person shall have the burden of proving the reasonableness of expenses in excess of $500. and of expenses incurred in searching more than 50 miles from the acquired property.

(1) The owner of a displaced advertising sign shall have the burden of proving the reasonableness of expenses in excess of $100. incurred in searching for a single replacement site, and in excess of $500. incurred in searching for replacement sites for all signs displaced by a single project.

(b) Eligible expenses under Code subsection (b)(4) include transportation expenses, meals, lodging away from home and the reasonable value of time actually spent in search, including the fees of real estate agents or real estate brokers.

(1) All expenses claimed except the value of time actually spent in search must be supported by receipted bills. Payment for time actually spent in search shall be based on the applicable hourly wage rate for the person(s) conducting the search, but may not exceed $10. per hour.

(FHWA IM 80-1-71, Para. 19d and 22d; HUD Reg. 1371.1, Chap. 6, §5, Para. 86 and 89e)

§104. Replacement Housing for Homeowners (Code §602-A)

§104.1. If a displaced person purchases and occupies a decent, safe and sanitary dwelling at a price less than the reasonable cost of a comparable replacement dwelling, the amount of damages payable under Code subsection (a) (1) shall be determined by using such actual cost rather than the reasonable cost of a comparable replacement dwelling. Reasonable costs of rehabilitating a replacement dwelling in order to make it decent, safe and sanitary and comparable to the acquired dwelling with respect to size and state of repair shall be included in calculating such actual cost.

(FHWA IM 80-1-71, Para. 24b(i); HUD Reg. 1371.1, Chap. 6, §3, Para. 34c(2))

§104.2. The amount necessary for the purchase of a comparable replacement dwelling may be determined (i) by analyzing probable selling prices of comparable dwellings available on the market, (ii) by reference to a schedule prepared on the basis of such an analysis, or (iii) in some other meaningful manner.

§104.3. If a displaced person purchases or retains a dwelling and moves it to another location, the displaced person shall be entitled to a payment under Code subsection (a)(1) in the amount by which the acquisition cost of his acquired dwelling, including its site, is exceeded by the sum of:

(a) the purchase price paid for the replacement dwelling;

(b) the reasonable cost of acquiring a comparable replacement site, or, if the dwelling is moved onto other land owned by the displaced person, the fair market value of a comparable replacement site on such land. If the dwelling

is moved onto the unacquired portion of property acquired in part for a program or project, the fair market value of the comparable replacement site shall be based on the after-value of such unacquired property:

(c) the reasonable cost of construction of a new foundation;

(d) the reasonable cost of moving the dwelling;

(e) the reasonable cost of connecting utilities;

(f) the reasonable cost of such improvements as are necessary to make the dwelling decent, safe and sanitary, and

(g) the reasonable cost of restoring the dwelling to a condition comparable to its condition before the move; provided, however, that the total payment shall not exceed the reasonable cost of a comparable replacement dwelling.

§104.4. If the acquired dwelling unit occupied by a displaced person is part of a structure owned by such person which also included space used for non-residential purposes (mixed-use property), the amount of damages payable under Code subsection (a)(1) shall be determined by using as the acquisition payment of the dwelling unit only that part of the total payment which relates to the value of the residential-use portion of the structure. Likewise, if the replacement dwelling unit is part of a structure which includes space used for non-residential purposes, the amount of damages payable under Code subsection (a)(1) shall be determined by using as the cost of the replacement dwelling only that part of the total cost which relates to the value of the residential-use portion of the replacement structure.
(HUD Reg. 1371.1, Chap. 6 §3, Para. 34c(1))

§104.5. If the acquired dwelling unit occupied by a displaced person is located on a parcel of land owned by such person which is substantially larger than a normal home site, the amount of damages payable under Code subsection (a)(1) shall be determined by using as the acquisition payment of the dwelling unit only that part of the total payment which relates to the value of the residential-use portion of the parcel. Likewise, if the replacement dwelling unit is located on a parcel of land which is substantially larger than a normal home site, the amount of damages payable under Code subsection (a)(1) shall be determined by using as the cost of the replacement dwelling only that part of the total cost which relates to the value of the residential-use portion of the replacement parcel.

§105. Replacement Rental Housing (Code §603-A, subsection (a)(1)).

§105.1. Damages payable under Code subsection (a)(1) are determined by subtracting from the amount necessary to rent a comparable decent, safe and sanitary dwelling for the next four years the following amount:

(a) 48 times the average monthly rental paid by the relocated individual or family during the last three months; or

(b) if such average monthly rental is not reasonably equal to market rentals for similar dwellings, or if the displaced person or family owned the acquired dwelling, 48 times the economic rent; or

(c) if the average monthly rental being paid by a displaced person or family, not including rent supplements paid by public agencies, exceeds 25 percent of the monthly gross income of such person or family, 12 times the average monthly gross income of such person or family.

§105.2. Replacement rental housing payments in excess of $500. will be made in four equal annual installments.
(FHWA IM 80-1-71, Paras. 26-28 and 30; HUD Reg. 1371.1, Chap. 6, §4, Paras. 55 and 56)

§106. Replacement Housing Down Payment (Code §603-A, subsection (a)(2))

§106.1. If a displaced person who is not eligible for a payment under Code §602-A, or who elects the benefits

available under Code §603-A, purchases or retains a dwelling and moves it to another location, the displaced person shall be entitled to a payment under Code subsection (a)(1) in an amount not to exceed the sum of paragraphs (a) through (g) of §104.2; provided:

(a) the total payment shall not exceed $4,000;

(b) the displaced person must equally match the amount of such payment which exceeds $2,000; and

(c) the full amount of the payment must be applied to the expenditures enumerated in paragraphs (a) through (g) of §104.2.

(FHWA IM 80-1-71; Para. 26c)

§107. Time and Conditions of Payment.

§107.1. No payment of damages under Code §§602-A and 603-A shall be made unless the displaced person or family is occupying and, except in the case of damages under subsection (a)(1) of Code §603-A, has purchased decent, safe and sanitary replacement housing.

(a) Upon the request of the displaced person, and where necessary to expedite the purchase or rental of a replacement dwelling, the acquiring agency shall pay the agreed amount of damages (or, if there is no agreement as to the amount due, make a pro-tanto payment in the amount of its estimate of the damages) in advance of occupancy and/or purchase of the replacement dwelling; however, in such event, payment will be made jointly to the displaced person and a lending institution, title company, the seller or similar party in order to assure that the funds are available and used exclusively for settlement of the replacement dwelling.

(HUD Reg. 1371.1, Chap. 6, §3, Para. 39c(2))

§107.2. In order to assure equitable determination of damages payable under Code Article VI-A, final determination thereof shall not be made until the displaced person, family, business or farm operator has purchased or rented a replacement dwelling, business or farm. This paragraph shall not apply, however, where the business or farm operation is discontinued.

(Code §604-A, Subsections (1), (2) and (4))

§107.3. All claims for damages for displacement must be filed not later than the end of the 18-month period beginning on the date on which the displaced person receives final payment of the full acquisition cost for his acquired property, if any, or on the date on which he moves or moves his property from the acquired property, whichever is the later date; provided, however, that the acquiring agency may extend the time for filing for good cause.

(FHWA IM 80-1-71, Para. 23e(1); HUD Reg. 1371.1, Chap. 6, §1, Para. 4c)

§108. Eligibility for Special Damages for Displacement (Code §606-A)

§108.1. Eligibility for special damages for displacement under Code Article VI-A is limited to persons, families, businesses and farm operations displaced on or after January 2, 1971.

(a) Persons, families, businesses and farm operations displaced prior to January 2, 1971, are eligible for such special damages for displacement as were provided in Code §608 through §610 and §614 through §618 prior to the December 29, 1971, amendment or by §304.1 through §304.7 of the State Highway Law (36 P. S. §670-304.1-7).

(b) Persons, families, businesses or farm operations displaced on or after January 2, 1971, and no later than December 29, 1971, are eligible for the greater of any item of special damages for displacement now provided in the Code or previously provided in the Code or the State Highway Law.

(c) Eligibility for special damages for displacement as herein set forth shall be without regard to any final disposition heretofore made of any claim for such damages under prior Law.

§109. Contingent Attorney Fees.

§109.1. In order to assure that displaced persons actually receive the

maximum amount of special damages for dislocation payable under Code Article VI-A, the amount of such damages offered to a displaced person by an acquiring agency on its own initiative shall not be considered as damages paid to such displaced person for the purpose of determining the amount of a contingent attorney fee. This paragraph shall apply, not only to the original offer made by the acquiring agency to the displaced person, but to any subsequent increases in said offer initiated by the acquiring agency, whether made before or after the displaced person engaged the attorney's services; provided, however, that this paragraph shall not apply to any original or increased offer or payment obtained as a direct result of the attorney's services on behalf of the displaced person.

§110. Information and Advice Re Special Damages for Displacement.

§110.1. In order to assure that each displaced person receives the maximum payments to which he is entitled under Code Article VI-A, the acquiring agency shall:

(a) Provide each potential displaced person with an information statement outlining the payments to which he may be entitled under the Eminent Domain Code at the earliest possible date prior to displacement.

(b) Make available at a reasonably convenient place and at times which shall include hours other than normal working hours, a responsible person who can provide information and advice to displaced persons regarding the payments to which they may be entitled and

(c) Make available to all displaced persons assistance in filling out and filing the required claim forms for the payments to which they may be entitled.

§110.2. In addition to outlining available benefits, the information statement will contain the name, address, telephone number and hours of availability of the responsible person who can be contacted regarding the benefits, and will outline the grievance procedure for appeal of any disagreement regarding the benefits, established in accordance with section 111 of these regulations. (Code §604-A(1), (2) and (4))

§111. Grievance Procedure.

§111.1. Each acquiring agency shall establish a grievance procedure whereby the head of the acquiring agency or his designee shall hear the grievances of displaced persons regarding the acquiring agency's determination of their eligibility for or the amount of any item of special damages for displacement.

§111.2. Delegation of authority to hear appeals shall be in writing and shall be available for examination by the appellant. Such authority shall not be delegated below the level of the supervisor of the employee who made the initial determination.

§111.3. An aggrieved displaced person shall have the opportunity for a prompt hearing at a reasonably convenient time and place, or may appeal in writing, at his option.

§111.4. An aggrieved displaced person shall have the right to be represented by counsel and to present evidence, including evidence of comparable replacement dwellings, moving expenses and other matters bearing on Special Damage for Displacement.

§111.5. The appeal shall be disposed of promptly, and the results conveyed to the appellant in writing.
(Code §604-A(3))

[Pa. B. Doc. No. 72-1401. Filed July 14, 1972, 9:00 a.m.]

Source: *Pennsylvania Bulletin*, Vol. 2, No. 31, Harrisburg, Pa., pp. 1333–1337.

Official Advance Copy of Statute Enacted at 1975 Session

No. 103

AN ACT

SB 462

Amending the act of June 22, 1964 (Sp.Sess., P.L.84, No.6), entitled "An act to codify, amend, revise and consolidate the laws relating to eminent domain," providing for the appointment of an alternate viewer in cities of the first class.

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

Section 1. Sections 504 and 510, act of June 22, 1964 (Sp.Sess., P.L.84, No.6), known as the "Eminent Domain Code," amended December 5, 1969 (P.L.316, No.137), are amended to read:

Section 504. Appointment of Viewers; Notice; Objections.—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. ***In counties of the first class, the court may appoint an alternate viewer in addition to the three viewers specifically appointed.*** The prothonotary shall promptly notify the viewers of their appointment unless a local rule provides another method of notification.

The viewers shall promptly give written notice by registered or certified mail, return receipt requested, 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 by registered or certified mail, return receipt requested.

Any objection to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualification of the viewers are waived unless included in preliminary objections. The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. If an issue of fact is raised, evidence may be taken by deposition or otherwise as the court shall direct.

Section 510. Powers of Viewers.—The viewers shall have power to administer oaths and affirmations, and to adjourn the proceedings from time to time. Upon request of the viewers or a party, the court which appointed the viewers shall issue a subpoena to testify or to produce

books and documents. 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. ***The provisions of this section shall not be affected by the appointment of an alternate viewer as provided for in section 504.***

APPROVED—The 7th day of October, A. D. 1975.

MILTON J. SHAPP

No. 71

AN ACT

HB 44

Amending the act of June 22, 1964 (P.L.84, No.6), entitled "An act to codify, amend, revise and consolidate the laws relating to eminent domain," adding all projects to the provision having to do with damages by floods, providing for limited interest takings and defining certain mobile homes as real property.

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

Section 1. Section 602, act of June 22, 1964 (P.L.84, No.6), known as the "Eminent Domain Code," amended September 1, 1972 (Special Session No.1, No.3), is amended to read:

Section 602. Measure of Damages.—*(a)* 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 code.

(b) 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.

(c) In case of the condemnation of property in connection with any [**flood control**] *program or* project [**or highway project**] which property is damaged by floods, the damage resulting therefrom shall be excluded in determining fair market value of the condemnee's entire property interest therein immediately before the condemnation. [**provided such damage has occurred within three years of the date of taking and during the ownership of the property by the condemnee. The damage resulting from floods to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement.**]

(d) In the case of property which was damaged by the floods of September, 1971 and June, 1972, an acquiring agency may acquire the entire property interest of a condemnee, except any improvements made since the date of the floods, and reconvey to the condemnee a portion of the property interest taken; in which case the damage shall be the difference between the value of the property interest acquired, excluding

purposes of this act, all mobile homes which were in use as dwellings and were destroyed, demolished or damaged beyond reasonable repair by the natural disasters of September 1971 and June 1972 shall be considered to be real property.

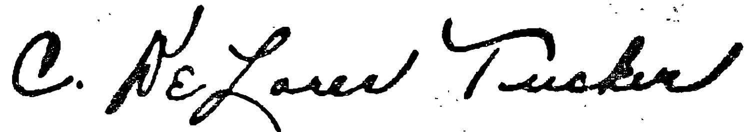
(e) Subsections (c) and (d) are applicable only where the flood damage has occurred within three years prior to the initiation of negotiations for or notice of intent to acquire or order to vacate the property and during the ownership of the property by the condemnee. The flood damage to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement.

Section 2. This act shall take effect immediately and shall apply to all programs or projects containing property damaged by the storms and floods of September, 1971, and June, 1972, whether or not property acquisition had commenced prior to September, 1971.

APPROVED—The 27th day of September, A. D. 1973.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 71.



Secretary of the Commonwealth