

**UNIFORM LAW COMMISSIONERS' MODEL
EMINENT DOMAIN CODE**

1974 ACT

ARTICLE I

GENERAL PROVISIONS AND DEFINITIONS

Section

- 101. [Short Title].
- 102. [Scope of the Code].
- 103. [Definitions].
- 104. [Agreement on Compensation and Other Relief].
- 105. [Compliance with Federal Requirements].

ARTICLE II

POLICIES GOVERNING LAND ACQUISITION

- 201. [Application of Article].
- 202. [Negotiation and Appraisal].
- 203. [Offer to Purchase at Full Appraised Value].
- 204. [Payment or Deposit Before Surrender of Possession].
- 205. [Notice to Terminate Occupancy].
- 206. [Rental Basis for Continued Occupancy].
- 207. [Coercive Action Forbidden].
- 208. [Offer to Acquire Uneconomic Remnant].
- 209. [Acquisition of Improvements to be Removed].
- 210. [Compensation for Tenant-Owned Buildings and Structures].
- 211. [Expenses Incidental to Transfer of Title].
- 212. [Waiver].
- 213. [Takings Without Condemnation Action].
- 214. [Interpretation and Effect of Article].

ARTICLE III

PROCEEDINGS BEFORE ACTION

- 301. [Entry for Suitability Studies].
- 302. [Court Order Permitting Entry].
- 303. [Deposit of Probable Compensation].
- 304. [Modification of Court Order].
- 305. [Recovery of Damages, Costs, and Expenses].
- 306. [Preliminary Efforts to Purchase].

- 307. [Scope of Efforts to Purchase].
- 308. [Purchase Efforts Waived or Excused].
- 309. [Condemnation Authorization].
- 310. [Contents of Authorization].
- 311. [Effect of Condemnation Authorization].

ARTICLE IV

COMMENCEMENT OF ACTION BY CONDEMNOR

- 401. [Procedure Generally].
- 402. [Commencement of Condemnation Action; Venue].
- 403. [Time for Commencement of Condemnation Action].
- 404. [Contents of Complaint].
- 405. [Consolidation and Separation of Properties and Issues].
- 406. [Service of Process].
- 407. [Recording Notice of Pending Action].

ARTICLE V

DEFENDANT'S RESPONSE

- 501. [Required Response].
- 502. [Answer].
- 503. [Disclaimer].
- 504. [Rights After Default].
- 505. [Additional Pleadings].
- 506. [Hearing on Preliminary Objections].
- 507. [Burden of Proof at Hearing on Objections].
- 508. [Disposition of Defendant's Objections].

ARTICLE VI

DEPOSIT AND POSSESSION PRIOR TO JUDGMENT

- 601. [Deposit of Appraised Value of Property].
- 602. [Notice of Deposit].
- 603. [Motion to Increase or Reduce Amount Deposited].
- 604. [Motion for Withdrawal of Deposited Funds Before Judgment].
- 605. [Determination of Application for Withdrawal; Waiver of Objections].
- 606. [Effect of Withdrawal].
- 607. [Deposit and Withdrawal Inadmissible in Evidence].
- 608. [Deposit at Interest].
- 609. [Order of Possession].
- 610. [Notice of Order of Possession].

ARTICLE VII

PROCEEDINGS BEFORE TRIAL

- 701. [Application of Article].
- 702. [Scope of Discovery].
- 703. [Protective Orders].
- 704. [Duty to Supplement or Amend Response].
- 705. [Effect of Article on Admissibility of Evidence].
- 706. [Effect of Discovery Proceedings Upon Trial Evidence].
- 707. [Pretrial Order].
- 708. [Offer of Settlement].

ARTICLE VIII

INFORMAL PROCEDURE FOR DISPUTES INVOLVING LIMITED AMOUNTS

- 801. [Informal Claims Procedure Authorized].
- 802. [Request for Informal Procedure].
- 803. [Hearing].
- 804. [Demand for Retrial].

ARTICLE IX

PROCEDURE FOR DETERMINING JUST COMPENSATION

- 901. [Setting for Trial].
- 902. [Trial by Jury; Waiver].
- 903. [Right to Open and Close; Order of Presentation of Evidence].
- 904. [Burden of Proof].
- 905. [Separation of Issues of Compensation and Apportionment].
- 906. [Separate Determination of Facts].
- 907. [Power of Court to Control Scope of Trial Participation].

ARTICLE X

COMPENSATION

- 1001. [Compensation Standards].
- 1002. [Compensation for Taking].
- 1003. [Date of Valuation].
- 1004. [Fair Market Value Defined].
- 1005. [Effect of Condemnation Action on Value].
- 1006. [Compensation to Reflect Project as Planned].
- 1007. ["Entire Property"].

- 1008. [Special Assessment Proceedings Excluded].
- 1009. [Use by Defendant; Risk of Loss].
- 1010. [Compensation for Growing Crops and Improvements].
- 1011. [Improvements Partially Located on Land Not Taken].
- 1012. [Compensation for Divided Interests].
- 1013. [Taking of Leasehold Interest].
- 1014. [Acquisition of Property Subject to Lien].
- 1015. [Property Subject to Life Tenancy].
- 1016. [Loss of Goodwill].

ARTICLE XI

EVIDENCE IN CONDEMNATION ACTIONS

- 1101. [Scope of Article].
- 1102. [View of Property Taken].
- 1103. [Opinion Evidence Competent to Prove Value].
- 1104. [Supporting Evidence].
- 1105. [Evidence Relating to Remainder Value in Partial Taking].
- 1106. [Matters Upon Which Opinion Testimony May Be Based].
- 1107. [Sales of Subject Property].
- 1108. [Comparable Sales].
- 1109. [Leases].
- 1110. [Capitalization of Rental Income].
- 1111. [Reproduction or Replacement Cost].
- 1112. [Conditions in General Vicinity].
- 1113. [Matter Upon Which Opinion May Not Be Based].

ARTICLE XII

JUDGMENT AND POSTJUDGMENT PROCEDURE

- 1201. [Contents of Judgment].
- 1202. [Interest on Compensation Awarded].
- 1203. [Interest on Judgment].
- 1204. [Adjustment of Taxes].
- 1205. [Recoverable Costs].
- 1206. [Crediting Amounts Paid Or Withdrawn from Deposited Funds].
- 1207. [Performance of Work to Reduce Amount of Award].
- 1208. [Payment of Judgment by Plaintiff].
- 1209. [Order Transferring Title].
- 1210. [Effect of Failure to Pay Judgment].
- 1211. [Payment after Judgment from Funds Deposited with Court].
- 1212. [Order for Possession after Judgment].

ARTICLE XIII

DISMISSAL AND ABANDONMENT

- 1301. [Involuntary Dismissal].
- 1302. [Voluntary Dismissal].
- 1303. [Award of Litigation Expenses].
- 1304. [Restitution of Property and Damages].

ARTICLE XIV

RELOCATION ASSISTANCE

- 1401. [Declaration of Policy].
- 1402. [Definitions].
- 1403. [Moving and Related Expenses].
- 1404. [Replacement Housing for Homeowners].
- 1405. [Replacement Housing for Tenants and Certain Others].
- 1406. [Relocation Assistance Advisory Program].
- 1407. [Replacement Housing Prerequisite to Requiring Person to Move].
- 1408. [Implementing Regulations].
- 1409. [Fund Availability].
- 1410. [Administration].
- 1411. [Payments Not Income or Resources].
- 1412. [Review of Application of Aggrieved Person].

ARTICLE XV

ARBITRATION OF COMPENSATION

- 1501. [Arbitration of Compensation Authorized].
- 1502. [Enforceability of Agreement].
- 1503. [Timing of Arbitration].
- 1504. [Effect of Pending Condemnation Action].
- 1505. [Absence of Concurrent Condemnation Action].
- 1506. [Arbitration Procedure].
- 1507. [Abandonment of Acquisition].
- 1508. [Recordation of Agreement].

ARTICLE XVI

EFFECTIVE DATE AND REPEALER

- 1601. [Time of Taking Effect].
- 1602. [Application].

1603. [Uniformity of Application and Construction].
1604. [Severability].
1605. [Repealer].

ARTICLE I

GENERAL PROVISIONS AND DEFINITIONS

Section

101. [Short Title].
102. [Scope of the Code].
103. [Definitions].
104. [Agreement on Compensation and Other Relief].
105. [Compliance with Federal Requirements].

Be it enacted

§ 101. [Short Title]

This Act may be cited as the "Uniform Law Commissioners' Model Eminent Domain Code."

This is the customary "short title" provision. It may be placed in such order in the bill for enactment as the legislative practices of the state indicate. If parts of the Uniform Code are introduced as separate measures, the short title should be adjusted accordingly.

COMMENT

§ 102. [Scope of the Code]

(a) This Code provides standards for the acquisition of property by condemnors, the conduct of condemnation actions, and the determination of just compensation. It does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised.

(b) This Code supplements the law of this state relating to the acquisition of property and to the exercise of the power of eminent domain. In the event of conflict between this Code and any other law with respect to any subject governed by this Code, this Code prevails.

COMMENT

The Uniform Eminent Domain Code is conceived primarily as a procedural statute. It does not attempt to prescribe which governmental and private bodies are authorized to exercise the power of eminent domain, or for what purposes the power may be exercised. Subsection (a). The Code has been drafted on the assumption that those matters are covered by other statutes. In preparing the bill for enactment, other statutory law of the state should be examined in light of this premise, so that appropriate repeals and conforming changes can be

enacted simultaneously. See Section 1605.

Paragraph (b) makes it clear that the Uniform Code is intended to supplement and not displace other provisions of law dealing with the substantive powers of land acquisition and eminent domain. It is recognized, however, that some provisions of the Code (e.g., the land acquisition policies in Article II) may arguably have a quasi-substantive effect in certain applications. This paragraph avoids possible disputes as to whether a particular provision is properly classifiable as "procedural" (and thus governed exclusively by the Uniform Code). In the event of conflicting statutory provisions of either kind, the Uniform Code prevails.

This Code does not purport to supply rules for inverse condemnation actions (except as provided in Section 213). The extent to which its provisions may be applicable in inverse condemnation actions is intended to be determined by judicial construction in the light of applicable state law.

§ 103. [Definitions]

As used in this Act:

(1) "action" means condemnation action;

(2) "appraisal" means an opinion as to the value of or compensation payable for property, prepared by or under the direction of an individual qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of property;

(3) "business" means a lawful activity, whether or not for profit, other than a farm operation, conducted primarily for the purchase, sale, lease, rental, manufacture, processing, or marketing of products, commodities, or other property, or for providing services;

(4) "condemn" means to take property under the power of eminent domain;

(5) "condemnation action" includes all acts incident to the process of condemning property after commencement of suit;

(6) "condemnee" means a person who has or claims an interest in property that is the subject of a prospective or pending condemnation action;

(7) "condemnor" means a person empowered to condemn;

(8) "costs" means the reasonable fees, charges and expenses necessarily incurred in an action, including the fees and charges of expert witnesses, the cost of transporting the court and jury to view the premises, and other recoverable costs;

(9) "court" means a [] court of this state, and includes, when the context requires, any [judge] [justice] of the court;

(10) "crops" means any form of vegetation intended to be removed and used or sold for commercial

purposes, including grass, flowers, fruits, vegetables, trees, vines, and nursery stock;

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

(12) "improvement" includes any building or structure, and any facility, machinery, or equipment that cannot be removed from the real property on which it is situated without substantial damage to the real property or other substantial economic loss;

(13) "lien" means a security interest in property arising from contract, mortgage, deed or trust, statute, common law, equity, or creditor action;

(14) "litigation expenses" means the sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual court proceedings;

(15) "local public entity" means a public entity other than the State;

(16) "person" includes a natural individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity;

(17) "personal property" means any property other than real property;

(18) "property" means an interest in real or personal property under the law of this State;

(19) "real property" means land and any improvements upon or connected with land; and includes an easement, servitude, or other interest therein; and

(20) "work" includes construction, alteration, repair, remodeling, excavation, demolition, rehabilitation, relocation and landscaping.

COMMENT

The definitions in the Uniform Code are designed to carry out the purpose of the Code to make uniform the eminent domain procedures of the enacting state in all condemnation actions by either public or private condemnors.

The pivotal term "property" is defined in paragraph (18) to include "any interest" in real or personal property. This terminology is intended to be accorded a broad interpretation so that it is coextensive with the state law of property and, if state law admits, will include such interests as air rights, subsurface rights, mineral interests, estates in submerged lands, water rights of any character, flowage or flooding easements, easements or servitudes for aircraft noise or operations, rights or permits for the temporary use and occupancy, franchises, rights to limit land use and development, leaseholds, liens, future interests, copyrights, etc.

§ 104. [Agreement on Compensation and Other Relief]

At any time before or after commencement of an action, the parties may agree to and carry out according to its terms a compromise or settlement as to any matter, including all or any part of the compensation or other relief.

COMMENT

This section provides assurance that public entities have ample authority, in connection with condemnation actions to which they are parties, to enter into and carry out stipulations and agreements relating to any matter or issue concerning the action. Under this section, objections to such agreements are untenable upon ultra vires grounds.

The section applies to both parties, since in some instances the condemnee may be a public entity with limited powers. Both complete and partial settlements are authorized; the latter may eliminate the necessity for trial as to the items agreed upon, even though other elements remain to be tried.

The concept of "other relief" includes the full range of matters that may be the subject of either adjudication or settlement in the action, including litigation expenses, the terms and conditions of relocation of underground structures, fencing of agricultural lands, design changes in the public improvement to reduce its detrimental effect upon remainder property, the harvesting of growing crops, or any other matter regarded by the parties as appropriate for agreement. See also, Section 307.

§ 105. [Compliance with Federal Requirements]

Notwithstanding any provision of this Code, a condemnor may comply with any federal statute, regulation, or policy prescribing a condition precedent to the availability or payment of federal financial assistance for any program or project for which the condemnor is authorized to exercise the power of eminent domain.

COMMENT

This section provides assurance that public entities have adequate authority to comply with applicable conditions of federal financial assistance.

ARTICLE II

POLICIES GOVERNING LAND ACQUISITION

Section

- 201. [Application of Article].
- 202. [Negotiation and Appraisal].
- 203. [Offer to Purchase at Full Appraised Value].
- 204. [Payment or Deposit Before Surrender of Possession].
- 205. [Notice to Terminate Occupancy].
- 206. [Rental Basis for Continued Occupancy].
- 207. [Coercive Action Forbidden].
- 208. [Offer to Acquire Uneconomic Remnant].
- 209. [Acquisition of Improvements to be Removed].
- 210. [Compensation for Tenant-Owned Buildings and Structures].
- 211. [Expenses Incidental to Transfer of Title].
- 212. [Waiver].
- 213. [Takings Without Condemnation Action].
- 214. [Interpretation and Effect of Article].

PREFATORY COMMENT

This Article is intended to assure that state law governing land acquisition is in accord with the federal requirements prescribed by the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, Public Law No. 91-646, 84 Stat. 1894 (1971), herein referred to as the "Federal Acquisition Policies Act." Federal financial assistance to any state or local governmental project involving the acquisition of real property must be withheld, pursuant to Section 305 of the Federal Acquisition Policies Act, unless the state can provide the cognizant federal agency head "satisfactory assurances" that the acquisition policies declared in Sections 301 to 304 of that Act will be adhered to. This Article provides a statutory basis for the giving of the required assurances, and, in addition, extends the same acquisition policies to projects that are not federally funded, and to acquisitions by private, as well as public, condemnors.

§ 201. [Application of Article]

(a) In order to encourage and expedite the acquisition of property by agreement, to avoid litigation and relieve congestion in the courts, to assure consistent treatment of owners, and to promote public confidence in practices and procedures relating to the acquisition of property for public use, a condemnor, when acquiring property, shall comply with applicable provisions of Sections 202 through 211.

(b) Sections 202 through 211 apply to the purchase and acquisition of materials, supplies, equipment, or other personal property only if the condemnor determines to exercise its power of eminent domain with respect to that property.

COMMENT

This section is an adaptation of the introductory paragraph to Section 301 of the Federal Acquisition Policies Act, which is applicable to state and local governmental land acquisitions funded, in whole or in part, by the Federal Government. This section, however, goes beyond the federal requirements, and is made applicable (1) whether or not federal financial assistance is available, (2) to acquisitions of both real and personal property, and (3) to acquisitions by both public and private condemnors. In addition, this section makes compliance mandatory ("shall comply") and does not merely set guidelines, as in the Federal Act. If this section were given a more restricted purview, it could conceivably raise questions of possible inconsistency with the Equal Protection Clause, and with special legislation and uniformity requirements of state constitutions. A limited "escape" provision designed to meet exceptional circumstances is included in the Code, below, as Section 212.

The term "condemnor" (line 6) makes it clear that this section applies to both public entities and private persons if the acquisition is one which, absent agreement with the owner, is intended to be achieved by an exercise of the power of eminent domain. See the definition of "condemnor" in Section 103(7). Under Subsection (b), routine purchasing and procurement actions are excluded from the general purview of this Article, since its purposes are not applicable and its application would be unnecessarily burdensome, in such case.

§ 202. [Negotiation and Appraisal]

(a) A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.

(b) Before initiating negotiations, the condemnor shall cause the property to be appraised to determine the amount that would constitute just compensation for its taking. The owner or his representative shall be given a reasonable opportunity to accompany the appraiser during his inspection of the property.

COMMENT

This section is an adaptation of Section 301, pars. (1) and (2) of the Federal Acquisition Policies Act. Its intent is to require good faith negotiations for purchase, based upon an appropriate appraisal openly made after reasonable notice to the owner or other person with whom a prospective purchaser would ordinarily deal in relation to the property.

What is an adequate appraisal sufficient to meet the requirements of this section depends upon the nature, size, functional purpose, and other characteristics of the property to be acquired. See the definition of "appraisal" in Section 103(2). For example, the appraisal of a lengthy pipe line easement, or of a minor road widening strip, might well be informal in character. Similarly, what is a "reasonable opportunity" to accompany the appraiser depends upon the relevant circumstances, including the identity and location of the owner, the use and occupancy of the property, and the customary practices in the community in connection with buying and selling like property. As defined in Section 103(18), the "property" to which this section applies includes any interest in real or personal property.

§ 203. [Offer to Purchase at Full Appraised Value]

(a) Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's approved

appraisal of just compensation for the property.

(b) In establishing the amount believed to be just compensation, the condemnor shall disregard any decrease or increase in the fair market value of the property caused by the project for which the property is to be acquired or by the reasonable likelihood that the property will be acquired for that project, other than a decrease due to physical deterioration within the reasonable control of the owner.

(c) The condemnor shall provide the owner of the property with a written appraisal, if one has been prepared, or if one has not been prepared, with a written statement and summary, showing the basis for the amount it established as just compensation for the property. If appropriate, the compensation for the property to be acquired and for the damages to remaining property shall be separately stated.

COMMENT

Section 203 is an adaptation of Section 301, par. (3) of the Federal Acquisition Policies Act.

Under Subsection (a), an offer to purchase must be submitted to the owner of any affected interest which the condemnor seeks to acquire.

The appraisal or summary statement required by Subsection (c) is required to show the "basis" or factual rationale for the amount determined by the public entity or private condemnor to be just compensation. A mere statement in conclusory terms, without supporting data, would be insufficient for this purpose. Moreover, under Subsection (a), the amount offered for the property may not be less than the amount of compensation shown by this appraisal or statement, but it may be more than that amount. The term "appraisal" is defined in Section 103(2).

§ 204. [Payment or Deposit Before Surrender of Possession]

An owner shall not be required to surrender possession of property before the condemnor:

(1) pays the agreed purchase price;

(2) pays, or deposits for the benefit of the owner in accordance with this Code, not less than the amount established as just compensation for the property as shown by an appraisal approved by the condemnor or the amount required by the court under Section 603; or

(3) pays, or deposits in accordance with this Code, the amount awarded by the judgment in the condemnation action.

COMMENT

Section 204 is an adaptation of Section 301, par. (4) of the Federal Acquisition Policies Act.

The term "owner" is not specifically defined by this Code, but is intended to include any person who, under state law, is deemed to own a property interest that is sought to be taken, and is not limited to the owner

of the fee.

Proceedings relating to deposit, referred to in paragraph (2), are governed by Sections 601 to 603. Provisions relating to the amount of the judgment, and to payment or deposit of the award, as referred to in paragraph (3), are set out in Article XII. See Section 1208.

§ 205. [Notice to Terminate Occupancy]

Except in an emergency, a condemnor may not require a person lawfully occupying property to move from a dwelling, nor to move his business or farm operation, unless he has received written notice from the condemnor at least 90 days before the date by which the move is required.

COMMENT

Section 205 is an adaptation of Section 301, par. (5) of the Federal Acquisition Policies Act. It limits dispossession of a lawful occupier by a condemnor even though all other legal requirements have been satisfied (e.g., the making of a sufficient deposit and other requirements for obtaining an order of possession under Section 609). What constitutes a sufficient "emergency" to justify disregard of the 90 day notice requirement is left to judicial determination in light of the facts in particular cases. See also Section 601(d).

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

§ 206. [Rental Basis for Continued Occupancy]

If a condemnor, after acquiring property, rents all or part of the property to the former owner or tenant for a short term or for a period subject to termination by the condemnor on short notice, the amount of rent charged may not exceed the lower of (1) the fairly prorated rent, payable under the terms of the tenant's immediately preceding unexpired lease, if any, or (2) the fair rental value of the property to a short-term occupant.

COMMENT

Section 206 is an adaptation of Section 301, par. (6) of the Federal Acquisition Policies Act. The phrases "short term" and "short notice" are intended to have the same meaning as the like phrases in the Federal Act.

Unlike the Federal Act, this section expressly provides for continued occupancy of only a part of the property acquired, as well as for occupancy of the entire parcel. It also limits the rental chargeable to a former tenant to a fairly prorated amount, based on his prior unexpired lease, if that is lower than the present fair rental value to a short-term occupier (the maximum that can be required from an owner holding over). Under this section, a condemnor that takes by eminent domain receives no preferential advantage as compared to its position when it acquires by purchase; and the tenant incurs no hardship in the form of an increase in rent above that required by his unexpired lease.

§ 207. [Coercive Action Forbidden]

In order to compel an agreement on the price to be paid for the property, a condemnor may not advance the time of condemnation, defer negotiations or condemnation and the deposit of funds in court for the use of the owner, nor take any other action coercive in nature.

COMMENT

Section 207 is an adaptation of Section 301, par. (7) of the Federal Acquisition Policies Act.

§ 208. [Offer to Acquire Uneconomic Remnant]

(a) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

(b) "Uneconomic remnant" as used in this section means a remainder following a partial taking of property, of such size, shape, or condition as to be of little value or that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.

COMMENT

Subsection (a) of Section 208, which is based upon section 301, par. (9) of the Federal Acquisition Policies Act, goes beyond the federal act and expressly authorizes a condemnor to acquire an uneconomic remnant—a power which, under the language of the Federal Act, is only implied. The statutory powers of condemnors under state law are, in many states, construed strictly; if an express grant of power were not included, this section might be deemed applicable only to acquisitions by agencies which are elsewhere empowered to acquire uneconomic remnants. Under Section 102(b), this section prevails over any statutory provisions inconsistent with it.

Subsection (b) is not based upon the Federal Act, but is believed to be consistent with its intent. Subsection (b) limits the operative effect of paragraph (a) to instances in which a partial taking results in one or more "physical" or "financial" remnants. Examples include remnants that are totally "landlocked" so that no physical use of the property is practicable; remnants reduced below minimum zoning area requirements where there is no reasonable possibility of a zoning change; remnants in such physical condition as to preclude economically practicable use for any plausible application; and remnants that are of significant potential value only to one or a few persons (e.g., adjoining landowners). See, e.g., *Department of Public Works v. Superior Court*, 68 Cal.2d 206, 65 Cal.Rptr. 342, 436 P.2d 342 (1968); *State v. Buck*, 226 A.2d 840 (N.J.1968). The duty of the condemnor to offer to acquire the remnant is limited to cases in which a failure to acquire it along with the rest of the "take" could impose a substantial economic hardship on the owner while acquisition would not be likely to increase total costs appreciably.

Section 208 does not require the acquiring agency to condemn the remnant if the offer is rejected; and it does not preclude a condemnor from acquiring an "uneconomic" remnant by eminent domain if the owner

refuses the offer. On the other hand, if the owner is prepared to sell, but is not willing to agree to the amount of compensation offered, this section authorizes the parties to agree to its acquisition by condemnation proceedings, so that the compensation may be ascertained by the trier of fact.

This section does not confer, nor does it affect, any authority which a public entity or private condemnor may have to acquire remnants other than those which are "uneconomic." For example, the acquisition of usable remnants for "protective" or "recoupment" purposes is not included within the mandatory offer here required. This section assumes that any offer in such cases, if elsewhere authorized by state law, ordinarily should be optional with the acquiring agency, and not mandatory, so that it will be free in light of the relative advantages and corresponding costs to decide whether to undertake the acquisition.

A separate offer required by subsection (a) must be made with respect to each remnant that meets the definition of subsection (b), and each may be acquired by different means, subject to the owner's consent. The offer in each instance must meet the requirements of Sections 202 to 203 (prior appraisal, and offer at not less than appraised compensation). The appraisal made of the portion of the owner's property included within the "take" may be used as the basis for the offer to acquire the uneconomic remnant if it contains sufficient valuation data for that purpose.

§ 209. [Acquisition of Improvements to be Removed]

A condemnor that acquires any interest in real property shall also acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property acquired, which the condemnor requires to be destroyed or removed or which will be adversely affected by the use to which the real property will be put.

COMMENT

The substantive content of the operative terms of this section, including "at least an equal interest" and "adversely affected," is intended to be consistent with the authoritative interpretations of the identical terms in Section 302(a) of the Federal Acquisition Policies Act, upon which it is based.

Subject to the waiver and excuse provisions of Section 212, this section confers an enforceable right upon the property owner, in the circumstances here provided, to compel the public entity to acquire an interest in improvements substantially identical to, or greater than, the interest acquired in the real property on which they are situated. The extent of the interest that must be acquired is suggested, inferentially, by the purpose underlying the two alternative conditions upon which acquisition of the improvements becomes mandatory: (a) to facilitate removal of the improvements without loss to their owner, and (b) to prevent loss to the owner of the improvements due to adverse effects from the use to which the land is put. Cf. Section 210. Under Section 302(a) of the Federal Act, the determination that the second of these conditions exists is left to the federal agency head. To avoid objections of nondelegability of authority and of inadequacy of decisional standards under state law, Section 209 treats this issue as one of fact to be decided, in the event of dispute, by the court.

§ 210. [Compensation for Tenant-Owned Buildings and Structures]

(a) If a building, structure, or other improvement to be acquired by a condemnor under Section 209 is

owned by a tenant,

(1) it shall be deemed for the purpose of determining compensation to be a part of the real property to be acquired notwithstanding the right or obligation of the tenant, as against the owner of any other interest in the real property, to remove it at the expiration of his term; and

(2) the compensation awarded shall include an amount sufficient to pay the tenant the larger of (i) the enhancement to the fair market value of the real property contributed by the improvement, or (ii) the fair market value of the improvement assuming its removal from the real property.

(b) Payment under this section shall not duplicate any payment authorized by law, and may be made only if the owner of the real property disclaims any interest in the improvement. In consideration for the payment, the tenant shall assign, transfer, and release to the condemnor all of his interest in the improvement.

(c) This section does not deprive the tenant of any right to reject payment hereunder and to seek to obtain payment for his interest in or damage to the improvement under any other law.

COMMENT

Section 210 is based upon Section 302(b) of the Federal Acquisition Policies Act.

§ 211. [Expenses Incidental to Transfer of Title]

(a) As soon as practicable after payment of the purchase price, or payment of or deposit in court of funds to satisfy the judgment in a condemnation action, whichever is earlier, the condemnor shall pay, or reimburse the owner for, any reasonable and necessarily incurred expenses for:

(1) recording fees, transfer taxes, and similar expenses incidental to conveying the property to the condemnor;

(2) penalty costs for prepayment of any debt secured by a preexisting lien, entered into or created in good faith, encumbering the property; and

(3) the prorated portion of property taxes allocable to a period after the date of vesting of title in, or the effective date of possession of the property by, the condemnor, whichever is earlier.

(b) The condemnor shall pay the owner interest at the annual rate of [6] percent upon any part of the amount required by subsection (a) that is not paid within 60 days after the owner has made written demand for payment.

COMMENT

Section 211(a) is based upon Section 303 of the Federal Acquisition Policies Act.

The Federal Act provides for reimbursement of the expenses here described only "to the extent the head of such [acquiring] agency deems fair and reasonable." The quoted words have been omitted from this section, thereby making payment or reimbursement under state law both mandatory and subject to a uniform statutory standard (i.e., that they be "reasonable" and "necessarily incurred"). Compare Section 1014(2), forbidding enforcement of prepayment penalties through the condemnation award.

Subsection (b) has no counterpart in the federal act. It is intended to encourage prompt payment of amounts required by subsection (a), and to clarify the acquiring agency's duty to pay interest. An appropriate statutory interest rate should be inserted within the indicated brackets.

§ 212. [Waiver]

If not inconsistent with the requirements of an applicable statute or regulation, a failure to satisfy the requirements or limitations imposed under Sections 201 through 211, inclusive:

(1) is waived by the failure of the property owner, in the exercise of reasonable diligence, to object to or seek relief based upon noncompliance; and

(2) may be waived by written agreement between the property owner and the condemnor.

COMMENT

Section 212 is intended to relieve the parties in acquisition and condemnation proceedings from an unduly restrictive application of Sections 201 to 211. The introductory clause, however, makes it clear that waiver and excuse are not recognized where to do so would be inconsistent with an "applicable" law, including federal statutes or regulations prescribing conditions of federal funding of state or local projects. If federal standards are either not "inconsistent" or are not "applicable," for example, the provisions of this section would control.

The provisions of Article II are drafted in mandatory language. Acquiring agencies are under a duty to comply with the requirements of Sections 201 to 211 even though, as provided in Section 214, noncompliance would not affect the validity of a completed property acquisition. Accordingly, noncompliance may be asserted as the basis for a preliminary objection pleaded under Section 502(b) and subject to disposition under Sections 506 to 508. The possibility of sanctions under Section 508 is conceived primarily as a procedural technique for inducing condemnors to comply.

The present section provides an "escape valve" from the general principle requiring full compliance with Sections 201 to 211. Paragraph (1) recognizes that noncompliance may be waived either by failure to object under Section 502(b), or by failure to seek relief pursuant to any other available state procedures. Under paragraph (2) the issue would center around whether there had been a waiver by written agreement of the parties.

§ 213. [Takings Without Condemnation Action]

(a) If property is to be acquired by a condemnor through the exercise of its power of eminent domain, the condemnor shall commence a condemnation action for that purpose. A condemnor shall not intentionally make it necessary for an owner of property to commence an action, including an action in inverse condemnation, to

prove the fact of the taking [or damaging] of his property.

(b) The judgment and any settlement in an inverse condemnation action awarding or allowing compensation to the plaintiff for the taking [or damaging] of property by a condemnor shall include the plaintiff's litigation expenses.

COMMENT

Subsection (a) is based upon Section 301(8), and Subsection (b) is based upon Section 304(c), of the Federal Uniform Acquisitions Policy Act.

The words in brackets are suggested for use in states in which there is a constitutional provision requiring payment of just compensation for both a "taking" and a "damaging" of private property for public use.

The term, "litigation expenses," as defined in Section 103(14), includes reasonably incurred attorney, appraisal, and engineering fees in addition to recoverable costs.

§ 214. [Interpretation and Effect of Article]

(a) A failure to satisfy the requirements or limitations of Sections 201 through 213 does not affect the validity of the condemnor's interest in any property which it acquires by purchase or condemnation.

(b) This Article shall be construed to be consistent with the requirements of federal law governing financial assistance for any project or purpose.

COMMENT

Subsection (a) of this section is an adaptation of Section 102(a) of the Federal Acquisition Policies Act. While noncompliance with Sections 201 to 213 has no substantive effect on completed acquisitions, it may constitute the basis for defensive pleadings in the condemnation action and for corrective orders of the court, absent a waiver under Section 212.

Subsection (b) is intended to provide assurance that the Uniform Code will be construed consistently with applicable requirements for obtaining federal financial assistance. See also Section 105.

ARTICLE III

PROCEEDINGS BEFORE ACTION

Section

- 301. [Entry for Suitability Studies].
- 302. [Court Order Permitting Entry].
- 303. [Deposit of Probable Compensation].
- 304. [Modification of Court Order].
- 305. [Recovery of Damages, Costs, and Expenses].
- 306. [Preliminary Efforts to Purchase].
- 307. [Scope of Efforts to Purchase].
- 308. [Purchase Efforts Waived or Excused].
- 309. [Condemnation Authorization].
- 310. [Contents of Authorization].
- 311. [Effect of Condemnation Authorization].

§ 301. [Entry for Suitability Studies]

(a) A condemnor and its agents and employees may enter upon real property and make surveys, examinations, photographs, tests, soundings, borings, and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to take for public use, if the entry is:

(1) preceded by reasonable efforts to notify the owner, and any other person known to be in actual physical occupancy of the property, of the time, purpose, and scope of the planned entry and activities;

(2) undertaken during reasonable daylight hours;

(3) accomplished peaceably and without inflicting substantial injury; and

(4) not in violation of any other statute.

(b) The entry and activities authorized by this section do not constitute a trespass, but the condemnor is liable under Section 305 for resulting damages.

COMMENT

Section 301 provides statutory authority for a condemnor to enter upon land to appraise it, or to determine its suitability for the public use and whether its acquisition is authorized. No time limitation upon entry is prescribed. Although appraisal and suitability studies generally precede the initiation of a formal condemnation action; this section does not preclude such studies after an action has been commenced with respect to the property.

Under Subsection (a), it is not necessary that the consent of the owner or occupier of the property be obtained, provided all of the requirements stated are satisfied. If some other statute requires the owner's consent, however, the entry would be unlawful under paragraph (4) unless consent were first obtained. Subsection (a) leaves the ultimate determination of the "reasonableness" of efforts to give notice under paragraph (1), the "reasonableness" of the time of entry under paragraph (2), and the "peaceable" nature of the entry under paragraph (3) to the sound discretion of the court in light of all of the circumstances.

Under Subsection (b), an entry and related activities are lawful, and non-trespassory, if the criteria of Subsection (a) are met. However, the condemnor remains liable for damages to the extent provided in Section 305.

§ 302. [Court Order Permitting Entry]

(a) If reasonable efforts to accomplish a lawful entry or to perform authorized activities upon real property under Section 301 have been obstructed or denied or would be futile, the condemnor may apply to the court [in the county where the property or any part is located] for an order permitting entry.

(b) Unless after notice good cause to the contrary is shown, the court shall make its order permitting and describing the purpose of the entry and setting forth the nature and scope of activities the court determines are reasonably necessary and authorized to be made upon the property. In addition to requiring a deposit under Section 303, the order may include terms and conditions with respect to the time, place, and manner of entry and authorized activities upon the property which will facilitate the purpose of the entry and minimize damage, hardship, and burden.

COMMENT

Section 302 authorizes judicial assistance to a condemnor seeking to obtain entry upon property for appraisal and study purposes. This procedure presumably would not be used routinely, but only in those instances in which a lawful entry cannot otherwise be obtained (e.g., cases in which the owner vigorously forbids entry) or the pursuit of the desired activities is obstructed by the owner or some other person (e.g., a tenant). The existence of a clear judicial remedy should facilitate lawful entries by reducing any incentives of the owner or occupant to deny permission.

This section contemplates the use of procedures in the nature of an order to show cause as the procedural framework for the application, with the burden of persuasion resting upon the person resisting entry. Since the owner will be compensated under Section 305 for damages caused by the entry, it seems reasonable to require him to show cause for not permitting a proposed entry, or for limiting the scope and nature of the activities.

Subsection (b) does not define what circumstances would constitute "good cause" for refusing or restricting entry. That determination must be based upon legal and equitable considerations relevant to the circumstances of individual cases. Lack of power to take the property for the use for which the proposed studies are to be made, for example, would be an adequate legal ground of refusal. See Section 301. Where the power to take exists, a showing that comprehensive, reliable, and recent data of the kind sought were readily available to the condemnor, so that the entry would merely produce cumulative information about the property, might constitute sufficient equitable grounds for denying entry. A showing that certain aspects of the proposed

activities were not reasonably necessary to support a rational judgment as to value or suitability, or that the condemnor proposed to employ unnecessarily onerous investigation techniques that would interfere with the occupant's use and enjoyment of the premises, might justify a limiting order restricting the time, place, or manner of the proposed activities. Under Subsection (b), the court has full discretion to condition and otherwise shape its order in the manner conducive to an equitable reconciliation of the competing interests disclosed at the hearing.

An order for entry under this section must also include provisions for the deposit of probable compensation, where the likelihood of compensable damage is determined to exist. See Section 303. The order may be modified upon a showing of changed circumstances. See Section 304.

§ 303. [Deposit of Probable Compensation]

(a) An order permitting entry under Section 302 shall include a determination by the court of the probable amount that will fairly compensate the owner and any other person in lawful possession or physical occupancy of the property for damages for physical injury to the property, and for substantial interference with its possession or use, found likely to be caused by the entry and activities authorized by the order, and shall require the condemnor to deposit that amount with the court before entry.

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

COMMENT

Section 303 requires the condemnor to post security for damage likely to be caused by his entry and appraisal or suitability studies, as a condition to obtaining a court order permitting entry. The statutory terms, "physical injury," and "substantial interference," are intended to preclude nominal and insignificant damages. See Comment to Section 305. Thus, in cases where the probable damage for actual injury to land or for interference with use and enjoyment is de minimis, Section 303 does not require a deposit. An order for a deposit is proper, however, where the foreseeable physical damages may be substantial, giving rise to a cause of action either in tort or inverse condemnation. See, e.g., *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923); *Van Alstyne, Inverse Condemnation: Unintended Physical Damage*, 20 *Hastings L.J.* 431, 483-85 (1969). Under some circumstances, the anticipated annoyance and interruption of peaceful use and enjoyment by the occupant may also be a probable source of more than merely nominal damages. Because the range of possible factual circumstances is wide, the occasions upon which a deposit should be required, as well as the amount of the deposit, are left to the court's determination, based on the evidence presented in conjunction with the order to show cause. The amount of the deposit is subject to modification on motion. See Section 304.

Subsection (b) requires the deposit to be retained by the court for a specified period, suggested as six months. During this period, the owner or occupant of the property may apply to the court for payment of compensation, out of the deposited sum, if compensable damages are incurred by reason of the entry and suitability studies. See Section 305.

§ 304. [Modification of Court Order]

(a) After notice and hearing, the court may modify an order made under Section 302.

(b) If a deposit is required or the amount required to be deposited is increased by an order of modification, the court shall specify the time within which the required amount must be deposited, and may direct that any further entry or specified activities or studies under the order as modified be stayed until the required deposit has been made.

COMMENT

Following an initial entry and survey, the condemnor may decide that more extensive exploratory studies of the subject property should be made, including, perhaps, substantial excavations, soil tests, or cutting of trees. If the newly conceived activities were not authorized by the original court order obtained under Section 302, a modification of its terms may be granted under the present section, including an initial or increased deposit for compensation.

To ensure the effectiveness of the security deposit requirement, a stay of proceedings may be imposed under Subsection (b) until the deposit is made. The stay, however, is not automatic but is discretionary with the court, in light of the circumstances. For example, if the condemnor is of undoubted solvency, or if the damages likely to accrue prior to the date upon which the newly required or additional deposit is to be made are amply covered by the amount of the original deposit less accrued damages, an order denying an interim stay of suitability studies might be appropriate. Another factor that could be considered in this connection might be the incurring of unnecessary expense by the condemnor if crews and equipment used in current work-in-progress, as part of the activities authorized under the original order, were suddenly required to be withdrawn by a stay order.

In some circumstances, a modification order may properly decrease the amount of the required deposit; in such an event, the excess can be disbursed at once to the condemnor pursuant to Section 303(b).

§ 305. [Recovery of Damages, Costs, and Expenses]

(a) A condemnor is liable for physical injury to, and for substantial interference with possession or use of, property caused by his entry and activities upon the property. This liability may be enforced in a civil action against the condemnor or by application to the court in the circumstances provided by subsection (c). [A notice of claim is not a prerequisite to the action or motion.]

(b) In an action or other proceeding for recovery of damages under this section, the prevailing claimant shall be allowed his costs. In addition, the court shall award the claimant his litigation expenses incurred in any proceeding under Section 302 or 304 if it finds that the condemnor:

(1) entered the property unlawfully;

(2) entered the property lawfully but thereafter engaged in activities upon the property that were abusive or lacking in due regard for the interests of the owner or occupant; or

(3) failed substantially to comply with, or wrongfully exceeded or abused the authority of,

an order made under Section 302 or 304.

(c) If funds are on deposit under Section 303 or 304, the owner or other person entitled to damages under subsection (a) may apply to the court for an award of the amount he is entitled to recover. The court shall determine the amount and award it to the person entitled thereto and direct that its payment be made out of the money on deposit. If the amount on deposit is insufficient to pay the full amount, the court shall enter judgment against the condemnor for the unpaid portion.

COMMENT

Subsection (a) of Section 305 provides the substantive basis for the condemnor's liability for damages arising out of entries for suitability studies. This statutory rule overrides the doctrine of governmental immunity which, in some states, might otherwise apply. The bracketed language precluding the need for a "notice of claim" is suggested for use in states where a failure to tender a formal claim for damages might otherwise be invoked as a defense to an attempt to enforce the liability provided in this section.

Damages required by this section are not dependent upon the existence of a court order under Section 302; liability also exists where a lawful entry is made under Section 301 without judicial assistance, as well as where the entry is unlawful.

The general criteria of damages under Subsection (a), as reflected in the terms, "physical injury" and "substantial interference," require a common sense interpretation. See, e.g., *Onorato Bros. v. Massachusetts Turnpike Authority*, 336 Mass. 54, 142 N.E.2d 389 (1957); *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So.2d 546 (1962). See, e.g., Calif.Govt.Code § 816; Kans.Stat.Ann. § 68-200 (1964); Pa.Stat.Ann., tit. 26, § 1-409 (Supp.1969). The term, "physical," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on tangible harm to property. Similarly, the term, "substantial interference," excludes liability for minimal annoyances or interferences that do not seriously impinge upon or impair the possession and use of the property. See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923).

Subsection (b) requires the court to award costs to the prevailing claimant in an action or proceeding for damages under this section. See the definition of "costs" in Section 103(8). In addition, this subsection requires an award of "litigation expenses" incurred in any proceedings previously held under Section 302 or 304 if the condemnor entered unlawfully, abused the right of lawful entry, or violated the terms of an order permitting entry. The prospect of such an award constitutes an inducement to condemnors to adhere to the requirements of Sections 301 to 304. The term, "litigation expenses," as defined in Section 103(14) includes a reasonable attorney's fee as well as appraisal and engineering fees necessarily incurred by the claimant.

Subsection (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses, where a deposit has been made under Section 303 or 304, and the funds deposited have not been disbursed under Section 303(b).

§ 306. [Preliminary Efforts to Purchase]

(a) Except as provided in Section 308, an action to condemn property may not be maintained over timely

objection by the owner unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action.

(b) An offer to purchase made in substantial compliance with Sections 202 and 203, accompanied or followed by reasonable negotiation efforts consistent with Section 307, is prima facie evidence of "good faith" under subsection (a).

COMMENT

Section 306 requires that a condemnor, whether a public entity or private person, should attempt to purchase the property by agreement before commencing an eminent domain action. The purposes of preliminary purchase attempts include the protecting of property owners from arbitrary and unexpected exercises of eminent domain power, facilitation of amicable settlement of disputes as to the amount of just compensation, minimizing acquisition costs through reduction of litigation and promotion of citizen cooperation with governmental programs involving land acquisitions.

Section 306 should be read in conjunction with Sections 202 and 203, which are based on the Federal Acquisition Policies Act. Section 202 requires condemnors to try to acquire real property by negotiated purchase based upon an appraisal, subject to waiver under Section 212. Section 203 requires that the offer to purchase be made at the full appraised value of the property, and that the owner be supplied with the basic appraisal data on which it is based. Those sections, however, do not explicitly make purchase efforts a prerequisite to maintenance of a condemnation action.

An owner wishing to make a "timely objection" under Subsection (a) must plead noncompliance with this section in his answer to the complaint in the condemnation action. See Sections 502, 506 to 508.

This section requires the condemnor to attempt "negotiations" (as defined in Section 307) only to the extent reasonably necessary to satisfy the "good faith effort" requirement. An inflexible negotiation rule could well prove a source of unnecessary litigation, and, unless carefully defined, the requirement could provide an opportunity for dilatory tactics by property owners.

Subsection (b) makes substantial compliance with Sections 202, 203, and 307, prima facie and not conclusive evidence of "good faith." Under this standard, for example, the unjustified refusal of a condemnor to discuss possible modifications in the terms of a formal offer that meets the letter of Section 203 might be deemed a failure of "good faith." On the other hand, use of the terms, "substantial compliance" and "reasonable efforts," provides latitude for a court to determine that an offer supported by informal negotiations, but not strictly in conformity with the policies declared in Sections 202 and 203, may, nonetheless, be sufficient. See Section 508. The ultimate question of compliance is one of fact, depending on the circumstances of the case. See also, as to waiver or excuse, Section 308. This section thus provides an incentive to condemnors to develop offer-to-purchase procedures that clearly meet or exceed the minimum standards of Sections 202 and 203, and are not mere routine administrative formalities.

§ 307. [Scope of Efforts to Purchase]

(a) In attempting to acquire the property by purchase under Section 306, the condemnor, acting within

the scope of its powers and to the extent not otherwise forbidden by law, may negotiate and contract with respect to:

- (1) any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;
- (2) the extent or nature of the property interest to be acquired;
- (3) the quantity, location, or boundary of the property;
- (4) the acquisition, removal, relocation, or disposition of improvements upon the property and of personal property not sought to be taken;
- (5) the date of proposed entry and physical dispossession;
- (6) the time and method of payment of agreed compensation or other amounts authorized by law; and
- (7) any other terms or conditions conducive to acquisition of the property by agreement.

(b) This section does not authorize a condemnor to enter into a contract in violation of law or in excess of its authority.

COMMENT

Section 307 authorized public and private condemnors to engage in broadly defined purchase negotiations, restricted only by the scope of their lawful powers. In the absence of this authorization, doubts as to specific authority to negotiate on the matters here designated, and to contract with respect to them, might reduce the practical effectiveness of the "good faith effort" rule of Section 306. On the other hand, Subsection (b) precludes any contract in excess of existing powers or contrary to any limitations imposed by law.

Nothing in Section 307 requires a condemnor to discuss all of the matters enumerated in paragraph (a) or to reach agreement on any of them. This section merely authorizes negotiations to proceed along the broad lines contemplated by the "good faith effort" rule, to the extent that such negotiations are reasonable under the circumstances. A refusal or failure to agree on any of the matters discussed is not, per se, evidence of lack of good faith.

§ 308. [Purchase Efforts Waived or Excused]

A condemnor's failure or inability substantially to comply with Section 306 does not bar the maintenance of a condemnation action, notwithstanding timely objection, if:

- (1) compliance is waived by written agreement between the property owner and the condemnor;
- (2) one or more of the owners of the property is unknown, cannot with reasonable diligence be contacted,

is incapable of contracting and has no legal representative, or owns an interest which cannot be acquired by contract;

(3) due to conditions not caused by or under the control of the condemnor, there is a compelling need to avoid the delay in commencing the action which compliance would require;

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

(5) noncompliance is excused in whole or in part by order of the court under Section 508.

COMMENT

Section 308 provides an "escape" from what might otherwise be an unduly rigorous application of the requirement in Section 306 that the condemnor undertake good faith efforts to purchase before commencing a condemnation action. This section makes it clear that the requirement is not jurisdictional, but is a waivable procedural prerequisite to suit. See also, Section 502(c).

Paragraph (1) recognizes the possibility of waiver by agreement. This might occur, for example, where preliminary informal discussions disclose the unlikelihood of a meeting of the minds on purchase terms, or where the owner, under Section 208, insists upon a condemnation suit to determine the just compensation for an uneconomic remnant.

Paragraph (2) excuses compliance in cases where it would be legally impracticable or impossible to acquire the property by purchase.

Paragraph (3) permits the condemnor to avoid compliance in order to prevent unacceptable delay in the filing of the contemplated condemnation action. When an excuse under paragraph (3) is advanced, the condemnor would be under the burden of showing, to the court's satisfaction, not only the factual sufficiency and bona fides of the claimed "compelling need" to avoid delay, but also such related matters as the degree of diligence it has exercised, and the practical effect of strict compliance upon program commitments and budgetary allocations beyond the condemnor's control.

Paragraph (4) excuses compliance when prior circumstances (e.g., a confused title situation; known dispute as to the condemnor's right to condemn the property; adamant insistence upon an exorbitant price repeatedly demanded by the property owner) reasonably convince the condemnor that a purchase-offer and related negotiations would be a useless formality. The test under this paragraph is not the fact of improbability that the offer would be accepted but the reasonableness of the condemnor's belief to that effect.

Paragraph (5) recognizes the court's power under Section 508 to grant relief from the usual consequences of noncompliance, upon a proper showing.

§ 309. [Condemnation Authorization]

[Alternative A]

(a) A condemnor [other than a natural person] may not commence a condemnation action until it has first adopted a written resolution in substantial conformity with Section 310, authorizing commencement and prosecution of the action.

[Alternative B]

[(a) A condemnor [other than a natural person] may not commence a condemnation action until it has first adopted an order, ordinance, resolution or other written statement required or permitted by law constituting a formal authorization for commencement and prosecution of the action. In addition to other legal requirements, the condemnation authorization shall include or be accompanied by the condemnor's determination of the matters designated in Section 310.]

(b) The authorization may be amended or rescinded at any time before or after the commencement of the condemnation action.

COMMENT

Section 309(a) is presented in alternative versions. Both versions, as drafted, apply to public entities and private corporations vested with the power of eminent domain. The bracketed words should be used if natural persons are authorized to exercise eminent domain power under the law of the adopting state, since the purpose of the section does not apply in such cases.

Alternative A contemplates a uniform practice calling for adoption of a formal resolution. Accordingly, where inconsistent statutory requirements, prescribing other methods by which condemnors may authorize a taking by eminent domain, are repealed concurrently, this version would be appropriate. Alternative B is for use when retention of other authorized forms for official authorization is contemplated.

This section (in both versions) requires that a formal determination to invoke the power of eminent domain be taken by a condemning corporation or public entity, conforming to the requirements of Section 310, before a condemnation action is commenced. The requirement has several purposes: (a) to assure that a considered decision to exercise the power of eminent domain is made by responsible officers of the condemnor; (b) to provide a clear record of the condemnor's determination to maintain the condemnation action and to commit the necessary resources (including the amount of just compensation expected to be awarded) to take the subject property; and (c) to establish an evidentiary basis for certain determinations of law and fact which are essential to an exercise of eminent domain power. See Section 311. The identity of the person, board, or other body authorized to adopt or amend the required authorization is determined by the applicable legislation governing the condemnor and its powers.

While this section makes the adoption of the required condemnation authorization a prerequisite to maintenance of a condemnation action, defects or omissions in the authorization may be cured by amendment. See Section 508(a)(2). Moreover, a failure to comply with this section is waived unless defendant pleads the defect as a preliminary objection in the answer. See Section 502(c).

§ 310. [Contents of Authorization]

(a) In addition to other requirements imposed by law, the condemnation authorization required by Section 309 shall include:

(1) a general statement of the proposed public use for which the property is to be taken and a reference to the specific statute that authorizes the taking of the property by the condemnor;

(2) a description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification; and

(3) a declaration that:

(i) the proposed use is required by public convenience and necessity; and

(ii) a taking of the described property is necessary and appropriate for the proposed public use.

(b) If possession of the property is to be taken before judgment, the authorization also shall direct designated officers or agents of the condemnor to take appropriate action in anticipation of, and to invoke procedures authorized by law for, obtaining early possession of the property.

(c) This section does not affect the determination of priorities between public uses.

COMMENT

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

The requirements here set out are not exclusive. Additional conditions may be established by other statutes, including, for example, the making of proper fiscal arrangements or appropriations, the promulgation of an environmental impact statement, adoption of a relocation program, or obtaining the concurrent approval of designated public agencies. Moreover, this section does not affect the determination of "more necessary public use," which may be required by statutes governing condemnation of property already dedicated to public use. See Subsection (c). This section does not replace other requirements of this kind, but is cumulative with them.

Subsection (a)(1) requires a statement of the public use for which the property is to be taken, and of the condemnor's authority to take it. These recitals are intended to facilitate a determination by the condemnee as to whether the condemnor is acting within its lawful power of eminent domain. The question whether a particular use is a "public use" is left to determination under state law.

Subsection (a)(2) calls for a general description of the property sought, but does not require a full legal description as long as the property can be reasonably identified by the condemnee. A complete legal description is not regarded as essential at this preliminary stage of the proceedings and may not be available.

Subsection (a)(3) is designed to focus the attention of the responsible officers of the condemnor upon the fundamental policy determinations subsumed by a decision to exercise the power of eminent domain. Under clause (i), the determination of "public convenience and necessity" should include consideration of all matters

that may be relevant to the general public good, including but not limited to environmental, aesthetic, economic, and social factors. Clause (ii) contemplates a determination of two aspects of the decision to take: first, that the particular interest sought to be taken is necessary for the proposed public use, and second, that the property is reasonably adaptable or suitable ("appropriate") for the particular use contemplated. Absolute necessity or indispensability are not required.

Subsection (b) requires a formal official direction for use of "quick-take" procedures where early possession of the property is desired. A taking of possession before judgment is regarded as a sufficiently important policy decision that it should be formally included in the condemnation authorization and not left to administrative discretion.

§ 311. [Effect of Condemnation Authorization]

(a) Except as otherwise provided by law and in this section, a sufficient condemnation authorization conclusively establishes the matters referred to in Section 310(a)(3) if adopted by:

(1) a public entity; or

(2) a condemnor with respect to a project authorized by a legislative or administrative body of a public entity having authority to review the matters referred to in Section 310(a)(3).

(b) A condemnation authorization creates a [rebuttable] presumption that the matters referred to in Section 310(a)(3) are true if (1) it is not conclusive under subsection (a); (2) it was adopted or last amended more than six months before commencement of the action to which it relates; or (3) the condemnor is a local public entity and the property described in its condemnation authorization is not located entirely within its territorial boundaries. This presumption is one affecting the burden of proof.

(c) A condemnation authorization has no effect to the extent that its adoption or contents were influenced or affected by fraud, corruption, bad faith, or gross abuse of discretion.

COMMENT

Section 311 describes the effect of a condemnation authorization.

Subsection (a) states the general rule that a public entity's authorization conclusively establishes the matters recited pursuant to Section 310(a)(3): public convenience and necessity for the project; and that the property is necessary and appropriate for the project. The same conclusive effect is extended to resolutions by private condemnors respecting projects that have been officially approved by an authorized public entity.

The authorization, however, is not conclusive in the following circumstances:

First, under Subsection (a), the rule of conclusive effect does not apply to cases in which it is "otherwise provided by law and in this section." Inclusion of other "law" recognizes that in special circumstances (e.g., condemnation by certain special districts or other public entities) the legislature may wish to give the

condemnation authorization less than conclusive effect.

Second, under Subsection (a), the authorization must be "sufficient" under Section 310 with respect to its contents.

Third, under Subsections (a)(2) and (b)(1), the authorization is only presumptively true if the condemnor is a private corporation, and the project has not been approved by an authorized governmental agency (e.g., a regulatory agency).

Fourth, under Subsection (b)(2), the authorization is only presumptively true if it is more than six months old, thereby casting doubt upon its reliability as a reflection of present circumstances and related political judgments as to public use and necessity. See Section 403.

Fifth, under Subsection (b)(3), the authorization has only presumptive effect if the property in question lies partly or wholly outside the boundaries of the local public entity seeking to condemn it. Under these circumstances, the decision to take the property may affect owners and territory for which the governing body has no direct political accountability. As a practical matter this qualification affects only those local public entities which have power to condemn extra-territorial property. It does not apply to takings by the state or other agencies with state-wide jurisdiction, nor by private condemnors.

Sixth, under Subsection (c), the authorization is vitiated by fraud, corruption, bad faith, or gross abuse of discretion. Where one of these factors is established, the resolution may still be given partial effect; it is declared of no force or effect only "to the extent" that its adoption, contents, or declarations were influenced or affected thereby.

A resolution with conclusive effect under Subsection (a) of this section only precludes judicial review of the matters designated in Section 310(a)(3). It does not affect a condemnee's right to plead objections to the taking upon other grounds. For example, a condemnee could still contend that the condemnor was acting ultra vires, that the taking was not for an authorized public use, that the property was exempt from being taken, or that other specific statutory requirements applicable to the proposed taking or to the institution of the particular project had not been met.

The description of the presumption referred to in subsection (b) as a "rebuttable" one may not be strictly necessary in some states, where presumptions are uniformly regarded as sufficient to create a prima facie case that can only be overthrown by a preponderance of evidence to the contrary. In order to avoid any doubt on the matter, however, the presumption has been here described as "rebuttable" and the last sentence of subsection (b) has been added, declaring that the burden of proof (as distinguished from the mere burden of production of contrary evidence) is intended to be affected. See Section 507 (burden of proof upon preliminary objections is upon the plaintiff, except that burden of overcoming presumption established by Section 311(b) is shifted to defendant).

ARTICLE IV

COMMENCEMENT OF ACTION BY CONDEMNOR

Section

- 401. [Procedure Generally].
- 402. [Commencement of Condemnation Action; Venue].
- 403. [Time for Commencement of Condemnation Action].
- 404. [Contents of Complaint].
- 405. [Consolidation and Separation of Properties and Issues].
- 406. [Service of Process].
- 407. [Recording Notice of Pending Action].

PREFATORY COMMENT

This Article provides certain special procedures related to the commencement of an eminent domain action. Only provisions which are uniquely responsive to the peculiar character of condemnation litigation are included. All other procedural aspects of the action are governed by state law, as in other civil actions. See Section 401. In states where procedural law is promulgated primarily by rules of court, many if not all of these provisions may be required to be redrafted in appropriate form for adoption as court rules.

§ 401. [Procedure Generally]

The procedure for the condemnation of property under the power of eminent domain is governed by the [Code] [Rules] of Civil Procedure except as otherwise provided in this Code.

COMMENT

Section 401 makes the general provisions for procedure and practice in the adopting state applicable to condemnation actions, except to the extent that inconsistent provisions are included in this Code. The special procedural provisions of the Code are designed to facilitate the determination of eminent domain actions in respects that differ materially from other civil litigation, and therefore should prevail over general legal provisions relating to these matters.

Appropriate references should be inserted, upon adoption, where the brackets appear. Consideration should also be given to the advisability of amending the state's code or rules of civil procedure to eliminate conflicts with this act and to include therein an express reference to the fact that the special procedural provisions of this Code apply in eminent domain actions.

§ 402. [Commencement of Condemnation Action; Venue]

A condemnation action is commenced by filing a complaint for condemnation with the [] court in the county in which the property or any part thereof sought to be taken is located. The court in which the action is commenced is the proper court for trial of the action, but the place of trial may be changed as in other

civil actions.]

COMMENT

The Uniform Code treats eminent domain proceedings as a form of civil action. Accordingly, a formal eminent domain action is referred to as a "condemnation action," and the initiating document as a "complaint." As to the form and contents of the complaint, see Section 404.

Section 402 is bracketed, since it may not be strictly necessary in those states where civil actions generally are commenced by filing the complaint and appropriate venue rules are applicable. Even in those states, however, this section may serve a useful purpose in clarifying the relevant terminology for condemnation actions.

§ 403. [Time for Commencement of Condemnation Action]

A condemnor must commence a condemnation action within [six] months after the date of adoption of the original or amended condemnation authorization upon which it relies for the taking of the property, but not later than [three] months after negotiations for the purchase of the property have terminated.

COMMENT

Section 403 requires a condemnation action to be commenced within a relatively short period of time after (1) the adoption of the condemnation authorization required by Section 309, or (2) the breakdown of the purchase negotiations contemplated by Section 306. The date on which these events occur is treated as a question of fact, and the time limits for suit are bracketed to indicate that appropriate limits consistent with local practice should be inserted.

A prolonged delay in the initiation of the action, following the required preliminary steps, may create avoidable uncertainties and personal anxieties for a property owner, as well as cause a diminution in the profitability of his property. In addition, the passage of considerable time following the adoption by a condemnor of a formal condemnation authorization (as required by Sections 309 to 310) could cloud the reliability of its determinations expressed therein. The requirement of expeditious initiation of the action provides a measure of assurance that the factual basis for the authorization is reasonably current.

The time limits here suggested are not true statutes of limitations, since the condemnor is, and in principle should be, free to initiate a condemnation action at any time. Failure to file within the prescribed period thus does not bar the action. Instead, the Code discourages delay by denying conclusive evidentiary effect to the condemnor's condemnation authorization. See Section 311(d). In addition, a failure to meet the time limits prescribed in this section may, on timely pleading of an objection by the defendant, be the basis for imposition of sanctions under Section 508.

The time requirements of this section should not be unduly burdensome. If unforeseen circumstances (e.g., a curtailment of available funds; engineering modifications requiring a change in the size of the project; unanticipated postponements in the scheduling of contemplated work, etc.) require a delay beyond the period prescribed in this section, the condemnation resolution can be amended or a new one adopted. See Section 309. In appropriate cases, a reopening of purchase negotiations would also start a new period running for initiation

of the action.

§ 404. [Contents of Complaint]

(a) In addition to other allegations required or permitted by law, the complaint shall:

(1) designate as a plaintiff each person on whose behalf the property is sought to be taken;

(2) name as defendants all persons who to the plaintiff's knowledge are owners of or who have or claim any interest in the property sought to be taken; defendants whose names are not known may be included under the designation "unknown claimants";

(3) contain a legal description of the property and of the interest therein sought to be taken;
and

(4) allege the basis of the plaintiff's right to take the property by eminent domain and maintain the action, including (i) a reference to the plaintiff's legal authority to take the property; and (ii) a statement of the purpose for which the property is sought to be taken.

(b) If a plaintiff claims any interest in the property sought to be taken or that the property is devoted to a public use, the complaint must describe that interest or public use.

(c) For purposes of information and notice, the complaint shall be accompanied by a map or diagram portraying as far as practicable the property sought to be taken and the property that will be affected by the taking, showing their location in relation to the project for which the property is to be taken.

COMMENT

Section 404 describes the essential minimum contents of the complaint in a condemnation action. A complaint that does not contain all of the elements provided in this section is subject to preliminary objection. See Section 502. Allegations not required by Section 404 (e.g., market value; necessity for the taking) may, but need not, be made.

Under Subsection (a)(1), each condemnor must be identified, since this information may be relevant to the issue of the right to exercise the power of eminent domain. For example, if a joint and cooperative condemnation action is brought by agreement between different agencies, each condemnor must be named as a plaintiff. Similarly, a condemnor taking property to convey it to a specific private developer, in furtherance of an authorized community redevelopment project, must designate the person for whose benefit the plaintiff is condemning the property.

Under Subsection (a)(2), the complaint is required to name as defendants all persons who are known or believed to be owners of or to have or claim any interest, including a lien or other security interest, in the property sought to be taken by the condemnor. Under this rule, it would not be necessary to join a lessee if the plaintiff seeks to take the property "subject to" the lease, for the lessee's interest would not be described in the complaint as property sought to be taken. Since persons who have an interest in the property, but who are not named and

served with process either personally or constructively, ordinarily are not bound by the judgment, this rule permits the condemnor to secure full title without collateral litigation.

Subsection (a)(3) requires a "legal" description of the property sought to be taken. Present practice in this regard varies from state to state; the Code seeks to provide a uniform rule of accurate description as a means for giving the defendants notice of the scope of the take. In this respect, notice through the pleadings is deemed more efficient than to rely on discovery, as in other civil litigation. The complaint is not required to describe the interest which each defendant has or claims in the property; specification of the defendants' individual interests is a matter for their several responses. The complaint is sufficient if it merely alleges that each defendant has or claims to have some interest in the property described.

Clauses (i) and (ii) of Subsection (a)(4) require allegations of legal authority and purpose in order to show the plaintiff's right to take. Since there may be many different statutory provisions of varying scope that relate to the right to take, specification of the source of authority and public use claimed by the condemnor should assist in reducing the number of unnecessary challenges to the right to take by clarifying that issue from the inception of the action. Compare Section 310(a) (similar requirement for condemnation authorization).

Subsection (b) is intended to provide notice of any claim by the condemnor of an existing interest in the property, and of any issue of "higher public use" arising from the fact that the property sought to be taken is already devoted to public use.

Subsection (c), requiring a map or diagram to be annexed to the complaint, is designed for informational assistance only. Practice currently varies in this regard, with some states requiring a map, others making no such requirement, and still others requiring a map to be filed and made available for examination to interested parties. Since a well prepared map may explain graphically and give better notice than a legal description of the property which the plaintiff seeks to take, or which may be affected by the taking, its attachment to the complaint is required. The map or diagram, however, need only attempt to portray the property sought to be taken "as far as practicable" thereby recognizing that certain interests, such as mineral or water rights, air rights, or development easements, may not be capable of fully accurate representation by cartographic means. The map or diagram, as part of the complaint, is subject to amendment as are other pleadings; and it may constitute an admission of the plaintiff to the same extent as other parts of the complaint.

This section does not prescribe an explicit rule for designating condemnees whose interests may be affected by death, pendency of probate proceedings, or other analogous circumstances. The determination of who should be named as a defendant in an action affecting the property of a decedent, or property under guardianship, conservatorship, or included within a trust, should be conformed to the requirements of acceptable title practice in the state where the action is pending. The appointment of a guardian or other representative for a minor, an incompetent person, or some other similarly situated condemnee, is also left to local practice and procedure.

§ 405. [Consolidation and Separation of Properties and Issues]

[(a)] The plaintiff may include in the complaint in a condemnation action, to the extent permitted by the law of venue, only properties under substantially identical ownership that are sought to be taken.

[(b)] Upon noticed motion, the court may order the consolidation of two or more condemnation actions

pending in that court if it finds that (1) all defendants in the actions have consented to the proposed consolidation or, after notice, have failed to object thereto, or (2) consolidation would promote the interests of justice and the economical resolution of similar or related issues of law or fact in the actions, but would not significantly prejudice rights of any party or significantly increase the expenses of any defendant.]

[(c) Upon noticed motion, the court may order a separation of condemnation actions previously consolidated, or may direct that designated issues, or issues relating to designated property, be tried and determined in the action before other issues, or issues relating to other property, are tried.]

COMMENT

Section 405 provides basic rules relating to the inclusion of properties in condemnation actions and the consolidation and separation of actions or issues. Since the adopting state may have appropriate provisions governing these matters in existing law, Subsections (b) and (c) are bracketed as optional and to underscore the need to assure the adaptability of the existing provisions.

Subsection (a) requires the joinder, subject to the applicable law of venue, of all properties that are under substantially the same ownership. Contiguity of boundaries, however, is not required. The term, "substantially identical ownership," is intended to induce a joinder of properties notwithstanding minor variations in the status of their respective titles. The purpose of this requirement is to assure fairness to property owners and to promote ease and simplicity in management of the litigation.

Subsection (b) gives the court flexible authority, upon motion by any party, to consolidate any two or more pending condemnation actions, if all defendants consent or fail to object, or if the court makes specified findings in support of its order. Consolidation of actions, for example, might be appropriate as to adjoining or nearby parcels involving similar valuation issues but different owners. See also, Section 506 (consolidated hearing on preliminary objections).

Subsection (c) permits a separation of previously consolidated actions, or a separation of issues for purposes of trial, on motion of any party. For example, such an order might be proper if the joined parcels are in widely separated places or pose quite dissimilar issues of valuation. The procedure for exercising the authority here conferred is left to the general practice in the adopting state.

§ 406. [Service of Process]

(a) Except as provided in subsection (b), the summons together with a copy of the complaint shall be served upon each defendant in the manner provided for personal service under the [Rules] [Code] of Civil Procedure.

(b) If service cannot be made under subsection (a), the defendant shall be served with process by any method reasonably calculated to give the defendant actual notice and afford him an opportunity to be heard.]

COMMENT

Section 406 is an optional section prescribing the method for serving process in the condemnation action.

Each defendant named in the complaint must be served under this section in order for the court to obtain jurisdiction to render a judgment binding him. The form of the summons is left to state law.

The primary requirement in Subsection (a) that process be served in the manner required by state law for personal service is intended to avoid an objection that due process standards for giving notice, as articulated by the Supreme Court, have not been met. See *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 255 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956). The expression, "personal service," as used in this section is intended to have the meaning understood for that term under the law of the adopting state.

Subsection (b) authorizes use of any reasonable method for serving process that satisfies constitutional standards, if the primary requirement of in personam service within the state is not feasible. In some instances, registered or certified mail to the defendant's last known address may be appropriate. See *Walker v. City of Hutchinson*, supra. A defendant whose address is unknown and cannot be ascertained by due diligence could presumably be served by publication accompanied by a posting of the summons and complaint upon the property to be taken. See *Schroeder v. City of New York*, supra. The method to be used is left to the court's sound discretion in light of the circumstances, subject to the state's Code or Rules of Civil Procedure, and to the requirement that it be "reasonably calculated to give the defendant actual notice and an opportunity to be heard." The quoted words are a paraphrase of the Supreme Court's Due Process language in *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865, quoted approvingly in *Schroeder v. City of New York*, 371 U.S. 208, 211, 83 S.Ct. 279, 9 L.Ed.2d 255, and do not require a showing that actual notice was received by the defendant but only that the method employed was one that ordinarily would be likely to give actual notice.

§ 407. [Recording Notice of Pending Action]

(a) After commencement of a condemnation action, the plaintiff shall cause a notice of the pendency of the proceedings to be recorded in the office of the [recorder] in each county in which any real property described in the complaint is located.

(b) The notice shall contain:

(1) the title of the action and the court, docket number, and date of filing of the complaint;

(2) a legal description of the real property sought to be taken as described in the complaint;

and

(3) the name of each plaintiff and each defendant designated in the complaint.

(c) The notice shall be filed for record and indexed in the same manner as a notice of lis pendens in other cases.

(d) If after the filing of a notice the complaint in the action is amended to enlarge the quantity of, or nature of the interest in, the real property to be taken, or to add or substitute parties, the plaintiff shall cause a supplemental notice to be recorded in conformity with this section.

(e) Upon entry of a judgment of dismissal, any party may cause a notice of the dismissal to be recorded in the same office.

(f) A recorded notice of the pendency of a condemnation action under this section constitutes notice to purchasers and encumbrancers of the described property to the same extent as like notices of pending litigation in other cases relating to real property.]

COMMENT

Section 407 is included, in brackets, as an optional provision for adoption in states where existing lis pendens statutes are inadequate or not applicable. It provides for constructive notice of the pendency, amendment, and dismissal of a condemnation action through recordation of a written statement. The exact place of recordation and method of indexing is left to local practice. See Subsection (c).

Recordation by the plaintiff of a notice of lis pendens is mandatory. Subsection (a). The plaintiff also has a duty to file a supplemental notice if the complaint is amended to increase the scope of the taking. Subsection (d). A failure to file an original or supplemental notice, however, only affects the extent to which third persons obtain constructive notice; it does not impair the plaintiff's rights to take the property or to maintain the condemnation action. See Subsection (f).

ARTICLE V

DEFENDANT'S RESPONSE

Section

- 501. [Required Response].
- 502. [Answer].
- 503. [Disclaimer].
- 504. [Rights After Default].
- 505. [Additional Pleadings].
- 506. [Hearing on Preliminary Objections].
- 507. [Burden of Proof at Hearing on Objections].
- 508. [Disposition of Defendant's Objections].

PREFATORY COMMENT

Under the approach to the defendant's responsive pleadings adopted in this Article, all objections to the sufficiency of the complaint and defenses to the condemnation action (as distinguished from claims to greater compensation) must be included in a timely answer. Neither a demurrer nor a motion may be used for these purposes. However, all preliminary objections and defenses pleaded in the answer must be heard and decided prior to trial on the question of the amount of compensation. Section 506.

To avoid default, the defendant must timely file either an answer, or a disclaimer of any interest in the action, within the response period allowed by state law. Section 501. A disclaimer, however, may subsequently be filed at any time, even after the defendant's default has been entered. See Section 503(b). Thus, the scheme of the Code contemplates three procedural postures for a defendant:

(1) The defendant may answer and thereby raise and litigate any permissible issues of law or fact. See Section 502. A failure to plead objections and defenses to the taking abandons them, but maintains the defendant as a party in the action who may introduce proof at the trial with respect to the scope and extent of his claimed property interest and the amount of compensation to be paid for it.

(2) The defendant may file a disclaimer. This removes him as a party to the action for all purposes, and he is not entitled to share in the award. See Section 503(c).

(3) The defendant may default by making no response within the time allowed. Section 504. After default, the defendant is still entitled to specified notices including notices of amendments to the complaint that may affect his rights and thereby open the default to permit an answer to be filed. A defendant in default may not introduce evidence at the trial, except by leave of the court on timely application under available procedural provisions of state law relating to the setting aside of defaults. In effect, unless it is opened or vacated to permit the filing of an answer, the default waives all objections and defenses to the taking. A defaulting defendant, however, is entitled to share in the award of compensation to the extent of his interest, and the plaintiff must prove the amount of such compensation, unless a disclaimer is filed.

§ 501. [Required Response]

The defendant's response shall consist of an answer, which must include any counterclaim or cross-complaint under Section 505, or a disclaimer of any interest in the action.

COMMENT

Under Section 501, the defendant's response to the complaint must be filed within the period allowed by the law of the adopting state for such responses in other civil actions. See Section 401. To the extent authorized by state practice, the time for response may be extended by stipulation, court order, or operation of law.

This section designates the only forms of response that are permitted. No pleading or motion other than an answer (see Section 502) or a disclaimer (see Section 503) may be filed by way of response. The response must be served on other parties in accordance with the procedural rules of the adopting state.

§ 502. [Answer]

(a) In addition to other matters required or permitted by law, a defendant shall state in his answer:

(1) the nature and extent of the interest claimed by him in the property sought to be taken;
and

(2) the nature of and basis for any preliminary objections.

(b) The preliminary objections must include any available ground for objecting to the maintenance of the action, including the grounds that:

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

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

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

(c) Subject to the power of the court to permit an amendment to the answer, the defendant waives (1) any ground of objection not fairly set forth in his answer, and (2) any interest in or compensation for any property sought to be taken in the action, except for his property as described or not controverted in the answer.

COMMENT

Section 502 prescribes the contents of the answer. See also, Section 505(b) (answer must include compulsory counterclaim, if any exists).

While the answer must "state" the "nature and extent" of the defendant's claimed interest in the property

sought to be taken, it need not contain a "legal description" of that interest; a general description adequate for identification is sufficient. However, all preliminary objections which the defendant wishes to assert must be pleaded in the answer. The objections need not be consistent with one another, and any objections not set forth are waived. The answer is the only pleading by which the defendant may assert that the condemnation action is unauthorized or has been defectively prosecuted. Section 501 precludes assertion of objections or defenses by way of motion or demurrer as in other kinds of civil actions.

As in the case of civil actions generally, well-pleaded allegations in the complaint that are not controverted in the answer are deemed admitted. Accordingly, by merely filing a simple answer describing his property interest or not controverting the description of his property in the complaint, but making no other claims or objections, the defendant may use the answer as a means of making an appearance that will preclude default.

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

The procedures for determining preliminary objections are provided in Sections 506 to 508.

§ 503. [Disclaimer]

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

(b) A disclaimer may be filed at any time, whether or not the defendant is in default, and supersedes any answer previously filed by him.

(c) Subject to subsection (d), a defendant who has filed a disclaimer has no right to notice of, or to participate in, any further proceedings, or to share in any award of compensation or damages.

(d) The court may implement the disclaimer by appropriate orders, including if justified an award of costs and litigation expenses.

COMMENT

Section 503 provides a simplified method for a defendant to disclaim any interest in the property or award of compensation involved in the action. Upon enactment, the adopting state should consider whether it would be advisable to provide that no filing fee need be paid to file a disclaimer (if such a fee would otherwise be required), in order to facilitate the purposes of this section.

Under Subsection (a), the disclaimer may be an informal document which merely states that the defendant claims no interest in either the property or the award. A defendant wishing to make only a partial disclaimer may do so by filing an answer describing only the limited interest claimed by him. See Section 502(a). In states where it would be deemed improper for an attorney to waive the rights of his client, the bracketed words in subsection (a) should be omitted.

Subsection (b) permits a disclaimer to be filed "at any time," even after an answer has been filed, or after the disclaiming defendant's right to respond has been terminated by his default. See Section 504(3). The disclaimer supersedes any earlier response.

The disclaimer, in effect, removes the disclaiming defendant from the action, and may result in a dismissal as to him. See Subsection (c) and (d). The power to implement a disclaimer, as provided in Subsection (d), is intended to assure that the court has full authority to enter a dismissal, with award of costs and litigation expenses (see Section 1303) where appropriate, or to enter other implementing orders calculated to facilitate use of the disclaimer as an aid to settlement. Adequate flexibility in this regard may be particularly useful, for example, in disposing of claims having relatively slight value.

§ 504. [Rights After Default]

A defendant whose [right to respond has been terminated by default] [default has been entered]:

(1) is entitled to notice of and the right to respond to any supplemental or amended complaint filed by the plaintiff, unless the court in the order authorizing the filing of the supplemental or amended complaint determines that the rights of the defaulted defendant will not be affected thereby and that notice need not be given;

(2) is entitled to notice under Section 1208 of his right to receive a share of the award; and

(3) may file at any time a disclaimer under Section 503.

COMMENT

Section 504 describes the special consequences of a defendant's default, due to failure to file a timely response, in a condemnation action. While like matters are presumably covered by procedural provisions relating to civil actions generally, the unique procedural features of condemnation procedure make it advisable to provide explicitly for these consequences of default. For example, a defaulting defendant in a condemnation action is entitled to share in the award of just compensation in the action, and thus should receive notices appropriate to the protection of that interest.

When the defendant's right to respond has been terminated by entry of default (or other mechanism employed in the adopting state's civil procedure for this purpose), the defendant is deemed to have waived by

operation of law all objections and defenses that he could otherwise have asserted. However, the plaintiff must still prove the amount of compensation that should be awarded to the defaulting defendant.

Unlike other civil actions, however, a defendant in default is still a party to the condemnation action for certain purposes. First, he is entitled to notice of, and to file an answer to, any amendments to the complaint, unless the court specifically orders to the contrary because the amendment does not affect his rights. For example, a defendant might elect to default if the complaint sought only to take a small portion of his property for a highway easement; but an amendment that enlarged the scope of the "take" to include a major portion of the premises could reasonably provoke an entirely different response. An opening of the default to give the defendant an opportunity to respond to amended pleadings of this kind is essential to ensure fairness. Second, a defendant in default is entitled to notice of his right to receive his proportionate share of the compensation awarded. See Section 1208. Third, he may still file a disclaimer under Section 503. Since disclaimers remove the defendant from the action for all purposes, they are encouraged by the Code in the interest of reducing litigation and simplifying the issues.

§ 505. [Additional Pleadings]

(a) Except as provided in subsections (b) and (c), the plaintiff may not file a reply or other pleading responsive to an answer. New matter alleged in an answer is deemed denied.

(b) The defendant shall assert by way of [counterclaim] [cross-complaint] all claims he has against the plaintiff relating to the property sought to be taken in the action. Any claim not so pleaded is forever barred. The [counterclaim] [cross-complaint] and pleadings responsive thereto shall conform to the [Code] [Rules] of Civil Procedure.

(c) The court on noticed motion and for good cause may permit a defendant to assert by way of [cross-claim] [third-party claim] [cross-complaint] any claim he has against another defendant, or against any person not a party to the action, relating to the property sought to be taken. The pleading and pleadings responsive thereto shall conform to the [Code] [Rules] of Civil Procedure.]

COMMENT

Section 505 is bracketed as an optional section for consideration by adopting states. By superseding other procedural rules of state law (see Section 401), it is intended to prevent a condemnation action from becoming unduly complex or unnecessarily delayed through the routine filing of additional pleadings, including non-compulsory cross-demands, that would otherwise be proper.

The need to file a compulsory counterclaim (or cross-complaint, depending on the proper terminology in the adopting state) under Subsection (b), should not arise very often, since the normal issues of just compensation and conflicting property claims can usually be effectively litigated without additional pleadings. On the other hand, a compulsory counterclaim, such as a claim for damages caused by the condemnor's entry for suitability studies (see Section 305), may, in some cases, be necessary to a complete disposition of the respective rights of the parties.

Third-party pleadings, which may be filed under Subsection (c) only with leave of court, may sometimes

be appropriate to assert claims for relief relating to the subject property but based on facts extrinsic to the condemnation action. For example, a defendant property-owner might have a claim for damages for trespass against a third person, or a claim against a co-defendant based on circumstances that affect the value or use of the subject property.

This section does not provide for amendments to pleadings, but leaves the procedure for amending or supplementing the pleadings to be handled under applicable rules of civil procedure. But see Section 601(d) (deposit may be modified as a condition of leave to amend).

§ 506. [Hearing on Preliminary Objections]

Preliminary objections shall be heard and determined [by the court] on the court's own motion, or on noticed motion by a party, before final determination of the amount of just compensation. The court may consolidate for hearing all preliminary objections asserted in separate actions pending in that court to take properties for the same use.

COMMENT

Section 506 provides for the hearing and determination of defendant's preliminary objections. See Section 502. No time limits for the hearing are provided, except that it must precede the final determination of the issue of just compensation. It is assumed that all of the objections pleaded will ordinarily be made the subject of a single hearing, although nothing in the section specifically so requires. If one party notices a hearing on only part of the issues, the court, on its own motion or on motion of the adverse party, may require the rest to be heard at the same time and place, subject, if need be, to a continuance of the date originally set. In appropriate cases, the court may order a consolidated hearing on such objections in related actions.

Nothing in this section directly affects the right to pursue discovery proceedings. Discovery, of course, may be an important prelude to resolution of fact issues raised by one or more objections pleaded in the answer.

This section assumes that the court has ample authority, either as part of its inherent powers to control its own proceedings or by affirmative delegation in procedural rules or statutes, to regulate the order of presentation of the objections and, where factual issues are present, the nature of the evidence (e.g., oral testimony or affidavits) that may be adduced at the hearing.

It is further assumed that a determination of all objections properly pleaded in the answer may constitutionally be made by the court without a jury. If this assumption is unwarranted under the law of the adopting state, the bracketed words should be deleted.

§ 507. [Burden of Proof at Hearing on Objections]

[(a) Except as provided in Section 311 and Subsection (b), the plaintiff has the burden of proof on all issues of fact raised in connection with a preliminary objection.]

[(b)] If in support of a preliminary objection a defendant alleges fraud, corruption, bad faith, or gross abuse of discretion on the part of the plaintiff or any of its officers, agents, or employees, the defendant has the

burden of proving by clear and convincing evidence the facts relating to that particular allegation.

COMMENT

Section 507 specifies the allocation of the burden of proof on issues of fact arising in connection with the determination of defendant's preliminary objections. While the defendant has the obligation and burden to raise these objections by appropriate pleading (see Section 502(c) providing for waiver of objections not pleaded), evidence relevant to the factual issues thus asserted is likely to be more readily available to the plaintiff. Moreover, as the party that initiated the litigation seeking to take the defendant's property without his consent, it seems reasonable to require the plaintiff to bear the burden of convincing the trier of fact that it should be permitted to maintain the action. This burden, however, does not obtain as to issues for which the condemnor has the benefit of either the conclusive or rebuttable effect of recitals of public use and necessity in its condemnation authorization. See Section 311. Subsection (a) is bracketed as an optional provision that may be deleted if existing procedural law in the adopting state adequately covers the matter.

The exceptions set out in Subsection (b) are based upon collateral policies that would be subverted by placing the burden of proof upon the condemnor. For example, fraud, bad faith, corruption and abuse of discretion may be alleged in connection with an objection asserting plaintiff's failure to engage in "good faith" negotiations to purchase, as required by Section 306(a), or when a condemnation authorization is attacked as void under Section 311(c). The disfavored nature of these allegations is reflected by placing upon the defendant the burden of proving them by clear and convincing evidence. The burden is shifted, however, only as to the specified issues; thus, if the defendant successfully impeaches the condemnation authorization, but the court decides not to dismiss the action under Section 508, the burden of proving public use and necessity remains upon the plaintiff.

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

§ 508. [Disposition of Defendant's Objections]

[(a) If the court determines that a preliminary objection is meritorious, the court shall make an appropriate order including:

(1) dismissal of the action, in whole or in part, if the plaintiff is not authorized to take the property, or some part thereof, or the acts or omissions constituting the basis for the objection will necessarily inflict irreparable injury upon the defendant;

(2) conditional dismissal, in whole or in part, unless, within a specified period, the plaintiff takes corrective or remedial action prescribed in the order, including, if appropriate, the adoption of a new or amended condemnation authorization; or

(3) any other disposition required by the circumstances.]

[(b)] In addition to other requirements of an order sustaining a preliminary objection or determining that the failure or omission constituting the basis of the objection was reasonably excusable, the court in the interest of justice may require the plaintiff to pay to the defendant all or part of his litigation expenses incurred because of the plaintiff's failure or omission constituting the basis of the objection. An award of litigation expenses shall be included in the order if the court finds that the plaintiff acted or failed to act without justification.

COMMENT

Section 508(a) is an optional provision that expressly authorizes a flexible range of disposition that can be ordered by the court upon sustaining objections pleaded by the defendant. While it is probably true that the court, in most states, would have power under existing rules or codes of civil procedure to make most, if not all, of the orders here described, it may be appropriate to spell out the authority of the court in order to avoid pre-emptive or restrictive interpretation. Pleading defects, for example, would ordinarily call for a disposition similar to that in other civil actions. An objection that the plaintiff had failed to adopt a condemnation authorization (as required by Section 309) or had failed to engage in preliminary negotiations for acquisition of the property by purchase (as required by Section 306) might call for a different disposition. Under circumstances showing extreme prejudice, for example, a dismissal under Subsection (a)(1) would be possible; more often, a corrective order under Subsection (a)(2) requiring the omitted step to be taken within a specified period of time on pain of dismissal for failure to do so, would be indicated. In still other cases, the court might conclude, that the omission was excusable under Subsection (a)(3). The choice of disposition, under this section, is left to the court's sound discretion in light of all of the circumstances of the case.

Subsection (b) authorizes the court to award the defendant all or a part of his litigation expenses in conjunction with an order ruling upon an objection, where justice requires. The award is mandatory, however, if the court finds that the plaintiff acted, or failed to act, "without justification." Accordingly, the plaintiff may avoid such an award by showing that it acted reasonably and in good faith in failing to take the action in question. For example, the plaintiff may have concluded, on the basis of information available to it, that a preliminary purchase offer was not required because the case appeared to be within the provisions of Section 308.

The term "litigation expenses" as used in Subsection (b) includes reasonable costs and expenses, including attorney's fees and appraisal or engineering fees, necessarily incurred by the defendant. See the definition of this term in Section 103(14).

ARTICLE VI

DEPOSIT AND POSSESSION PRIOR TO JUDGMENT

Section

- 601. [Deposit of Appraised Value of Property].
- 602. [Notice of Deposit].
- 603. [Motion to Increase or Reduce Amount Deposited].
- 604. [Motion for Withdrawal of Deposited Funds Before Judgment].
- 605. [Determination of Application for Withdrawal; Waiver of Objections].
- 606. [Effect of Withdrawal].
- 607. [Deposit and Withdrawal Inadmissible in Evidence].
- 608. [Deposit at Interest].
- 609. [Order of Possession].
- 610. [Notice of Order of Possession].

PREFATORY COMMENT

Article VI provides for three important aspects of pre-judgment condemnation practice:

(1) Early taking of possession. Condemnors frequently have substantial need to take possession of the subject property at an early stage in the proceedings. Orderly programming and financing of improvements, with maximum savings of funds, may often be facilitated if definite schedules can be established for taking actual possession of the needed property. Undue delays can complicate both financing and contracting arrangements, and may force the condemning authority to pay more than fair market value for property in order to accelerate possession; as a result, the condemnor may pay more than necessary for the improvement, and the affected property owners may be treated unequally.

Many of these problems could be minimized if there were relative certainty as to the date on which possession can be taken; yet if actual possession must be postponed until after judgment, such certainty is unlikely to be realized. Due to the dynamics of the litigation process, it is practically impossible to predict when an action to condemn will result in a final judgment as to all of the parcels that may be required for a particular project. Accordingly, this Article provides a general procedure, applicable to all condemnation actions, by which possession prior to judgment may be taken in an orderly manner by the condemnor with full protection for the rights of property owners.

(2) Deposit of compensation before judgment. The deposit of estimated compensation by the condemnor is made a mandatory condition precedent to taking possession; this deposit is essential (and often constitutionally mandated) to protect the property owner's rights. But, in certain situations, a condemnor may find it desirable and expedient to make a deposit of the probable amount of compensation even when a taking of immediate possession is not contemplated.

For example, by making a deposit and obtaining a judicial settlement of any objections to its sufficiency before possession is required, the condemnor may expedite the actual taking of possession at a later date. In some situations, it may be advantageous to both the condemnor and the property owner to defer taking possession as

long as possible, provided possession can be quickly secured when needed. In other circumstances, the condemnor may find it desirable to make a deposit to stop the running of interest on the award (see Section 1202(b), *infra*), to establish the date of valuation (see Section 1003), or to induce the property owner, by withdrawal of the deposited funds, to relinquish his defenses to the taking of the property. See Section 606. Accordingly, this Article authorizes a deposit to be made at the condemnor's option prior to judgment, whether or not a taking of possession is immediately contemplated.

In the interest of fairness, however, the making of a deposit should not be entirely at the condemnor's option. In appropriate cases, on motion of the property owner, the condemnor should be required to make a deposit before judgment if necessary to prevent hardship. The property owner, following the commencement of the condemnation action, sometimes finds himself in a difficult financial position. As a result of the action, he will have lost significant incidents of ownership, being unable to either sell or finance the property, and sometimes finding its profitability greatly impaired. At the same time, he often is under a practical compulsion to locate and acquire substitute property, arrange to move his home or business there, and incur the costs of defending the condemnation action. While relocation assistance benefits may be of some help, they are not always equal to the fiscal need. See Article XIV. Unless the property owner can obtain funds from some source, the condemnor may be able to exert unfair bargaining leverage to induce a settlement at a figure substantially below that which the owner would receive by defending the condemnation action. Accordingly, this Article authorizes the court, on a proper showing, to compel the condemnor to make a deposit, thereby creating a fund available for withdrawal by the property owner with which the latter may meet his legal expenses and undertake to deal with the other problems resulting from the condemnation of his property.

(3) Withdrawal of compensation prior to judgment. This Article also provides a procedure by which the property owner may withdraw all or any part of the funds on deposit prior to judgment, so that they can be used for immediate fiscal needs, without prejudicing the right of the parties to litigate the question of the actual amount to be awarded for the taking. The availability of such deposited funds for withdrawal terminates the property owner's right to interest on that portion of the ultimate award. See Section 1202(b). On the other hand, actual withdrawal constitutes a waiver of all defenses to the action except a claim to greater compensation. See Section 606. In order to provide protection for the rights of other possible claimants to the funds on deposit, withdrawal may only be accomplished by securing leave of court, and is subject to judicial control. See Sections 604, 605.

§ 601. [Deposit of Appraised Value of Property]

(a) At any time before judgment, the plaintiff may deposit with the court the full amount indicated by an appraisal which the condemnor believes to be just compensation for all or a specified part of the property sought to be taken. The deposit may be made whether or not the plaintiff applies for an order of possession or intends to do so.

(b) If within [30] days after the commencement of the action the plaintiff does not make a deposit or makes a deposit covering less than all properties sought to be taken, the court after hearing on noticed motion and for good cause may order the plaintiff to make a deposit of the full amount of compensation for the property in which the moving defendant claims an interest, based upon an appraisal in accordance with subsection (a).

(c) If the plaintiff fails to comply substantially with the order for deposit within the time allowed by the order, the defendant may move to dismiss the action under Section 1301.

(d) If a deposit has previously been made under this section, the court may require an additional deposit to be made as a condition to the allowance of leave to amend the complaint to increase the amount or change the nature of the interest in the property sought to be taken.

(e) On noticed motion, or in an emergency upon ex parte application, the court may permit the plaintiff to make a deposit if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit proposed to be made is not less than the full amount of compensation the plaintiff, in good faith, estimates will be payable for the property. In its order permitting a deposit under this subsection, the court shall require a copy or written summary of the required appraisal to be served within a reasonable time, accompanied by the deposit of any additional amount of compensation shown by the appraisal.

COMMENT

Section 601(a) permits the plaintiff to make a voluntary deposit, without court authorization, of just compensation for all or part of the property sought to be taken. The approved appraisal upon which the voluntary deposit must be based may but need not be the appraisal used to support the condemnor's preliminary purchase offer under Section 306(b). See also, Sections 202, 203. In some cases, a preliminary purchase offer is not required (see Section 308) and no previously approved appraisal may have been identified; in other instances, due to a change of circumstances, or to reappraisal of the property, a new or different appraisal may be considered more accurate and may be given the plaintiff's approval. The plaintiff may select for itself the appraisal which it regards as "approved" for the purpose of this section. In making that choice, of course, the plaintiff must keep in mind the fact that the valuation data relied upon must be made available to the property owner under Section 602 and that the amount deposited is subject to court review under Section 603.

Subsection (b) authorizes the court, on defendant's motion, to order the condemnor to make a deposit if "good cause" is shown. The quoted term is addressed to the sound discretion of the court, recognizing that under certain circumstances a mandatory deposit may be essential to prevent serious hardship or prejudice to the defendant, or to avoid the risk that the condemnor may ultimately be unable to pay the compensation awarded. As in other cases, the amount deposited pursuant to court order is available for immediate withdrawal under Section 604, subject to the waiver of defendant's objections to the right to take the property or to maintain the action. See Section 606.

Subsection (c) prescribes the consequences of the plaintiff's failure to make a deposit as directed by the court. The defendant may seek a dismissal under Section 1301, with recovery of his litigation expenses and rental losses, if any, or may continue to defend, and obtain interest on the ultimate award. See Section 1202. If the action is dismissed under this subsection, the condemnor is not precluded from commencing the action over again.

Subsection (d), authorizing the court to require an additional deposit as a condition to granting leave for the plaintiff to amend the complaint, makes it unnecessary for the defendant to incur the expense of a separate motion under Section 603 to require an increase.

Subsection (e) is included to permit a departure from the normal deposit procedure in situations, such as

an emergency caused by fire, flood, or other calamity, where a "quick-take" is essential to the public welfare and there is insufficient time to complete a full appraisal.

§ 602. [Notice of Deposit]

On making a deposit under Section 601, the plaintiff immediately shall serve on all parties who have appeared in the action a notice that the deposit has been made, accompanied by a copy of the written appraisal or summary of the appraisal upon which the amount of the deposit was based, or by a copy of all affidavits upon which an order for deposit under Section 601(e) was based.

COMMENT

The plaintiff is required by Section 602 to serve notice of the deposit and supporting documents upon all parties who have appeared in the action, thereby giving them an opportunity to challenge the amount of the deposit by motion under Section 603, as well as to withdraw the funds on deposit pursuant to Section 604.

The phrase "parties who have appeared," as used in this section, means those parties who have filed an answer; it does not include defendants who have merely been served with process but have not filed any response, or those who have filed a disclaimer under Section 503.

§ 603. [Motion to Increase or Reduce Amount Deposited]

(a) Upon noticed motion by the plaintiff, or by a defendant for whose property a deposit was made, the court shall determine or redetermine whether the amount deposited is the reasonably estimated compensation for the taking of that property.

(b) If the court determines that the estimated compensation for the property of the defendant making the motion exceeds the amount deposited and that the plaintiff has not taken possession of the property, it shall enter an order requiring the plaintiff to increase the deposit, or denying the plaintiff the right to take possession of the property before judgment until the amount on deposit has been increased to not less than the estimated compensation specified in the order.

(c) If the court determines that the estimated compensation for the property of the defendant making the motion exceeds the amount deposited and that the plaintiff has taken possession of the property pursuant to an order of possession, it shall require the plaintiff to increase the amount on deposit to not less than the estimated compensation specified in the order.

(d) If the plaintiff fails to increase the deposit by the amount and within the time allowed by the court in an order under subsection (b) or (c), the defendant who obtained the order may move to dismiss the action under Section 1301.

(e) If the court determines that the amount deposited exceeds the estimated compensation for the property for which the deposit was made, it may permit the plaintiff to withdraw the excessive portion of the deposit if it has not been withdrawn by the defendant.

COMMENT

Section 603 provides for judicial determination or redetermination, on motion by any party, whether the amount deposited by the plaintiff equals the estimated compensation for the property for which the deposit was made. The motion may be made either before or after the amount on deposit has been withdrawn. Compare subsection (e).

Subsection (a) contemplates that the hearing on the motion will conform to local practice requirements as to the nature and form of evidence received. Nothing in this subsection precludes the plaintiff from making a voluntary additional deposit at any time, if it sees fit to do so, without the need for a motion.

If the plaintiff has not yet taken possession of the defendant's property, whether or not an order for possession has been entered, subsection (b) authorizes the court to order an increased deposit or to defer actual possession until the insufficient deposit is increased by the required amount. Whether an order of the latter character is appropriate is left to the court's discretion; but in some states at least, the taking of possession without prior deposit of the full amount of estimated compensation would violate constitutional requirements. A failure to comply timely with a mandatory order requiring an increased deposit is subject to the sanction of dismissal under subsection (d). Compare Section 601(c). The time for compliance, however, is subject to extension by order of the court under existing civil procedure rules, or pursuant to stipulation of the parties.

On the other hand, if the plaintiff has taken possession of the property under an order of court, subsection (c) requires the court to increase the deposit to an amount at least equal to the estimated just compensation. The plaintiff's failure to comply may be treated as an abandonment of the action, resulting in a dismissal of the action. Subsection (d). This result is not automatic, but is left to defendant's motion, since in some cases it may be to his interest to proceed with the action, accepting interest on the additional amount of the award (see Section 1203) in lieu of the right to an additional deposit. Moreover, the court is not required to order a dismissal and, subject to state constitutional requirements, might deny the motion under appropriate circumstances.

Subsection (c) only applies where the plaintiff has taken possession pursuant to an order of possession. If possession was taken pursuant to agreement of the parties, the defendant may properly be deemed to have waived his right to object to the amount of the deposit. On the other hand, if the defendant is willing to stipulate to a taking of possession, but wishes to preserve his right to challenge the amount on deposit, the stipulation may require that an order of possession be entered, thereby obviating any inference of waiver.

Under subsection (e) the plaintiff may obtain a refund of that part of the deposited funds, not withdrawn by the defendant, which are in excess of the estimated compensation. If the deposited funds have been withdrawn, however, immediate recovery of the excessive portion is not authorized, but the plaintiff will ultimately be entitled to judgment against the defendant for any amount withdrawn that exceeds the amount awarded the defendant. See Section 1206(b).

§ 604. [Motion for Withdrawal of Deposited Funds Before Judgment]

(a) By motion before entry of judgment, the defendant may apply to the court for leave to withdraw all or any portion of the amount on deposit. The motion shall specify the applicant's property for which the deposit was made and request leave to withdraw a stated amount from the funds on deposit.

(b) The defendant shall give notice of the motion, and of the time and place of the hearing thereon, to the plaintiff who made the deposit and to all other parties who have appeared in the action. Before the hearing, the plaintiff may serve any other person with notice of the time and place for the hearing, together with a statement that his failure to object at or before the hearing will be deemed a waiver of any objections he has to the proposed withdrawal.

(c) This section does not prevent the court from authorizing a defendant to withdraw deposited funds without notice or hearing if the plaintiff consents in writing.

COMMENT

Section 604 establishes a procedural framework by which a defendant may move for withdrawal of deposited funds. While the defendant making the motion is required to give notice of the motion, and of the hearing thereon, to the plaintiff and all other parties who have appeared in the action (i.e., who have filed an answer), the plaintiff may also give notice to any other person, such as a defendant who has not yet been served with process. By giving such notice, the plaintiff can protect itself against liability to such persons under Section 605(a). Any objection that could properly be asserted by a party with notice (e.g., that the amount proposed to be withdrawn exceeds the probable amount of compensation to be awarded to the applicant) is deemed waived if not timely asserted. See Section 605(a).

§ 605. [Determination of Application for Withdrawal; Waiver of Objections]

(a) A party who receives notice of hearing under Section 604 waives all objections to the proposed withdrawal that are not timely asserted, and has no claim against the plaintiff for compensation to the extent of any amount withdrawn pursuant to the order of the court. The plaintiff remains liable for compensation that may be awarded to any party who did not receive notice, and to any other owner of record, but if the liability is enforced plaintiff may recover from a defendant to the extent he has been overpaid.

(b) An order permitting withdrawal may impose terms and conditions which justice requires, including if appropriate a requirement that the defendant provide security, in an amount and manner approved by the court, to guarantee repayment of any amount he withdraws in excess of the total amount to which he is entitled as finally determined by the judgment.

COMMENT

In permitting a withdrawal under Section 605 the court may impose reasonable terms and conditions, including a requirement that the applicant provide security to guarantee repayment if the amount withdrawn proves to be excessive in relation to the judgment. The condemnor, of course, may waive this security if it deems it appropriate to do so, and may consent to a withdrawal without notice or hearing.

§ 606. [Effect of Withdrawal]

A defendant who withdraws money under this Article waives all objections and defenses to the action and to the taking of his property, except for any claim to greater compensation.

COMMENT

Under this section, a withdrawal of funds on deposit operates as a waiver of all objections and defenses, whether pleaded or not, by the withdrawing party. If the amount withdrawn proves excessive, the judgment must provide for repayment of the difference to the plaintiff or other person entitled to it. See Section 1206.

In addition to the other consequences provided by this section, the withdrawal of funds on deposit may entitle the plaintiff to an order for possession of the property for which the deposit was made. See Section 609.

§ 607. [Deposit and Withdrawal Inadmissible in Evidence]

The amount deposited or withdrawn under this Article is not admissible in evidence and may not be referred to at the trial.

COMMENT

The purpose of Section 607 is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited or withdrawn from being used in evidence against the plaintiff either at the trial upon the issue of the amount of compensation or the trial on issues of apportionment. It recognizes that the amount of the deposit, to a considerable degree, is within the control of the plaintiff, since it is based in the first instance upon the approved appraisal and supporting appraisal date selected by the plaintiff. See Sections 601, 602.

Only the amounts deposited and withdrawn are excluded from evidence by this section; the fact that a deposit and withdrawal took place, if otherwise admissible, is not required to be excluded. Moreover, this section does not prevent the defense from using plaintiff's expert appraiser or his appraisal data for impeachment or other permissible evidentiary purposes. Nor does it preclude pretrial or post-trial reference to the amounts deposited and withdrawn in order to implement other statutory provisions, such as Section 1206 (amount withdrawn required to be credited against award).

§ 608. [Deposit at Interest]

Upon motion of a party at any time after a deposit has been made under this Article, the court may direct that the money on deposit and not withdrawn be invested in [investments lawful for fiduciaries] subject to reasonable terms and conditions. Interest earned or other increments derived from the investment shall be allocated, credited, and disbursed between the parties as directed by the court. As between the parties to the action, the money invested remains at the risk of the party who made the motion.

COMMENT

Section 608 authorizes a procedure by which money on deposit may, on motion by any party, be invested at interest. In adopting states which have general statutory provisions already prescribing and regulating the investment of funds deposited with the court, this section may be modified to require compliance with those statutes. For example, the bracketed phrase may be replaced, if desired, by a specific reference to statutory provisions authorizing legal investments for public fiduciaries, or by a list of authorized investments specified for funds on deposit under this section.

In some cases, substantial amounts may be earned by interim investment as permitted by this section, especially if the amount of money is large and the time consumed in litigating is prolonged. The fact that the plaintiff may have made a deposit does not, of course, mean that the defendant will always apply for a withdrawal of the funds deposited. A defendant who seeks to press defenses other than those relating to valuation, for example, would not seek a withdrawal, since that would constitute a waiver of his defenses. See Section 606. Yet, under Section 1202(b) the award in the action does not preclude interest on deposited funds that are available for withdrawal. This section thus provides a means, subject to judicial control, by which the defendant may benefit from the investment of the deposited funds without having to withdraw them, although the investment is at his own risk.

The allocation and disbursement of earnings on the funds invested under this section are determined by the rights of the several parties, as they are ascertained in the action and in connection with the motion made under this section.

§ 609. [Order of Possession]

(a) As used in this section, "record owner" means the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments.

(b) At any time before entry of judgment, upon motion by the plaintiff after notice to the record owner of the property and to persons in actual physical occupancy, if any, the court may direct the plaintiff to take possession of all or a designated part of the property on or after a specified date on such terms and conditions as justice requires, if the court determines that:

(1) the plaintiff has deposited the estimated amount of just compensation, or before the date of taking possession will have done so, in accordance with Sections 601 to 603; and

(2) all legal requirements for the taking of possession of the property by plaintiff have been waived or satisfied, or will be satisfied before the time possession is to be taken.

(c) In determining the date of possession and any terms and conditions to be specified in the order, the court shall consider, in addition to the matters required by subsection (b), all relevant facts presented at the hearing, including:

(1) the extent to which objections to plaintiff's right to take the property, that have not been resolved in favor of plaintiff, are insubstantial on their merits;

(2) the extent to which the plaintiff has a compelling need to take possession at a particular time, in view of its construction schedule or plan of operation for the property and the situation and other circumstances of the property with respect to the schedule or plan;

(3) the extent to which the property owner or other person in physical occupancy of the property would sustain substantial hardship if possession were taken on the date requested by the plaintiff; and

(4) the extent to which any additional cost or loss which the plaintiff would sustain by reason of a postponement of possession, or any additional hardship which the defendant or occupant would sustain by reason of a taking of possession on the date requested by plaintiff, may be minimized by the imposition of reasonable conditions or limitations upon the plaintiff's possession or may be mitigated through reasonable efforts by the respective parties.

(d) The court for good cause may authorize the plaintiff to take possession of the property without serving notice upon a record owner not occupying the property.

COMMENT

Section 609 authorizes the court, on noticed motion, to make an order of possession prior to judgment if specified conditions are found to exist. Subsection (a) defines, "record owner," for the purpose of notice under this section, in broad terms including an owner of an interest less than a fee, thereby assuring notice to all interested persons. But see Subsection (d), under which notice to a record owner not in occupancy of the property may be dispensed with.

Subsection (b)(1) assumes that all proceedings to require an increase in the amount of the plaintiff's deposit have been concluded and the sufficiency of the deposit determined. If the amount of a required increase has not yet been deposited, the order of possession must be conditioned upon actual deposit of the additional amount. See Section 603(b).

Subsection (b)(2) requires satisfaction or waiver of all other legal conditions precedent to taking of possession, including any applicable statutory requirements not included in the Uniform Eminent Domain Code. In some states, depending on local law, these non-Code conditions might include the securing of prior zoning approval or the filing of a required environmental impact statement. Requirements imposed by the Code, on the other hand, include assurance of adequate provisions for relocation assistance and availability of relocation housing (see Article XIV, based upon the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 (1971), §§ 201 to 221) [42 U.S.C.A. § 4621 et seq.], and the statutory requirement, set forth in Section 205, that the occupant of the property must receive not less than 90 days written notice of the date on which he will be required to vacate the premises.

Subsection (c) provides guidelines for assessing the claimed need of the plaintiff to take possession upon a specified date as against the claimed hardship to the defendant or occupier if possession is not deferred. This subsection is designed only to focus the attention of court and counsel upon the elements deemed relevant to a sound exercise of judicial discretion in fixing the date of possession and imposing limitations or conditions. It does not purport to declare any firm substantive standards that might restrict the intended flexibility with which the court may resolve individual problems.

In addition to the date of possession, the order is required by Subsection (b) to state any conditions or limitations imposed, in the interest of justice, upon the plaintiff's right of possession pending the completion of the litigation. In some instances, for example, the court might authorize the plaintiff to enter into possession of only a portion of the property sought to be taken or to share possession with the defendant. In other instances, the order might limit the areas of use permitted to the plaintiff and defendant, or authorize joint use for compatible purposes. Intermediate relief of this sort, falling between the extremes of no possession and unlimited

possession, may sometimes be required by a reasonable balancing of equities.

§ 610. [Notice of Order of Possession]

Promptly after the making of the order, and not later than the time possession is actually taken, the plaintiff shall give notice of the order for possession to all parties who have appeared in the action and to any persons in actual physical occupancy of the property described in the order.

COMMENT

Notice of the order of possession must be given promptly under this section, and in any event not later than the time possession is actually taken. The notice is necessary not only in the interest of fairness, but also to start the running of time for the making of any post-decision challenges to the order (e.g., a motion to vacate the order; petition to a higher court for relief by way of extraordinary writ, etc.) that may be available under state law.

The notice required by this section must also be considered in conjunction with the requirement of Section 205 that at least 90 days written notice be given before a person dwelling on the property or engaged in a business or farm operation can be ousted of his possession of the property. In cases to which Section 205 applies, the time for giving notice of the order must be at least 90 days in advance of the taking of possession, unless the 90 day period has previously been satisfied by giving of an earlier notice of plaintiff's intent to take possession, or has been waived by agreement under Section 213. (The court, of course, must take these factors into account in fixing the date of possession. See Section 609). Even though the 90 day rule of Section 205 has been satisfied, however, the plaintiff must still give the notice required by this section.

Compliance with the notice requirement of this section does not preclude the necessity for serving notice of the order in accordance with other statutes or rules. Section 611 assumes that the court may employ any available judicial means to make the order of possession effective. Local law will determine whether the appropriate device is a writ of possession, writ of assistance, or other form of process. Similarly, local law will determine the proper form of procedure (e.g., petition for mandamus) to enforce conditions and limitations upon the plaintiff's possession which are set forth in the order.

ARTICLE VII

PROCEEDINGS BEFORE TRIAL

Section

- 701. [Application of Article].
- 702. [Scope of Discovery].
- 703. [Protective Orders].
- 704. [Duty to Supplement or Amend Response].
- 705. [Effect of Article on Admissibility of Evidence].
- 706. [Effect of Discovery Proceedings Upon Trial Evidence].
- 707. [Pretrial Order].
- 708. [Offer of Settlement].

§ 701. [Application of Article]

Discovery and pretrial conferences in condemnation actions are governed by the [Rules] [Code] of Civil Procedure, except as otherwise provided in this Article.

COMMENT

Article VII liberalizes conventional discovery practice as applied in eminent domain actions, and includes optional provisions strengthening the court's authority to conduct effective pretrial conferences in condemnation actions.

Since the intent of this Article is to expand the range of discovery normally available in condemnation actions, this section should be modified appropriately in adopting states that observe a more liberal discovery approach than that which is here set forth.

§ 702. [Scope of Discovery]

(a) Without leave of court, and without showing any need for the information sought or of hardship or prejudice if discovery is withheld, a party to a condemnation action may:

(1) [by request for production] require any other party to produce for inspection and copying, or to furnish a copy of, any written appraisals, reports, maps, diagrams, charts, tables, or other documents in his possession or under his control that contain engineering, economic, valuation, comparable sales, or other data pertaining to the issue of compensation;

(2) by written interrogatory require any other party to disclose the identity and location of each person whom the other party expects to call as a witness at the trial on any question relating to the issue of compensation, to state the substance of the facts and opinions to which the witness is expected to testify, and to summarize the grounds for each opinion;

(3) by written interrogatory or deposition require any other party to disclose the identity

and location of every person, including an employee or agent, whom he has caused to examine the property sought to be taken, or whom he has consulted or employed to provide information or to express an opinion relating thereto, in order to assist in determining the amount of compensation, whether or not the person so identified is expected to be called as a witness at the trial; and

(4) by deposition examine any person whose identity is discoverable under paragraphs (2) and (3), and whom the other party expects to call as a witness at the trial, with respect to his findings and opinions on any question relating to the issue of compensation.

(b) A party may discover the findings and opinions, on any question relating to the issue of compensation, of a person whose identity is discoverable under paragraphs (2) and (3) of subsection (a), but whom the other party does not expect to call as a witness at the trial, only with leave of court first obtained on noticed motion for good cause shown and subject to reasonable conditions required by the court.

COMMENT

Section 702 provides a liberal rule of discovery with respect to valuation issues that goes beyond the purview of conventional discovery in other civil actions. For example:

(1) Section 702(a)(1) permits discovery as a matter of right and without prior court approval of documentary data relating to valuation issues which may be in the possession of the other party, whether or not prepared by a prospective trial witness. See, e.g., *State v. Leach*, 516 P.2d 1383 (Alaska 1973) (accord). Absent specific authorization, data of this kind would often be discoverable in other civil actions only upon a showing of special need or inability to obtain equivalent materials by other means. Compare FRCP, Rule 26(b)(3), relating to discovery of "trial preparation materials." The specification of the kinds of data included under subsection (a)(1) makes it clear that the mental impressions, opinions, conclusions or legal theories of an attorney (often called "attorney's work product") are not made discoverable by this section. The bracketed phrase "by request for production" should be adapted to conform to the usual discovery technique used in the adopting state to obtain documentary inspection (e.g., motion for inspection; subpoena duces tecum; etc.).

(2) Section 702(a)(2) authorizes a party by interrogatories to require disclosure of the identity and a summary of the testimony of the valuation witnesses expected to be called by any other party. If the party from whom the information is sought has not determined the choice of valuation witnesses he intends to call to testify at the trial, he must so respond, and later supplement his answer under Section 704 or the equivalent supplementation provision of state discovery practice. A failure to do so, unless relief is secured by a protective order under Section 703, exposes the noncomplying party to sanctions. See Section 706.

(3) Section 702(a)(3) authorizes discovery, as of right, of the identity and address of valuation experts employed by another party, whether they are engaged solely as advisers or are expected to be called to testify at the trial. Identification of all such persons will facilitate investigation and trial preparation both by informal means (e.g., interview) and by formal discovery (i.e., deposition) to the extent permitted by law. See Subsection (b). Moreover, knowledge of the identity of consultants used by another party will assist counsel in seeking to employ other experts to help prepare his client's cause, and may provide clues as to the opponent's theory of value.

(4) Section 702(a)(4) authorizes the taking of the deposition of an expert or other valuation consultant whom another party expects to call as a witness at the trial, without the necessity for obtaining leave of court by motion in advance. Compare FRCP, Rule 26(b)(4)(A) and (B). Nothing in paragraph (4) precludes objections to questions asked during the deposition, if otherwise permissible under state discovery practice. But see Section 703.

Subsection (b) authorizes discovery of compensation-related facts and opinions held by consultants who are not expected to be called as witnesses at the trial, but only with prior leave of court. No special test of exceptional circumstances or impracticability is imposed; the requisite "good cause" for the order is left to the court's sound discretion in light of the circumstances of the case. FRCP Rule 26(b)(4)(B).

Section 702 is predicated upon the view that condemnation actions represent a unique form of litigation principally concerned with the determination of the single issue of the amount of just compensation to be paid. Because of their exceptional character, such actions can be expedited and tried with greater efficiency and less expense if the fullest possible pretrial disclosure of valuation data and testimony is authorized. As with other discoverable matter, of course, discoverability does not necessarily imply admissibility in evidence at the trial, and the rules here set forth are subject to the court's power under Section 703 to grant protective orders.

§ 703. [Protective Orders]

(a) Discovery under Section 702 is subject to the power of the court to make orders which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense, but discovery authorized by Section 702 may not be denied or limited solely because the documents, information, facts, opinions, or other matters sought either were or were not prepared, obtained, or procured in anticipation of litigation or in preparation for trial in the particular action.

(b) The party taking the deposition of an independent expert witness shall pay the expert a reasonable fee for time spent in preparing for and in giving his deposition.

COMMENT

Section 703 limits the court's authority to restrict the liberal discovery contemplated by Section 702. While the general power to make protective orders is expressly confirmed in Subsection (a) (compare FRCP, Rule 26(c), as to the general scope of protective orders), two significant limitations not ordinarily applicable in other civil actions are established:

(1) The court may not curtail discovery solely because the material sought was prepared, obtained, or procured in anticipation of litigation or trial in the action. Compare FRCP, Rule 26(b)(3), limiting discovery of anticipatory "trial preparation materials."

(2) The fact that the material was not prepared or obtained for use in the present case is not, standing alone, grounds for denying discovery. In the absence of this qualification, a protective order could be granted on the theory that the material sought (e.g., an appraisal prepared for some purpose unrelated to the present action) was not relevant to the subject matter. Compare FRCP, Rule 26(b)(4) (implied limitation of discovery of expert facts and opinions to those "acquired or developed in anticipation of litigation or for trial").

If agreement cannot be reached between the parties as to the payment of the expert witness fees required by subsection (b), the court may determine the amount due and order its payment.

§ 704. [Duty to Supplement or Amend Response]

A party who has responded to a request for discovery is under a duty seasonably to supplement or amend his response by supplying any subsequently obtained information upon the basis of which he knows that an earlier response by him was incorrect when made or, though correct when made, is no longer true or accurate, if a failure to supply the information would tend prejudicially to mislead the other party.]

COMMENT

Section 704 is intended to make it clear, in the context of the special discovery provisions governing condemnation actions, that a party responding to discovery has a continuing duty to supplement his responses. A "party," within the purpose of this section, includes a corporate or other person whose officer or agent made a response or gave a deposition in discovery proceedings.

In states that already have adequate supplementation provisions in their general discovery rules or code, this section may not be strictly necessary and it is therefore bracketed as optional. Its enactment, however, may assist in avoiding any doubts on the matter, and will clarify the scope of the sanctions described in Section 706.

§ 705. [Effect of Article on Admissibility of Evidence]

This Article does not make admissible any evidence not otherwise admissible nor permit a witness to base an opinion on any matter not a legally proper basis for the opinion.]

COMMENT

Section 705 is bracketed for optional use in states where it is deemed appropriate expressly to foreclose the drawing of any inference from the provisions of Article VII regarding the admissibility of evidence or the permitted bases for an expert opinion. These matters are governed by other statutes, rules, and court decisions, and not by this section. See Article XI.

§ 706. [Effect of Discovery Proceedings Upon Trial Evidence]

(a) Except as provided in subsection (b),

(1) a party required to produce documentary data under this Article, over objection by a party who was entitled to production thereof, may not call a witness to testify at the trial on any question relating to valuation or compensation, unless copies of all appraisals, reports, maps, diagrams, charts, tables, or other documents prepared by or under the direction of the witness, or upon which his testimony is based in whole or in part, were supplied in substantial compliance with this Article; and

(2) a party who was requested to disclose the identity of a person by discovery proceedings

under this Article may not call and examine that person at the trial, over objection by the party seeking the disclosure, with respect to any issue relating to valuation or compensation, unless the witness was identified and all additional properly requested information relating to the witness or his testimony was supplied in substantial compliance with this Article.

(b) Upon such conditions as are just, the court may permit a party to call, or elicit an opinion or other testimony from, a witness whose testimony is barred under subsection (a), if the court determines that the failure to respond to discovery was due to excusable mistake, inadvertence, or surprise, and did not materially impair the ability of the objecting party fairly to present the merits of his case.]

COMMENT

Section 706 is an optional provision designed to confirm the court's power to impose appropriate sanctions in the form of orders excluding evidence where pertinent pretrial discovery thereof was withheld. By reference to discovery under "this Article," this section makes it clear that the same consequence may be attached to a failure to properly supplement a prior discovery response. See Section 704.

Subsection (b) gives the court power to excuse noncompliance upon a proper showing of good cause and lack of prejudice. The court, however, may impose reasonable conditions, such as a continuance of the trial or the payment of additional cost or expense of preparation to meet the unexpected evidence.

§ 707. [Pretrial Order]

The court may [hold a pretrial conference and], in addition to other matters, include in its pretrial order terms and conditions reasonably necessary to enforce any agreement between the parties respecting the scope or design of the project, the location or relocation of improvements, or the performance of work by the plaintiff, and in connection therewith may define the scope of the issues and order of presentation of evidence at the trial.]

COMMENT

Section 707 is an optional provision intended to assure that the court is vested with flexible authority, at the pretrial stage of the action, to facilitate stipulations providing for the terms and conditions of acquisition of the subject property. For example, to the extent authorized by agreement of the parties, the court, at a pretrial conference, may prescribe and thereafter supervise "physical solutions," and may redefine the issues and order of presentation of evidence as needed in connection therewith.

§ 708. [Offer of Settlement]

(a) Not less than [ten] days before the trial on the issue of the amount of compensation, either party may file and serve on the other party an offer of settlement, and within [five] days thereafter the party served may respond by filing and serving his offer of settlement. The offer shall state that it is made under this section and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree is just compensation for the property sought to be taken. The offer supersedes any offer previously made under this section by the same party.

(b) An offer of settlement is deemed rejected unless an acceptance in writing is filed and served on the party making the offer, before the commencement of the trial on the issue of the amount of compensation.

(c) If the offer is rejected, it may not be referred to for any purpose at the trial, but may be considered solely for the purpose of awarding costs and litigation expenses under Section 1205.

(d) This section does not limit or restrict the right of a defendant to payment of any amounts authorized by law in addition to compensation for the property taken from him.

COMMENT

Section 708 establishes a procedure by which either party to a condemnation action may make a formal offer to settle.

The plaintiff's decision to accept or reject an offer made by a defendant will be influenced by the prospect that the latter will be entitled to an award of litigation expenses under Section 1205 if the amount awarded by the trier of fact exceeds the amount of the rejected settlement offer. Conversely, a defendant's decision to accept or reject such an offer from the plaintiff will be affected by the realization that if the award is less than the offer, the defendant will be denied recovery of costs incurred after the offer was made.

A withholding of normally recoverable costs from the defendant in an eminent domain action may be regarded as unconstitutional in some jurisdictions. If this is true in the adopting state, it may be appropriate to modify this section so that it is limited to offers by the defendant.

ARTICLE VIII

INFORMAL PROCEDURE FOR DISPUTES INVOLVING LIMITED AMOUNTS

Section

- 801. [Informal Claims Procedure Authorized].
- 802. [Request for Informal Procedure].
- 803. [Hearing].
- 804. [Demand for Retrial].

PREFATORY COMMENT

This Article provides an informal procedure by which claims for compensation involving limited amounts, or involving claims with a relatively limited "spread" between the condemnor's highest offer and the property owner's lowest demand, may be determined in an inexpensive and expeditious manner. Because legal and appraisal fees often amount to a substantial proportion of the ultimate award, claims of this kind often cannot be litigated economically under normal trial procedures. As a result, either the property owner is forced to settle on the condemnor's terms or the condemnor is compelled to settle upon the basis of the "nuisance value" of the litigation. This Article provides a simplified procedure by which either party may obtain a fair hearing and determination on this kind of claim by an independent tribunal within practical fiscal limits. See also, Article XV (Arbitration).

§ 801. [Informal Claims Procedure Authorized]

This Article applies whenever only the amount of compensation is in dispute and (1) the total compensation demanded by all defendants is less than [\$20,000], excluding interest and costs, or (2) the difference between the latest offer of the condemnor and the latest demand by all defendants is less than [\$5,000]. [The Supreme Court may adopt rules governing proceedings under this Article.]

COMMENT

The scope of the limited claims to which this Article applies may be adjusted by the adopting state to conform to local circumstances. The suggested alternate test (total demand of less than \$20,000 or "spread" of less than \$5,000) reflect a preliminary judgment that the need for informal procedure is most pressing as to compensation claims in these ranges. The dollar criteria are determined by reference to the plaintiff's "latest offer" (which may or may not be the highest one) and the defendant's current demand as of the date when the application seeking invocation of the informal procedure is filed. See Section 802.

The last sentence is bracketed as an optional authorization for implementing court rules in states where existing authority may be lacking.

§ 802. [Request for Informal Procedure]

A party may file with the court a written request that the issue of the amount of compensation be determined under this Article, identifying the property, and setting forth the amount of the plaintiff's latest offer

and the defendant's latest demand for compensation.

COMMENT

Under Section 802, a party may request use of the informal procedure by simply filing a request with the court. If a defendant claims an interest in more than one parcel of property involved in the action, he may request informal consideration as to any one of them independently of the others. No time limit for filing the request is specified; presumably, the court would deny such a request if not timely presented well before the date of trial on the issue of compensation for the property.

The simplicity of the request is intended to facilitate requests for use of this informal procedure by property owners acting in propria persona. Its contents are sufficient if they include relevant identification data and a recital of the basic fiscal facts, i.e., the compensation presently demanded by the defendant for the property and the amount of the latest offer by the condemnor. The offer and demand need not be written, since preliminary purchase negotiations as well as settlement discussions after the action has begun, will often be oral in nature. In any event, the request itself will be, in effect, the latest offer or demand by the party submitting the request and the opposing party may assert his latest position in response to the request, if he is unable to agree to the figure asserted.

§ 803. [Hearing]

(a) If the court determines that the request should be granted, it shall hold a hearing upon reasonable notice to the parties to determine compensation.

(b) The court shall proceed without a jury and in an informal manner. The parties may present oral and documentary proof and may argue in support of their respective positions, but the rules of evidence need not be followed. Neither party is required to offer the opinion of an expert or to be represented by an attorney. Unless demanded by a party and at his own expense, a record of testimony received at the hearing need not be kept.

(c) Costs shall be claimed and taxed as in other condemnation actions. Upon entry of judgment, the clerk shall serve upon the parties a copy of the judgment with notice of its entry, together with instructions as to the procedure for demanding a retrial.

COMMENT

The limited claims procedure is intended to be informal; accordingly, the rules of evidence may be dispensed with. The participation of attorneys and the testimony of expert witnesses is not precluded, but is not required. The conduct of the hearing may be subject to more detailed court rules adopted under Section 801.

§ 804. [Demand for Retrial]

(a) Either party, within 30 days after entry of the judgment, may reject the judgment and file a written demand for trial under Article IX. The action shall be restored to the docket of the court as though proceedings under this Article had not occurred.

(b) If the condemnor files a demand under subsection (a) and ultimately obtains a judgment no more favorable to him, the court may require him to pay, in addition to costs, the defendant's litigation expenses incurred after the demand was filed.

COMMENT

Under Section 804, either party may reject the judgment in a limited claim proceeding and demand a trial de novo under normal plenary procedure. If a timely demand is filed, the case is restored to the court's docket, with the same status as when the request for informal proceedings was filed under Section 802. Thus, for example, the issue of the amount of compensation will be triable by jury, upon the retrial, on the same terms as in other condemnation actions. While this approach may necessitate a duplication of effort in some cases, experience in jurisdictions having a similar procedure reportedly indicates that few actual retrials are sought. See New York State Commission on Eminent Domain, 1971 Report, p. 36.

Subsection (b) authorizes the court to require the condemnor to pay the litigation expenses subsequently incurred by the defendant if the condemnor demands a retrial and fails to secure a more favorable determination of the issue of compensation. The possibility that the court may impose this sanction is intended to deter the condemnor from filing a demand for retrial except in cases in which the judgment appears to be grossly erroneous. The term, "litigation expenses," includes reasonable attorney, appraisal, and engineering fees. See Section 103(14).

ARTICLE IX

PROCEDURE FOR DETERMINING JUST COMPENSATION

Section

- 901. [Setting for Trial].
- 902. [Trial by Jury; Waiver].
- 903. [Right to Open and Close; Order of Presentation of Evidence].
- 904. [Burden of Proof].
- 905. [Separation of Issues of Compensation and Apportionment].
- 906. [Separate Determination of Facts].
- 907. [Power of Court to Control Scope of Trial Participation]].

§ 901. [Setting for Trial]

(a) To the extent practicable, actions under this [Code] shall be heard and tried in advance of other civil actions.

(b) The court may require any severable nonjury issue to be tried separately in advance of the trial on the issue of the amount of compensation.

COMMENT

While the procedures for setting an eminent domain action for trial are left by the Code to local calendaring practice, Subsection (a) establishes a general policy that condemnation actions should be tried at the earliest feasible date, and for that purpose are entitled to precedence over other civil actions. Preferential trial setting requirements for condemnation actions are not uncommon in the United States, and tend to promote several policy objectives: (1) reduction of economic and psychic loss to the property owner, whose ability to plan and reorganize his affairs, in light of the compulsory taking of his property, may be adversely affected by uncertainty as to the amount of compensation that will be awarded; (2) promotion of the social values implicit in the public use for which the property is to be taken, by reducing the time in which uncertainty as to the amount of compensation may inhibit the condemnor from proceeding with the project; and (3) reduction of costs to the public caused by unnecessary delay, especially in periods of generally rising property values and project costs.

Under Subsection (b), the court may require a preliminary trial of nonjury issues, including issues affecting the determination of compensation (e.g., whether there has been a partial taking, whether access has been impaired, etc.). Resolution of collateral issues of this kind prior to trial should expedite the determination of the amount of compensation. See also, Section 506 (preliminary objections to be determined before issue of compensation is tried).

§ 902. [Trial by Jury; Waiver]

[Alternative A]

(a) The amount of compensation [and any additional issue for which the right to trial by jury is secured

by the Constitution] shall be determined by a jury only if a party entitled to participate in the trial of the issue [expressly] demands trial by jury. The court shall determine all other issues without a jury.

[Alternative B]

(a) The amount of compensation [and any additional issue for which the right to trial by jury is secured by the constitution] shall be determined by a jury unless, and to the extent that, the parties entitled to participate in the trial of the issue [expressly] waive the right to trial by jury. The court shall determine all other issues without a jury.

[(b) The number of jurors, method used for impanelling and selecting jurors, number and method for exercising challenges, form of oath to be administered, number of jurors required to return a verdict, and all other procedures relating to trial by jury, to the extent practicable, shall conform to the requirements applicable in civil actions under the [Code] [Rules] of Civil Procedure.]

COMMENT

Alternative A of Section 902(a) requires the court without a jury to determine the amount of compensation, unless a jury trial is properly demanded. Alternative B is an alternative version of this section, designed for use in those states in which a jury is routinely convened unless waived.

Upon enactment, the wording of this section should be adapted both to local practice and state constitutional requirements. While it is clear that there is no federal constitutional requirement for a jury trial in eminent domain actions, some states extend a right to a jury trial on issues other than the amount of compensation. See "Eminent Domain," 28 Am.Jur.2d § 407 (1966). The first bracketed phrase in Subsection (a) suggests a means for conforming to such constitutional guarantees. The bracketed term "expressly" is also suggested for optional use where, under existing state practice, it would be appropriate.

The term "compensation," as used in Subsection (a), includes only the amount of just compensation required to be paid for the property taken. Disputed questions on other matters, such as the scope of compensable elements, additional financial increments (e.g., costs) that may be included in the award, or the allocation of the award as between conflicting claimants, are deemed to be "other issues" within the meaning of Subsection (a).

In condemnation actions involving several parcels of property under different ownership (e.g., a consolidated action under Section 405, supra). Subsection (a) could result in a jury trial to ascertain compensation for some parcels but not for others. Whether a jury should be convened is left to the parties entitled to participate in the trial of the issue of compensation to be paid for the particular property taken.

Subsection (b) is bracketed as an optional provision for adoption by states in which, absent this language, there might be doubt as to whether normal jury trial procedures are applicable. Compare Section 401. In addition, it is recommended that each adopting state consider carefully whether additional modifications in jury trial procedures should be made, either in other statutes or procedural rules, or as an exception added to Subsection (b), in view of the unique nature of eminent domain actions. For example, there seems to be no persuasive policy reason why a condemnee who desires a jury trial should be required to deposit jury fees (as is the case in some states with respect to other civil actions). Regardless of the outcome of the condemnation

action, any such deposit will ordinarily be recovered by the condemnee as costs. See Section 1205. In this and other respects, eminent domain actions necessarily differ from the usual practice in other cases. Since the extent to which modifications of this kind may be necessary will vary from state to state, no attempt is made here to provide detailed statutory proposals.

§ 903. [Right to Open and Close; Order of Presentation of Evidence]

(a) The defendant shall make the first opening statement, proceed first in the presentation of evidence on the issue of the amount of compensation, and make the final closing argument.

(b) The court may designate the order in which multiple parties make their respective opening statements and closing arguments, and the order in which they present evidence.

COMMENT

In eminent domain actions the normal position of the parties is reversed (i.e., the property owner who is seeking an affirmative award of money appears as a defendant), and the issues are generally tried in a different order than other civil actions, thus warranting special treatment of these matters in the Uniform Code.

Subsection (a) is consistent with the majority view in the United States that the property owner, in an eminent domain action, has the right to open and close, and may proceed first with the presentation of evidence on the issue of the amount of compensation. See 5 P. Nichols, Eminent Domain § 18.5[2] (3d rev. ed. 1969). In addition, due to the possibility that there may be multiple defendants, some with similar and others with conflicting interests, Subsection (b) provides clear authority for the court to control the order of the respective presentations. See also, Section 907 (power of court to limit participation, where justice may require).

Under Subsection (a), the property owner is required to proceed first; however, nothing in the section precludes him from waiving an opening statement if he deems it tactically appropriate. Absent a waiver, however, the defendant must proceed first on all three aspects-opening statement, evidentiary presentation, and closing argument as well as to conclude it.

§ 904. [Burden of Proof]

No party has the burden of proof on the issue of the amount of compensation.

COMMENT

Section 904 changes the rule, apparently recognized in a majority of jurisdictions, which places the burden of proof (i.e., risk of nonpersuasion) on the issue of compensation upon the defendant property owner. See 5 Nichols, Law of Eminent Domain § 18.5 (3d rev. ed. 1969).

It seems difficult to assign an intelligible meaning to the concept of "burden of proof" in the eminent domain context, since the pleadings are not required to allege or deny the amount of compensation claimed, and the ultimate standard of decision is the constitutional rule of "just compensation." The amount of compensation that is "just" is essentially an objective market-established fact, although the practical difficulties or marshalling

persuasive evidence of that fact are often formidable. From a realistic view, the trier of fact ordinarily is presented with varying and inconsistent opinions as to value, together with disparate supporting data; the ultimate determination necessarily reflects the weight and degree of credibility accorded to these estimates. Under these circumstances, no rational policy basis exists for assigning presumptive validity to the amount specified either in the condemnor's offer or in the property owner's demand, thereby requiring the adverse party to assume the burden of controverting that figure.

By declaring that neither party has the burden of proof on the compensation issue, this section in effect requires the trier of fact to make its determination upon the basis of all relevant evidence presented on the issue, without regard to its source, and without assuming that either party has a greater burden of persuasion than the other. See, in accord: Ore.Rev.Stat. § 35.305(2); proposed Calif. Eminent Domain Law, § 1260.210 (1974); *State v. 45.621 Square Feet of Land* (Alaska 1970) 475 P.2d 553; *Martin v. City of Columbus* (1920) 101 Ohio St. 1, 127 N.E. 11 (1920).

This section is intended to eliminate any formal burden of proof on all issues directly relating to the amount of compensation, including subsidiary issues affecting valuation and damages. The burden of producing evidence, as distinguished from the risk of nonpersuasion, is not affected, but remains upon the proponent of a particular issue. For example, a defendant who claimed that there was a probability of imminent rezoning of his property for a higher and more valuable use, or that substantial damage had accrued to the remainder of his property in a partial taking case, would have the obligation to adduce evidence supporting his position on those issues. Absent such production, the trier of fact would necessarily reach its conclusions from the other party's evidence alone. Conversely, if the condemnor contended that recent increases in property value were in fact caused by public knowledge of the project for which the property is being taken, and should thus be excluded from consideration, it would have the duty initially to produce relevant evidence in order to have that contention properly submitted to the trier of fact.

The rule of this section does not affect the burden of proof on issues other than the amount of compensation. See Section 507 (preliminary objections); Section 1016 (loss of goodwill).

§ 905. [Separation of Issues of Compensation and Apportionment]

The court or jury shall first determine the total compensation as between the plaintiff and all defendants claiming an interest in the property. The court or jury shall then determine any further questions in the action, including the apportionment of the amount awarded. After the amount of compensation has been determined, the plaintiff may withdraw from further participation in the trial.

COMMENT

Section 905 prescribes the order of determination of the issues at the trial. In effect, the trial of the action proceeds in two phases: (1) the total amount of compensation is first ascertained, and (2) the proper apportionment of that award among the conflicting claimants is then determined. The use of the expression "court or jury" in this section is consistent with the policy reflected in Section 902 that all issues other than the amount of compensation should, where constitutionally permissible, be tried without a jury.

The present section, it should be noted, has only procedural effect. It does not purport to prescribe the

rule by which the value of property held in divided ownership is to be determined. See, e.g., *People v. Lynbar, Inc.* (1967) 253 Cal.App.2d 870, 62 Cal.Rptr. 320, 324 (construing similar language of Calif.Code Civil Proc. § 1246.1 as purely procedural). Thus where divided interests exist, the court may require a separate determination of the compensation for each interest being taken. Ordinarily, a separate determination of this type is both unnecessary and inadvisable, since apportionment of the award is generally required to be determined in a separate proceeding after the total compensation for the property taken has first been determined. In some cases, however, the amount of compensation that would be awarded if the property were valued on the assumption that it is under single and undivided ownership may be insufficient to provide adequate compensation for each of the divided interests. If the court determines that this may be the case, a separate determination of the compensation required for each interest may be advisable; the aggregate of the amounts separately assessed for each of the interests will then constitute the amount to be subsequently apportioned.

The concept of a bifurcated trial, as reflected in this section, does not preclude a defendant from presenting any admissible evidence, in the first stage of the trial, relative to the value of or injury to his property interest. Similarly, a defendant may present in the second stage of the trial any appropriate evidence as to the nature, value, or extent of his interest in the property, even though he presented no evidence on these matters in the first stage.

§ 906. [Separate Determination of Facts]

If there is a partial taking, the court may determine, or may direct the jury in its verdict to determine, separately:

(1) the fair market value of the property being taken;

(2) the fair market value of the entire property before the taking and the fair market value of the remainder after the taking; and

(3) the amount representing loss of good will, compensable under Section 1016.

COMMENT

Section 906 authorizes the court to require the elements of compensation to be made the subject of specific findings in partial taking cases. See Section 1002(b). While this section may not be necessary in some states, it is deemed appropriate to remove any doubt as to the court's power to require the jury to answer special interrogatories in eminent domain cases. Specificity, as contrasted with a lump sum general verdict, may encourage more responsible consideration of the evidence by jurors, and facilitate informed appellate review.

§ 907. [Power of Court to Control Scope of Trial Participation]

The court in the interest of justice may limit the scope of trial participation by any party on the issue of the amount of compensation, and may require that the presentation of evidence, examination of witnesses, and statements or argument to the trier of fact by a party be restricted to matters germane to the amount of compensation for the particular property that party seeks to acquire or in which he claims an interest.]

COMMENT

This section confirms the court's power to limit the scope of trial participation where justice requires. Judicial control is particularly useful if multiple parties or properties are involved in a single trial on compensation issues, or if a defendant whose sole interest in the property is for security purposes (e.g., mortgages, lienholders, etc.) seeks without justification to participate in the trial to an undue degree even though his interest is fully and adequately protected by other defendants before the court.

Since this section may be merely a statement of existing law in some states, it is bracketed as an optional provision.

ARTICLE X

COMPENSATION

Section

- 1001. [Compensation Standards].
- 1002. [Compensation for Taking].
- 1003. [Date of Valuation].
- 1004. [Fair Market Value Defined].
- 1005. [Effect of Condemnation Action on Value].
- 1006. [Compensation to Reflect Project as Planned].
- 1007. ["Entire Property"].
- 1008. [Special Assessment Proceedings Excluded].
- 1009. [Use by Defendant; Risk of Loss].
- 1010. [Compensation for Growing Crops and Improvements].
- 1011. [Improvements Partially Located on Land Not Taken].
- 1012. [Compensation for Divided Interests].
- 1013. [Taking of Leasehold Interest].
- 1014. [Acquisition of Property Subject to Lien].
- 1015. [Property Subject to Life Tenancy].
- 1016. [Loss of Goodwill].

§ 1001. [Compensation Standards]

(a) An owner of property acquired by eminent domain is entitled to compensation determined under the standards prescribed in this Article.

(b) Unless otherwise provided by law, the right to compensation accrues upon the date of filing of the complaint.

(c) Except as specifically provided in this Article, compensation, damages, or other relief to which a person is otherwise entitled under this Code or other law are not affected, but duplication of payment is not permitted.

COMMENT

This Article establishes general standards applicable to the determination of the amount of compensation to which the property owner is entitled for the taking of his property. While it is not intended by the Uniform Code to attempt to formulate rules governing every possible factor that may affect the amount of compensation, the features of eminent domain law chiefly responsible for disparities of results, with attendant inequities for both condemnors and condemnees, relate to compensation standards. The purpose of this Article is to formulate uniform principles governing the major elements of just compensation.

Subsection (a) makes it clear that a property owner is entitled to the compensation provided by this Article, even though it may exceed what would be payable under applicable judicial construction of the "just

compensation" clause. While the award for a taking of property cannot be less than the "just compensation" guaranteed by the Constitution, the legislature may enlarge compensability standards beyond the constitutional minimum. See Eminent Domain § 151, 26 Am.Jur.2d 813, 814 (1966).

Subsection (b) establishes the filing of the complaint as the date upon which the right to compensation accrues. This rule is consistent with the principle that the court acquires jurisdiction of the property upon the filing of the complaint. See Section 402. The date on which the right to compensation accrues is not the same as the date of valuation (see Section 1003), but is the date upon which the legal condition of the various ownership interests in the property, and its physical features, are deemed fixed for the purpose of determining the right to compensation. The rule, however, is only intended to affect the "accrual" of the "right" to compensation; payment of the award is made according to the respective interests of the parties, or their successors, as shown by the evidence. Moreover, this rule is subject to exceptions recognized by statutory or decisional law. For example, under Section 407, subsequent encumbrancers are charged with constructive notice of the action only from the date of recordation of a notice of lis pendens. See also, Section 1009 (right to harvest crops planted after commencement of action; Section 1010 (right to compensation for improvements placed on property after commencement of action). The commencement of the action may also have an effect upon pre-existing interests in the property (e.g., may operate to extinguish an existing lease or other interest, pursuant to agreement between the parties). See, e.g., Eminent Domain § 250, 27 Am.Jur.2d p. 21 (1966). Cf. Section 1013.

Subsection (c) clarifies the relationship between this Article and other provisions of law authorizing payment of additional amounts under specified circumstances. See, e.g., Article XIV (Relocation Assistance). Under this subsection, the property owner is entitled to the compensation authorized by this Article and also, but without duplication, any additional amounts authorized by law.

§ 1002. [Compensation for Taking]

(a) Except as provided in subsection (b), the measure of compensation for a taking of property is its fair market value determined under Section 1004 as of the date of valuation.

(b) If there is a partial taking of property, the measure of compensation is the greater of (1) the value of the property taken as determined under subsection (a) or (2) the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

COMMENT

Subsection (a) states the basic rule that the measure of just compensation under the Uniform Code is the market value of the "take." Where there is a partial taking, Subsection (b) qualifies the basic rule by authorizing a greater (but not a smaller) recovery, if greater compensation is warranted under a comparison of the respective market values of what the condemnee possessed before the taking and what he had left afterwards. The principal difference between the rule expressed in Subsection (b) and the conventional "before and after" approach followed in several states and in federal condemnation practice is that the latter can sometimes result in a zero award (if the remainder after the taking is more valuable than the entire property before the taking), while under the present section, the award cannot be less than the value of the "take."

A different approach, something referred to as the "value plus damage" rule, appears to be followed in one of several variant formulations in a majority of states. Under this rule, briefly stated, compensation in partial taking cases generally consists of the sum of the value of the property taken and of any net damages to the remainder after off-setting benefits. Text writers and commentators, however, are in substantial agreement that the "before and after" rule is preferable to the "value plus damage" approach, since it avoids confusing artificialities inherent in the latter approach, is more consistent with realistic market valuation and appraisal techniques, and reduces the risk of inequitable windfall recoveries by property owners that may unnecessarily increase the cost of public improvements. See 4A P. Nichols, *Eminent Domain* § 14.232[1] (3d rev. ed. 1971); 1 Orgel, *Valuation Under the Law of Eminent Domain* § 65 (2d ed. 1953); Conner, *Valuation of Partial Taking in Condemnation: A Need for Legislative Review*, 2 Pac.L.J. 116 (1971); Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 Calif.L.Rev. 833 (1963). See also, Palmore, *Damages Recoverable in a Partial Taking*, 21 Southwestern L.Rev. 740 (1967).

The two basic rules generally reach substantially identical results in partial taking cases in which resulting damages outweigh any special benefits to the remainder caused by the taking or of the proposed public use. Divergent results are obtained principally in cases where net special benefits are realized by the remainder. Under the "before and after" rule, such benefits are, in effect, offset against the compensation payable for the property taken, while under the "value plus damage" approach, they are offset only against damages to the remainder. The present section takes an intermediate position between these two views, requiring the compensation to be measured by the "before and after" rule, except that the award cannot be less than the value of the "take." On the other hand, if applicable statutory rules or constitutional interpretations require additional amounts to be awarded, this section does not preclude that result. See Section 101(c). Moreover, nothing in this section precludes the court from making, or requiring the jury to make, special findings as to the extent of damages to the remainder for tax purposes.

The "before" and "after" values determined under the rule declared in this section necessarily reflect all property elements affected by the taking. For example, a partial taking could include either a physical portion of a large parcel or item of property, leaving a tangible remainder, or may consist of the taking of an interest (e.g., an easement, air rights, etc.) that leaves the property owner with no diminution in physical area. The rule here stated would apply in either of these cases consistent with market assessments.

Section 1002 must be construed in conjunction with other sections of the present article. "Date of valuation" is governed by Section 1003. The concept of "fair market value" is defined in Section 1004. The rule requiring the "before" value to be determined without regard for changes in value due to the imminence of the condemnation action is set out in Section 1005. On the other hand, the determination of the "after" value must take into account the impact of the project as planned. See Section 1006. See also, Section 1007 ("entire property").

§ 1003. [Date of Valuation]

(a) Except as provided in subsection (b), the date of valuation is the earlier of (1) the date upon which the plaintiff first makes a deposit under Article VI or (2) the date upon which the trial of the issue of the amount of compensation commences.

(b) On motion of the defendant made not later than [60] days before the date of trial of the issue of the

amount of compensation:

(1) If the amount first deposited by the plaintiff is determined to be insufficient under Section 603 and the plaintiff does not deposit the additional amount required by the court's order within [30 days] after the order is made, the court may designate as the date of valuation the earlier of (i) the date on which the plaintiff thereafter deposits the required additional amount or (ii) the date upon which the trial of the issue of the amount of compensation begins.

(2) If the court determines that the date of valuation required by subsection (a) is more than [one year] after the commencement of the action and that the defendant did not cause the delay, the court shall designate as the date of valuation the date on which the action was commenced.

(3) If the court determines that the plaintiff entered into possession of the defendant's property without the consent of the defendant, and not under the authority of an order for possession, the court may designate as the date of valuation the date on which the plaintiff entered into possession.

(c) At a retrial of the issue of compensation, the date of valuation is the date determined to be applicable under this section for the purpose of the original trial.

COMMENT

This section fixes the date as of which fair market value is required to be determined. See Section 1002(a). It must be distinguished from the date of accrual of the right to compensation. See Section 1001(b). Current practice as to the date of valuation varies considerably from state to state, with the applicable rule often prescribed by decisional rather than statutory law. Clear specification of a date of valuation is deemed preferable to use of potentially ambiguous language, such as "date of taking" or "date of condemnation," found in some statutes.

Under Subsection (a), the condemnor may obtain a measure of protection in periods of generally rising market values, since it may deposit the amount of estimated compensation with the court and thereby fix an early valuation date. See Section 601. The property owner, on the other hand, will receive the benefit of general increases in property values by use of the trial date for valuation purposes, if the condemnor does not make a deposit at an earlier date. Moreover, if a deposit is made, the property owner may withdraw the amount deposited (see Sections 604 to 606) and receive interest on any deficiency below the amount of the ultimate award. See Section 1202. On the other hand, if the normal valuation date is deemed unsatisfactory to the defendant, and the special circumstances specified in Subsection (b) obtain, the defendant may seek a judicial change in that date by motion under Subsection (b).

Subsection (b)(1) is intended to discourage the condemnor from seeking to establish an early date of valuation, in a period of rising property values, by making a deposit that is insufficient. The date of the original deposit, in such a case, is not necessarily the date of valuation if, on defendant's motion, the court finds that the plaintiff did not increase the deposit within [thirty] days after the determination that it was insufficient. See Section 603. In this event the court may designate as the date of valuation the date, if any, on which the amount

on deposit is increased in conformity with the court's order, or the date of trial, if that occurs first. These rules obtain whether or not the plaintiff has entered into possession or has obtained an order for possession.

In a period of generally declining property values, absent an early deposit by the condemnor, the property owner may require protection against undue delay in bringing the compensation issue to trial, since delay is likely to reduce the amount of the award. Accordingly, Subsection (b)(2) requires the court, on application by a property owner, who has not deliberately caused the delay, to designate the date of filing of the complaint as the valuation date, if the actual trial date or date of deposit by the plaintiff is more than one year after filing. In effect, Subsection (b)(2) embodies a policy judgment that, as between the condemnor and an innocent property owner, the risk of a diminished award due to declining market values during prolonged delay in getting the case to trial, whether due to crowded dockets and court congestion or to deliberate stalling by the plaintiff, ordinarily should not be charged to the property owner. The remedy prescribed is only available on motion by the property owner and thus presumably will be sought only if the latter deems a change in the valuation date to be advantageous to his interests.

Under Subsection (b)(3), the court, on defendant's motion, may designate as the date of valuation the date on which the plaintiff, without either defendant's consent or the authority of an order of possession, entered into possession of the property. The possibility of a shift in the valuation date under this provision may discourage an unauthorized taking of possession either before or after commencement of the action.

Subsection (c) makes the date of valuation at a retrial the same as that which is "determined to be applicable" for the purpose of the original trial. This may not always be the same valuation date as that used at the original trial; for example, if the new trial was ordered by an appellate court because the trial court used an erroneous valuation date for the original trial, the correct valuation date "determined to be applicable" under the appellate decision would govern the new trial. The rule of Subsection (c) would govern even if there were several successive new trials. Delay in ascertaining and obtaining payment of the amount ultimately awarded is taken into account by adding interest to the award. See Section 1203.

§ 1004. [Fair Market Value Defined]

(a) Except as provided in subsection (b), (1) the fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy; and (2) the fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

(b) The fair market value of property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) includes (1) the cost of a functionally equivalent site; (2) the cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and (3) the cost of betterments and enlargements required by law or by current

construction and utilization standards for similar facilities.

COMMENT

Section 1004 defines the meaning of "fair market value" in terms which correspond with widely approved judicial and statutory definitions. The Uniform Eminent Domain Code rejects the "value-to-the-taker" and "loss-to-the-owner" approaches to compensation, and adopts the majority "market value" test as the soundest and fairest measure. The term "price" in Subsection (a) means the amount that would be paid to the seller by the buyer if agreement on a sale were reached. The term "informed" refers to buyers and sellers who have reasonably complete knowledge of all uses and purposes for which the property is reasonably adaptable and available. Moreover, it is not enough that the parties are not legally "obligated" to buy or sell; this term also includes practical urgency or necessity. On the other hand, if no relevant market for the property exists, any just and equitable method of determining fair market value may be employed.

Subsection (b) recognizes that special purpose properties (e.g., public fire stations, nonprofit schools, churches, parks, cemeteries) for which no realistic market exists, may require a special rule for determining "fair market value" in order to assure just compensation. Thus, under Subsections (b) and (c), compensation in such cases cannot be less (but may be more) than "functional replacement" cost. While this approach requires a showing that relocation and rehabilitation or replacement are needed in good faith to continue the purpose for which the building taken is presently being used, it does not require any offset for accrued depreciation. This approach, however, is limited to (1) public entities and private owners organized and operated for nonprofit purposes, and (2) properties actually used for public or nonprofit educational, religious, or eleemosynary services that are available to the general public. Property operated by producer or consumer cooperatives, for example, would not qualify under this dual requirement.

§ 1005. [Effect of Condemnation Action on Value]

(a) The fair market value of the property taken, or of the entire property if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by (1) the proposed improvement or project for which the property is taken; (2) the reasonable likelihood that the property would be acquired for that improvement or project; or (3) the condemnation action in which the property is taken.

(b) If, before completion of the project as originally adopted, the project is expanded or changed to require the taking of additional property, the fair market value of the additional property does not include a decrease in value before the date of valuation, but does include an increase in value before the date on which it became reasonably likely that the expansion or change in the scope of the project would occur, if the decrease or increase is caused by any of the factors described in Subsection (a).

(c) Notwithstanding subsections (a) and (b), a decrease in value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner, and by his unjustified neglect, may be considered in determining fair market value.

COMMENT

Section 1005 requires changes in value (i.e., "blight" or "enhancement") caused by the project or by the

imminence or pendency of the condemnation action to be excluded from consideration for purposes of establishing the fair market value of the property taken. See *United States v. Miller* (1943) 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336. The term "condemnation action" in Subsection (a) includes steps preparatory to the filing of the complaint. See Section 103(5).

This section applies to the determination of the "amount of compensation" for the property taken. It thus affects not only the market value of the property taken, but also the determination of the "before" value of the entire property in partial taking cases. See Section 1002(b). While compensation is intended to reflect the impact of the project or improvement upon market estimates of the value of the remainder in partial taking cases (see Section 1006), the base value of the original parcel, with which the "after" value of the remainder is to be compared, should be unaffected by condemnation-caused blight or enhancement.

General knowledge of officially announced public improvement plans that involve a probability of condemnation of the property, as well as preparatory steps such as route studies and area surveys, land suitability studies, site selection proceedings, and preliminary purchase negotiations may affect the market value of the property taken even before the complaint in the condemnation action has been filed. The pendency of the action itself may also exert an influence upon value during the period prior to the date of valuation (see Section 1003). Under the present section, these condemnation-induced changes in value, whether upwards or downwards, are excluded from consideration so that neither party will be adversely affected by market abnormalities caused by the prospect of the condemnation action. Compare Section 203(b), relating to the required basis for a purchase offer. This section does not identify a specific point of time to govern the exclusion of the indicated changes in value, but leaves the application of the rule to be determined as one of factual causation.

Changes in value that are not shown by the evidence to be the result of the factors described in Subsection (a), however, are properly included in market value. For example, market changes caused by a different project from that for which the property is taken, even though the two projects may be related, are not governed by Subsection (a).

The rule of Subsection (a) is subject to stated exceptions. Subsection (b), for example, permits inclusion of increases in value occurring prior to the time at which it became likely that there would be an expansion of the project to include the subject property. This rule is intended to assure that changes in the scope of the project will not prejudice persons acting in reliance on the original proposal. On the other hand, in order to prevent manipulation by a condemnor of the scope of the project to artificially depress the value of adjacent property that is later included in the scope of the take, Subsection (b) excludes project-caused decreases that occur before the valuation date. In addition, under Subsection (c), preventable deterioration caused by the owner's unjustified neglect may be included as an element of market value depreciation so that it is not charged to the condemnor.

§ 1006. [Compensation to Reflect Project as Planned]

(a) If there is a partial taking of property, the fair market value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.

(b) The fair market value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized.

COMMENT

Section 1006 makes it clear that in partial taking cases the "after" value must reflect changes in value caused by the project as planned, including any work to be done pursuant to pretrial order or agreement of the parties. The term "work" is defined by Section 103(20) to include construction, alteration, repair, remodeling, excavation, demolition, rehabilitation, relocation, and landscaping.

The rule set out in Subsection (a) is intended to provide an inducement to condemnors to develop project designs that will mitigate damages to or confer benefits upon remainder properties so far as possible, and to work out by agreement or at the pretrial conference mutually satisfactory "physical solutions" to sources of damage from the project. If the condemnor has no specific proposal for the design and construction of the project, the court may properly assess the "after" value of the remainder on the basis of the most injurious plan that is reasonably probable. See *People v. Schultz Co.* (1954) 123 Cal.App.2d 925, 268 P.2d 117.

Agreements of the kind contemplated by this section may be an essential step in settlement of the action, as well as in reducing the amount of compensation that would otherwise be awarded. Thus, the kind of work that may be included is broadly expressed in order to allow maximum flexibility for negotiation. For example, the plaintiff might agree to engage in land grading or fill operations; landscape planting to screen a highway; soundproofing of a building near an airport runway; construction of retaining walls or driveways; or relocation of underground drainage and utility facilities. Since this work may often be phased into and performed concurrently with project construction, and by the same construction personnel and equipment, its performance by the condemnor may be less costly than the additional damages to the remainder that might be included in the award if it were not done at all. If a subsequent change of plans causes additional damage, the property owner may obtain relief in a proceeding after judgment. See Section 1207.

Under Subsection (b), the determination of fair market value of the remainder is not based on the often unrealistic view that the improvement has already been completed on the valuation date, but must be computed in a manner that will take into account any anticipated delay before the benefit or damage to the remainder is actually realized.

§ 1007. ["Entire Property"]

For the purpose of determining compensation under this Article, all parcels of real property, whether contiguous or noncontiguous, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, for their highest and best use as an integrated economic unit, shall be treated as if the entire property constitutes a single parcel. Any issue arising under this section shall be decided by the court [trier of fact].

COMMENT

This section prescribes the rule for determining whether two or more parcels of real property under single ownership should be treated, for purposes of determining compensation, as a single unit or as several separate parcels. While some cases require three elements (i.e., unity of title, unity of use, and contiguity) to be concurrently present before multiple parcels may be treated as one, this section rejects any mandatory requirement of contiguity. See 4A, Nichols, *Law of Eminent Domain* § 14.31[1] (rev. 3d ed. 1971). However, evidence as

to the degree of contiguity or separation may still be relevant for its bearing on the principal criterion, unity of use. The term "real property," as here used, is defined by Section 103(19) to include improvements as well as land.

The approach here taken is of practical importance in determining whether there is a partial taking, leaving a remainder which realized benefits or sustained damages from the project. See Section 1002(b). The second sentence makes it clear that any issue of fact under this section is regarded as a preliminary or foundational question of fact to be decided by the court. The bracketed term "trier of fact" is suggested for use in jurisdictions where the constitutional right to a jury trial extends to this issue.

§ 1008. [Special Assessment Proceedings Excluded]

If there is a partial taking of property and special assessments or charges are imposed upon the remainder to pay for all or part of the project, the increase in value of the remainder caused by the project shall be considered in determining its value after the partial taking only to the extent the increase exceeds the amount of the special assessments or charges.

COMMENT

Section 1008 is intended to prevent a property owner from being specially assessed for benefits inuring to his property because of the improvement, and then being denied the value of those benefits in the condemnation action by having them set off against severance damages. If this were permitted to happen, the property owner would, in effect, pay twice for the benefits. See *City of Tucson v. Rickles*, 15 Ariz.App. 244, 488 P.2d 180; *Oro Loma Sanitary Dist. v. Valley*, 86 Cal.App.2d 875, 195 P.2d 913; 3 P. Nichols, *Law of Eminent Domain*, § 8.6209, p. 102 (rev. 3d ed. 1971).

§ 1009. [Use by Defendant; Risk of Loss]

(a) Unless the court otherwise directs, the defendant may use the property sought to be taken for any lawful purpose before the date on which the plaintiff is authorized to take possession. Thereafter, the defendant may use the property only with the consent of, and subject to any limitations required by, the plaintiff. The uses authorized by this subsection include any work on the property and the planting, cultivation, and removal of crops. The compensation awarded the defendant shall include an amount sufficient to compensate for loss caused by any restriction or limitation imposed by the court upon his right to use the property.

(b) As between the plaintiff and defendant, the defendant has the risk of loss due to damage, destruction, or unauthorized removal of improvements or crops situated upon the property until the earliest of (1) the date after which, by order of the court, the defendant's right to use the property is substantially limited or forbidden; (2) the date upon which the plaintiff is authorized to take possession; or (3) the date upon which title is transferred to the plaintiff.

COMMENT

Under Section 1009, the condemnee ordinarily may continue to use his property in a normal manner until the condemnor takes possession, including the performance of "work" (see the definition in Section 103(20),

above) and the planting, cultivation and harvesting of crops. The mere fact that the condemnation action is pending ordinarily should not interfere with the property owner's right to continue to derive earnings from the property until he is divested of possession. The condemnor may protect any interest it may have in preserving the property in an undisturbed state by making a deposit and taking immediate possession. See Article VI. Moreover, if necessary to prevent waste or frustration of the purpose of the taking, the court may impose specific limitations on the use of the property before possession is taken, but the property owner is entitled to compensation for the resulting losses.

Subsection (b) expressly places the risk of loss or destruction of improvements or crops upon the property owner up to the date on which the plaintiff, pursuant to an order for possession, may take possession of the property, the date upon which any substantial judicial limitations on the owner's right of use are imposed, or the date of passage of title, whichever is earlier. The rules governing the determination of compensation for crops and improvements, as set out in Section 1010, are consistent with this allocation of responsibility. In effect, the risk of loss follows the right to use.

§ 1010. [Compensation for Growing Crops and Improvements]

(a) The compensation for crops growing on the property on the date of valuation is the higher of (1) the current fair market value of the crops in place, assuming the right to bring them to maturity and to harvest them, or (2) the amount by which the existence of the crops enhances the fair market value of the property.

(b) The compensation for an interest in improvements required to be taken under Section 209 is the higher of (1) the fair market value of the improvements, assuming their immediate removal from the property, or (2) the amount by which the existence of the improvements enhances the fair market value of the property.

(c) If crops or improvements are destroyed, removed, or damaged by defendant after the date of valuation, the amount of compensation shall be adjusted to reflect the extent to which the fair market value of the property has thereby been reduced.

(d) Crops or improvements that are first placed upon the property after the date of valuation shall be excluded from consideration in determining the amount of the award, except that the award shall be adjusted to include the reasonable and necessary cost of providing (1) improvements required by law, and (2) improvements, other than ordinary and routine maintenance, made for the primary purpose of protecting persons and property from a risk of injury caused by the condition of a damaged or partially completed structure, or for the purpose of protecting partially installed machinery or equipment from damage, deterioration, or vandalism.

COMMENT

Section 1010 provides general rules for determining the extent to which crops and improvements, including those placed on the property after the commencement of the action, may properly be taken into account in determining the amount of compensation to be awarded. Compare Section 1009, dealing with the property owner's right to use the property and the resulting risk of loss.

"Crops," as here used, include any form of vegetation, such as grass, flowers, fruits, vegetables, trees, vines, grasses, and nursery stock, intended to be used or sold for commercial purposes. See Section 103(10).

"Improvements" include buildings, structures, machinery, and equipment that cannot be removed from the property on which they are located without substantial economic loss or damage. See Section 103(12).

While improvements placed on the property after the valuation date are ordinarily deemed not compensable, Subsection (f) creates two exceptions regarded as justified by practical or equitable considerations. The parties, of course, may also agree to arrangements contrary to the general statutory rule.

§ 1011. [Improvements Partially Located on Land Not Taken]

If a compensable improvement is located in part upon the property sought to be taken and in part on property not sought to be taken, the court, upon motion by either party and upon a determination that justice so requires, may direct the plaintiff to acquire the entire improvement, including that portion of it located upon the property not sought to be taken, together with any easement or other interest reasonably necessary for use of the improvement or for the purpose of its demolition, removal, or relocation.

COMMENT

Section 1011 authorizes the court, on motion, to direct that the plaintiff take and pay compensation for improvements located only partially on the land sought to be taken. The grant of this authority recognizes that while the damages occasioned by a partial taking will, in most cases, be assimilated into the determination of the "after" value of the remainder, this may not always be the case. For example, the improvement may be owned by a tenant, and the compensation payable under Section 1010 may not fully take into account the need for reorientation or rehabilitation of the portion not taken, or the fact that the taking may have made it unusable except for demolition purposes. In other cases, where the improvement is owned by the owner of the land and substantial special benefits accrue to the remainder (e.g., a shift in the highest and best use resulting from the public improvements), the compensation awarded may not reflect the cost of rehabilitation of the improvement even though, in a practical sense, that cost must be immediately assumed by the property owner. Furthermore, the need for rehabilitation, which may include immediate shoring and sealing, often involves substantial safety considerations in which the condemnor may be vitally interested.

This section leaves the determination of the most just and equitable treatment of the problem of an "improvement remainder" to the sound discretion of the court, upon application by any party.

§ 1012. [Compensation for Divided Interests]

The amount of compensation for the taking of property in which divided interests exist is based upon the fair market value of the property considered as a whole, giving appropriate consideration to the effect upon market value of the terms and circumstances under which the separate interests are held.

COMMENT

Section 1012 provides the guiding rule for determining compensation for a taking of property in which the ownership interests are divided between two or more parties. In such cases, absent contractual provisions governing the rights of the parties if the property is taken by eminent domain, the award must be apportioned between them in accordance with their respective interests. Difficulties have arisen, however, because the value

of the property considered as a whole and without regard for the several divided interests, may not be equal to the aggregate of the values of each of the several interests, considered separately. The former approach-sometimes referred to as the "undivided fee" rule-is adhered to in a majority of American jurisdictions, while the latter-often described as the "aggregate of interests" rule-also has significant support in the case law. See 4 P. Nichols, *Law of Eminent Domain*, § 12.36 (rev. 3d ed. 1971). However, some courts have indicated that in exceptional cases where strict adherence to the undivided fee rule will fail to provide adequate compensation for all interests taken, it may be unconstitutional to apply it strictly. Nichols, *op. cit.* § 12.36[2].

Section 1012 avoids the difficulties inherent in the two conventional rules just described, by requiring that in the first phase of the trial on the issue of compensation, the total amount of compensation to be paid for the property taken must reflect the fact that the property is held in divided interests. In effect, under this section, the trier of fact must take into account the mode of ownership of the property being taken, to the extent that the market would do so as between a willing buyer and seller. The property is not required to be valued as an unencumbered whole when, in fact, it is not held as an unencumbered whole. Accord: *People v. Lynbar, Inc.* (1967) 253 Cal.App.2d 870, 62 Cal.Rptr. 320. See also, *Boston Chamber of Commerce v. City of Boston* (1910) 217 U.S. 189 (Holmes, J.); *New York State Commission on Eminent Domain, Annual Report 92-95* (1972).

§ 1013. [Taking of Leasehold Interest]

(a) If all or part of the property taken includes a leasehold interest, the effect of the condemnation action upon the rights and obligations of the parties to the lease is governed (1) by the provisions of the lease, and (2) in the absence of applicable provisions in the lease, by this section.

(b) If there is a partial taking and the part of the property taken includes a leasehold interest that extends to the remainder, the court may determine that (1) the lease terminates as to the part of the property taken but remains in force as to the remainder, in which case the rent reserved in the lease is extinguished to the extent it is affected by the taking; or (2) the lease terminates as to both the part taken and the remainder, if the part taken is essential to the purposes of the lease or the remainder is no longer suitable for the purpose of the lease.

(c) The termination or partial termination of a lease under this section shall occur at the earlier of (1) the date on which, under an order of the court, the plaintiff is permitted to take possession of the property, or (2) the date on which title to the property is transferred to the plaintiff.

(d) This section does not affect or impair a lessee's right to compensation if his leasehold interest is taken in whole or in part.

COMMENT

Section 1013 changes the rule followed in many states under which the lessee of property that is the subject of a partial taking must continue to pay the full amount of the agreed rent for the balance of the term, but is entitled to receive out of the award the present value of the future rent allocable to the part of the premises taken. This rule is widely criticized as unfair to both parties. See Horgan & Edgar, *Leasehold Valuation Problems in Eminent Domain*, 4 Univ.San Francisco L.Rev. 1 (1969), and authorities cited. See also, *New York Commission on Eminent Domain, Annual Report 93* (1972). Section 1013 substitutes a rule of equitable partial abatement (Subsection (b)) or termination by judicial action (Subsection (c)). Compare West Va.Code § 37-6-29.

Under Subsection (a), however, these statutory dispositions are subject to any agreement between the parties set forth in the lease.

§ 1014. [Acquisition of Property Subject to Lien]

Notwithstanding the provisions of an agreement, if any, relating to a lien encumbering the property:

(1) if there is a partial taking, the lienholder may share in the amount of compensation awarded only to the extent determined by the court to be necessary to prevent an impairment of his security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness until it is paid; and

(2) neither the plaintiff nor defendant is liable to the lienholder for any penalty for prepayment of the debt secured by the lien, and the amount awarded by the judgment to the lienholder shall not include any penalty therefor.

COMMENT

Section 1014 must be construed in light of the general rule that lienholders are entitled to satisfy their debts out of the condemnation award in the order of their respective priorities. Subsection (1) provides an equitable approach to apportionment of liens in the event of a partial taking. It would change the existing law in some states under which a lienholder, upon a partial taking, is entitled to a full discharge of his lien from the award, even though his security has not been substantially impaired. See "Eminent Domain," 27 Am.Jur.2d § 257 (1966).

Subsection (2) makes unenforceable, in the condemnation context, any agreement or statutory requirement imposing a penalty in the event of prepayment of a lien. It seems inequitable to impose liability for such penalties upon the property owner, when the decision to take his property and thus discharge the encumbrance prematurely was not voluntary on his part. See Section 211 (condemnor required to assume penalty if paid). On the other hand, it also seems contrary to the public interest to increase project costs by transferring liability for the penalty to the condemnor.

§ 1015. [Property Subject to Life Tenancy]

If the property taken is subject to a life tenancy, the court may include in the judgment a requirement that:

(1) the award be apportioned and distributed on the basis of the respective values of the interests of the life tenant and remainderman;

(2) the compensation be used to purchase comparable property to be held subject to the life tenancy;

(3) the compensation be held in trust and administered subject to the terms of the instrument that created the life tenancy; or

(4) any other equitable arrangement be carried out.

COMMENT

Section 1015 provides the court with express statutory authority to devise an equitable solution where property subject to a life tenancy is taken and an outright division of the award would not result in substantial justice under the circumstances of the particular case. See *Estate of Giacomelos*, 192 Cal.App.2d 244, 13 Cal.Rptr. 245 (1961) (trust imposed on proceeds).

§ 1016. [Loss of Goodwill]

(a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill, (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.

(b) Within the meaning of this section, "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

COMMENT

Section 1016 is intended to reverse the general rule but widely criticized rule under which compensation for loss of business goodwill is not allowed in eminent domain. See *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority* (Colo.1974) 517 P.2d 845; *Aloi and Goldberg, A Reexamination of Value, Goodwill, and Business Losses in Eminent Domain*, 53 Cornell L.Q. 604 (1968). It provides compensation for loss of goodwill in both a whole or a partial taking; but such loss is recoverable only to the extent it cannot reasonably and economically be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not by the special rules of evidence relating to property valuation in eminent domain contained in Article XI. See Comment to Section 1103. In addition, the burden of proof under this section is upon the owner. Compare Section 904 (neither party has burden of proof on issue of amount of compensation).

This section compensates for goodwill loss to a "business" only to the extent such loss is not compensated under the relocation provisions of Article XIV (moving expenses and moving losses for business that cannot be relocated without a substantial loss of patronage), or as part of the compensation awarded to the owner. See Section 1001(c) (no double recovery). The term "business" as used in Section 1016 is defined in Section 103(3).

ARTICLE XI

EVIDENCE IN CONDEMNATION ACTIONS

Section

- 1101. [Scope of Article].
- 1102. [View of Property Taken].
- 1103. [Opinion Evidence Competent to Prove Value].
- 1104. [Supporting Evidence].
- 1105. [Evidence Relating to Remainder Value in Partial Taking].
- 1106. [Matters upon Which Opinion Testimony May be Based].
- 1107. [Sales of Subject Property].
- 1108. [Comparable Sales].
- 1109. [Leases].
- 1110. [Capitalization of Rental Income].
- 1111. [Reproduction or Replacement Cost].
- 1112. [Conditions in General Vicinity].
- 1113. [Matter upon Which Opinion May Not be Based].

§ 1101. [Scope of Article]

(a) Actions under this Code are governed by the rules of evidence applicable in other civil actions and as supplemented by this Article.

(b) This Article does not create or diminish any right to compensation or damages, and does not affect the meaning of "just compensation" under the law of this State.

COMMENT

In condemnation actions, the principal issue to be tried relates to the amount of compensation to be awarded for the property taken. Since the "market value" approach to "just compensation" (see Section 1002) involves debatable judgmental factors, efforts to achieve comparability of testimony of valuation witnesses necessarily center upon the applicable rules of evidence. This Article establishes special rules of evidence adapted to the peculiar circumstances of condemnation, which are to be applied together with the general evidence law of the adopting state. The rules here set out, however, govern in the event of conflict. See Section 102(b).

§ 1102. [View of the Property Taken]

(a) Upon motion of a party or its own motion, the court may direct the jury to be placed in charge of an officer of the court and taken personally to view the property sought to be taken. Upon like motion, if the case is tried before the court without a jury, the judge presiding at the trial may view the property. The court may prescribe additional terms and conditions consistent with this section.

(b) During a view of the property by the jury, the judge presiding at the trial shall be present and supervise

the proceedings. The parties, their attorneys, engineers, and other representatives may be present during a view by the jury or judge.

(c) If a view is taken by a jury, only the judge presiding at the trial or a person designated by the court may make to the jury during the view a statement relating to the subject matter of the action.

(d) The physical characteristics of the property and of surrounding property, and any other matters observed during a view, may be considered by the trier of fact solely for the purpose of understanding and weighing the valuation evidence received at the trial, and do not constitute independent evidence on the issue of the amount of compensation.

COMMENT

Section 1102 authorizes, but does not require, the court to order a view of the premises either on its own motion or when any party requests. A view may properly be denied if the premises have changed in appearance or are no longer in substantially the same condition as when the action was commenced, so that the view might be of little or no assistance, or might even be misleading, on the issue of value. Additional factors that may influence the court's discretion in this regard are the availability of other reliable evidence (e.g., maps, photographs, diagrams) and the cost of taking a view.

This section also prescribes basic procedural guidelines for the conduct of a view if one is ordered. The required presence of the presiding judge, and the limitation on persons who may make statements to the jury during the view, are intended to protect the impartiality of the proceedings outside of the courtroom.

The evidentiary consequences of a view are defined in Subsection (d), which adheres to what appears to be the majority approach among the several states. See Massey, Rules of Compensability and Valuation Evidence for Highway Land Acquisition 20-21 (Highway Research Board, Report No. 104, 1970). Under this rule, the view does not have independent evidentiary effect, but is intended only to assist the jury in understanding the valuation testimony. Thus, for example, an award that is outside the range of the valuation testimony of record could not be sustained on appeal merely on the conjecture that it was supported by observations made by the jury during a view.

§ 1103. [Opinion Evidence Competent to Prove Value]

(a) Upon proper foundation, opinion evidence as to the value of property may be given in evidence only by one or more of the following persons:

(1) a witness qualified by knowledge, skill, experience, training, or education to express an opinion as to the value of the property;

(2) an owner of the property; or

(3) a shareholder, officer, or regular employee designated to testify on behalf of an owner of the property, if the owner is not a natural person.

(b) This section does not preclude the admissibility of other evidence explaining and enabling the trier of fact to understand and weigh opinion testimony given under Subsection (a).

[(c) The court, for good cause, and in the interest of expediting the trial, may limit the number of witnesses permitted to give testimony for any party in the form of an opinion with respect to the issue of the amount of compensation.]

COMMENT

Under Section 1103, opinion evidence of property value may be given at the trial not only by qualified valuation experts, but also by persons who own a compensable interest in the property. A corporate owner, for example, is not limited to the employment of an expert witness, but may designate a stockholder, officer, or regular employee (i.e., a person who has not been employed solely to give testimony in the case) to testify in its behalf. A proper foundation for the opinion testimony must first be offered, however; the elements of such a foundation and the qualifications of an expert are determined by the law of the adopting state. For example, an adequate foundation for an owner's testimony would ordinarily be provided by mere proof of his ownership; no special requirements of familiarity with the property or knowledge of its value are prescribed for an owner's testimony. Nothing in this section, however, limits evidence of value to opinion testimony under this section. Nor does this section affect the admissibility of proper rebuttal evidence.

This section does not prevent the appointment by the court of an impartial expert witness, if such appointment is authorized by the procedural law of the adopting state. Nor does this section preclude the court from giving effect to other rules of law in the adopting state that may require exclusion of the testimony of a witness. For example, an otherwise qualified expert valuation witness may be ineligible to testify in some jurisdictions if it is shown that his fee is contingent upon the magnitude of the award.

This section and the subsequent sections in this Article relate only to opinion evidence on the issue of property value. Accordingly, the issue of the amount of any loss of good will, under Section 1016, is not governed by these special rules of evidence.

Subsection (b) is intended to remove any possible basis for a claim of inconsistency between this section and Sections 1104 to 1112.

Subsection (c) is bracketed as an optional provision for use in states where it is deemed useful to eliminate any doubt as to the authority of the trial court to limit the number of valuation witnesses in the exercise of sound judicial discretion.

§ 1104. [Supporting Evidence]

For the purpose of supporting an opinion as to the value of property, evidence may be received relating but not limited to the following factors:

- (1) extent of loss of property and improvements;
- (2) present use of the property, and the highest and best use for which it is reasonably suitable and

available in the reasonably foreseeable future;

(3) extent of loss of a legal nonconforming use;

(4) extent of damage to crops; and

(5) existing zoning or other restrictions upon use, and the reasonable probability of a change in those restrictions.

COMMENT

Section 1104 provides a non-exclusive list of factors that may be the subject of admissible evidence for the purpose of supporting an opinion as to property value. See Section 1103(b). Evidence relating to the items listed, however, is subject to ordinary rules of admissibility under state law; thus, it may ordinarily be admitted, over objection, only if it is competent and neither speculative nor conjectural. Moreover, state law also determines whether supporting evidence under this section must be offered as part of the "foundation" required by Section 1103(a) or may be introduced after reception of the opinion which it seeks to support.

Under the basic approach to determining the amount of compensation (see Section 1002), this section provides a rule of evidence applicable to the question of the value of the property taken as well as to the issue of the value of the remainder in a partial taking case. See also, Section 1105.

§ 1105. [Evidence Relating to Remainder Value in Partial Taking]

(a) For the purpose of supporting an opinion as to the value of a remainder after a partial taking, evidence may be received relating but not limited to the following factors:

(1) extent of increase or decrease in the productivity and convenience of use of the remainder reasonably attributable to the taking;

(2) extent of improvement in or impairment of access to the public highways from the remainder upon completion of the project;

(3) extent of benefit or detriment caused by the project due to a change in the grade of a right of way abutting the remainder;

(4) extent of enhancement or loss of appearance, view, or light and air as a consequence of the project;

(5) extent of benefit or damage resulting from severance of land or improvements;

(6) extent of benefit or damage resulting from the distance or proximity of the remainder, or improvements on the remainder, to the project in view of its character and probable use, including any increase or decrease in noise, fumes, vibration or other environmental degradation; and

(7) cost of fencing not provided by the plaintiff and reasonably necessary to separate the land taken from the remainder.

(b) If there is a partial taking of property, evidence may be received as to the value of the part taken considered as part of the whole, based on its contribution to the value of the whole, or as to its value considered independent of the whole.

COMMENT

Section 1105(a) provides guidelines as to the admissibility of evidence in a partial taking situation for the purpose of supporting an opinion as to the market value of the remainder under the "before-and-after" phase of the basic rule for determining the amount of compensation. See Section 1002. The approach here adopted does not attempt to distinguish between "special" and "general" benefits or damages, and authorizes the reception of competent evidence relating to all compensable influences upon market value shown to be a consequence of the project. This section is consistent with the rule that the "after" value of the remainder must be determined in light of the project as planned. See Section 1006. But see Section 1113(6) excluding evidence of losses caused by police power or other noncompensable factors.

Subsection (b) recognizes that all parts of an entire tract of property do not necessarily have equal value. The fair market value of property which, before the taking, was part of a larger parcel should thus be determined by considering both the value of the entire tract and the relationship of the part taken to the whole. Under some circumstances, the severed part may have a value for its highest and best use which is independent from that of the entire parcel. In other situations, the part taken may be so related to and may so contribute to the value of the entire property that its value for its highest and best use is dependent upon the value of the entire tract. Under Subsection (b), the parties are free to present competent evidence in support of their respective theories of independent or dependent value from a market perspective, so that the property owner may be compensation for the part taken at not less than the fair market value shown by the approach which the trier of fact deems most persuasive. See Section 1002(b) (compensation for partial taking cannot be less than value of part taken).

The terms "taking," "partial taking," and "remainder," as used in this section, are not specifically defined, but are intended to have the meaning ascribed to them under relevant state law. But see Section 1007 (defining "entire parcel").

§ 1106. [Matters upon Which Opinion Testimony May be Based]

As the basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider any nonconjectural matters ordinarily relied upon by experts in forming opinions as to the fair market value of property, whether or not they are admissible in evidence.

COMMENT

Section 1106 prescribes the general rule governing the basis for the valuation opinion of a witness qualified under Section 1103(a). Compare Sections 1104 and 1105 (collateral evidence in support of valuation opinion). The data upon which such an opinion is predicated need not be admissible in evidence, provided it is the kind of nonconjectural information upon which experts generally rely in determining property values. This

section governs the opinion of any witness offered under Section 1103(a), whether or not the witness is an expert, and whether or not a relevant market exists for the property being valued. Information perceived by or made known to the witness, and verified through sources generally regarded as reliable (e.g., records of sale transactions, published economic indicators, etc.) illustrate the kinds of data that are clearly permissible to establish a foundation for an opinion of value.

For more specific provisions describing what matters may be considered under the general rule of this section, see Sections 1107 through 1112. But see Section 1113 (inadmissible factors).

§ 1107. [Sales of Subject Property]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the price and other circumstances of any good faith sale or contract to sell all or part of the property sought to be taken, or all or part of any remainder that will be left after a partial taking of the property, whether the sale or contract was entered into before or after the valuation date.

COMMENT

Under Section 1107, an opinion as to value may be based, in part, upon the purchase price agreed to be paid to purchase all or part of the subject property, in a good faith transaction entered into before or after the valuation date in the condemnation action. See Section 1003 (defining "valuation date"). Previous sales, however, are not admissible as independent evidence of value; they may be considered only as a basis for the opinion of the witness as to value. This limitation is necessary to assure that the trier of fact will evaluate the sales price evidence with the informed assistance of a qualified witness and in light of the witness' analysis and interpretation of that data.

Previous sales data may be used as the basis of opinion testimony under this section only if the transaction was made in good faith. This requirement of "good faith" is believed to be a sufficient safeguard against efforts to manipulate the sales price. The weight to be given to the data, of course, will depend upon whether the particular transaction was fully voluntary, not too remote in time, and was made at a price and under circumstances which make it a useful criterion of market value on the valuation date. For example, if the prior sales price reflected project-caused enhancement or blight, or if physical and economic conditions substantially changed since the date of the sale, the agreed price might not be reasonably indicative of value for purposes of the condemnation action. In many states, factors of this kind (e.g., remoteness, voluntariness, relevancy to value on valuation date) are treated as conditions to admissibility of the previous sales data; this section takes a more liberal position, deeming their elements as going to the weight and persuasiveness of the data rather than to admissibility. See Massey, Rules of Compensability and Valuation Evidence for Highway Land Acquisition 31-34 (Highway Research Program Rept. No. 104, 1970).

Nothing in this section precludes the use of previous sales of the subject property as the basis of cross-examination of a valuation witness for the purpose of rebutting his opinion of value.

§ 1108. [Comparable Sales]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider

the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this section if it was made within a reasonable time before or after the valuation date and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

COMMENT

Section 1108 provides guidelines for the use of "comparable" sales evidence solely as the basis for an opinion as to value. The limited use of comparable sales authorized by this section is contrary to the majority view, under which such sales data are treated as independent evidence of value. See 5 Nichols, Law of Eminent Domain, § 21.3(1) (rev. 3d ed. 1971); Massey, *op. cit.*, 22-31. The position here taken is deemed preferable, since it avoids the danger that condemnation trials could be unduly prolonged by parades of witnesses called to testify as to the terms and conditions of comparable sales transactions. Moreover, the rule of this section provides assurance that the sales data will be interpreted with the aid of analysis and explanation by an informed valuation witness. Finally, since comparable sales may be used only as a basis for an opinion of value, greater attention can be given to their probative significance in relation to that opinion.

Under this section, a sale is "comparable" if it meets the stated specifications. Comparable sales, moreover, may include those made both before and after the commencement of the condemnation action, provided the other prescribed factors are satisfied. The initial determination of admissibility under this section is within the sound discretion of the trial judge; once admitted, the weight to be ascribed to a particular comparable sale is open to challenge by adverse parties. It is intended that this section should be liberally applied, since errors of admission are less likely to be prejudicial to the interest of justice than errors of exclusion. However, this section must be read together with Section 1113(1) and (5), excluding comparable sales to condemnors, and exchanges of comparable properties.

§ 1109. [Leases]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the terms and circumstances of any lease made in good faith that included all or part of the property being valued or of comparable property whether the lease was made before or after the valuation date.

COMMENT

Section 1109 provides guidelines for the consideration, as the basis of a valuation opinion, of leases of the property being valued and of comparable property. The approach incorporated in this section parallels that used in Sections 1107 (sales of the subject property) and 1108 (sales of comparable property).

§ 1110. [Capitalization of Rental Income]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the actual or reasonable net rental income attributable to the property when used for its highest and best use, capitalized at a fair and reasonable interest rate.

COMMENT

Under Section 1110, a valuation witness may employ an income approach to valuation, subject to the general rules declared in Section 1106. For example, the witness may consider either the capitalized actual or reasonable net rental income from the property for its highest and best use, if the property is of a kind which is bought and sold on that basis in the relevant market. However, he may not calculate a capitalized value from the income or profits of a business conducted on the property, since this would introduce unduly speculative and uncertain elements depending upon managerial skills or other factors that are remote from the issue of property value.

This section does not preclude admission of evidence that a business being conducted on the property is in fact profitable, if under the circumstances prospective purchasers would consider this as a measure of its suitability for business purposes. See Section 1106. It does, however, authorize the court to deny use of an income valuation approach that assumes unrealistic or highly speculative capitalization rates.

§ 1111. [Reproduction or Replacement Cost]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the cost of reproducing or replacing existing improvements on the property sought to be taken which enhance its value for its highest and best use, less any depreciation resulting from physical deterioration or from functional or economic obsolescence.

COMMENT

Section 1111 authorizes use of reproduction or replacement cost data as one factor supporting opinion evidence as to the value of improved property. The cost of "reproduction" refers to the cost of duplication with the same or similar materials and appearance, and is not necessarily the same as the cost of "replacement" (i.e., providing a substitute facility of equal functional utility).

Under this section, the evidence may be used only for the purpose of proving the market value of the land with the improvements on it, to the extent they enhance its value for its highest and best use, but not to prove the value of the improvements separate from the land. The section is not applicable, of course, if the improvements are detrimental to the use, and thus diminish the value, of the property for its highest and best use.

§ 1112. [Conditions in General Vicinity]

As a basis for an opinion as to value, a valuation witness qualified under Section 1103(a) may consider the nature, condition, and use of properties in the general vicinity of the property being valued.

COMMENT

Section 1112 should be read in conjunction with Section 1104(2) and (5) which permits reception of competent evidence as to the highest and best use of, and the reasonable probability of a change in existing zoning or other use restrictions on, the property being valued. Section 1112 makes it clear that similar evidence, relating to the uses of other properties in the vicinity, may be used as a basis for an opinion of value. Compare

Calif. Evidence Code § 821 (1966).

§ 1113. [Matter upon Which Opinion May Not be Based]

Notwithstanding the provisions of Sections 1103 to 1112, the following factors are not admissible as a basis for an opinion as to the value of property:

(1) the price or other terms and circumstances of an acquisition of comparable property, where that property was or could have been acquired in that transaction under the power of eminent domain;

(2) the price at which property was optioned, offered, or listed for purchase, sale or lease;

(3) the assessed value of property for purposes of taxation;

(4) an opinion as to the value of property other than the property being valued;

(5) the terms and circumstances of a trade or exchange of property, and

(6) except as provided in Section 1104(5), the influence upon the value of the property being valued of an exercise of the police power or of other noncompensable damage.

COMMENT

Section 1113 provides a non-exclusive list of factors which are inadmissible as the basis for an opinion as to the value of property, either because the designated items are speculative and unreliable, or because their admission would be contrary to basic policies underlying the substantive law. This section does not preclude cross-examination of a valuation witness on matters that are inadmissible into evidence for the purpose of determining whether the witness' opinion was based upon matter which this section defines as not a proper basis for such an opinion.

Under paragraph (1), only acquisitions of comparable property by condemnors are excluded, consistent with the prevailing view that such transactions are not sufficiently voluntary, but tend to exhibit the characteristics of a forced sale or to involve elements of compromise that impair true comparability. Previous sales of the subject property to a condemnor, however, are not excluded; in most instances, these sales will presumably be to the present defendant in the instant condemnation action, and it is deemed unduly harsh to refuse to permit the defendant to show what it has in fact paid for the property in a recent acquisition, if the defendant deems that factor to be helpful. On the other hand, if the prior sale to the defendant condemnor is used by the plaintiff, the defendant is in an advantageous position to explain its terms and circumstances in the most favorable light.

Under paragraph (2), options, offers, and listings which were not accepted are inadmissible to support a valuation opinion. This rule is consistent with the majority view in the United States, which regards such evidence as inherently unreliable, easily susceptible to abusive manipulation, and at best merely a representation of the opinion of one party to a hypothetical transaction that was never confirmed by the opinion of another. See Massey, op. cit., pp. 34-37; 5 Nichols, Law of Eminent Domain, § 21.4(1) (rev. 3d ed. 1971).

Paragraph (3) excludes assessed valuation, since local taxing officers' standards for determining assessed valuation for tax purposes are regarded as an unreliable basis of market value, since they are generally applied with an eye to equalization of tax loads rather than an ascertainment of market value, and are seldom determined in a consistent and systematic manner. See 5 Nichols, op. cit., § 22.1.

While Paragraph (4) seeks to exclude the expansion of the trial into largely irrelevant and remote issues distant from that of the value of the subject property, it does not preclude admission of comparable sales data, nor prevent a valuation witness from testifying to adjustments made in such data in the course of forming his opinion.

Trades and exchanges of property are impermissible under paragraph (5) in view of the fact that these transactions are often motivated by factors quite independent from market value elements, including significant tax consequences arising from the terms and circumstances of the exchange. Moreover, to translate the circumstances of a trade or exchange into dollar terms for use in arriving at an opinion of market value, the witness would be required, in most instances, to formulate an opinion as to the value of the properties exchanged, contrary to paragraph (4). This process would introduce elements of a complicated nature that would be largely irrelevant to the issues in the condemnation trial, without significant improvement in the credibility of the valuation opinion regarding the subject property.

Paragraph (6) seeks to exclude from consideration any elements of loss of value that are legally noncompensable under the law of the adopting state. The principal elements made unacceptable by this paragraph are those caused by "an exercise of the police power." The Uniform Code is concerned primarily with procedural matters and closely related concerns, while the boundary line between police power and eminent domain is largely a matter of substantive decisional law in the several states. Moreover, existing differences in the law in this regard are, to some extent, a reflection of the fact that some, but not all, state constitutions require compensation for both "taking" and "damaging" of private property. Accordingly, the content of this exclusionary provision is left for judicial determination under the applicable law of the adopting state. The introductory exception is intended to resolve any doubts as to the propriety of considering zoning changes under Section 1104(5) even though zoning is regarded as an exercise of police power.

ARTICLE XII

JUDGMENT AND POSTJUDGMENT PROCEDURE

Section

- 1201. [Contents of Judgment].
- 1202. [Interest on Compensation Awarded].
- 1203. [Interest on Judgment].
- 1204. [Adjustment of Taxes].
- 1205. [Recoverable Costs].
- 1206. [Crediting Amounts Paid or Withdrawn from Deposited Funds].
- 1207. [Performance of Work to Reduce Amount of Award].
- 1208. [Payment of Judgment by Plaintiff].
- 1209. [Order Transferring Title].
- 1210. [Effect of Failure to Pay Judgment].
- 1211. [Payment after Judgment from Funds Deposited with Court].
- 1212. [Order for Possession after Judgment].

§ 1201. [Contents of Judgment]

(a) The judgment may, and in the case of a partial taking shall, describe the proposed project in relation to the property taken, and shall:

(1) describe the property condemned and declare the right of the plaintiff to take it by eminent domain;

(2) recite the verdict or decision and declare that title to the property will be transferred to the plaintiff after the plaintiff has paid to the defendant, or to the court for the benefit of the defendant, the amount of compensation awarded and any additional amounts allowed;

(3) describe the interest of each defendant in the property condemned, and state the amount of the award to which each defendant is entitled; and

(4) determine all other questions arising from the taking, including questions relating to taxes, encumbrances, liens, rentals, insurance, or other charges.

(b) If the court determines that any issue under paragraph (3) or (4) of subsection (a) cannot be tried expeditiously and that no party will be prejudiced by reserving it for later determination, the court may enter a preliminary judgment that includes the recitals required by paragraphs (1) and (2) of subsection (a), directs the plaintiff to deposit in court the amount of compensation awarded, and describes any issue reserved. A preliminary judgment so entered is appealable as to all matters and issues actually determined therein and not reserved. A supplementary judgment of apportionment determining any reserved issue shall be entered after that issue has been resolved.

COMMENT

Section 1201 contemplates that the judgment in the action may be entered in two consecutive phases, corresponding with the two phases of the trial contemplated by Section 905, if the apportionment issues cannot be resolved without undue delay. The court may first enter a judgment determining the plaintiff's right to take the property, and specifying the total amount of compensation to be paid. A supplementary judgment disposing of the reserved apportionment issues is entered later, after those issues have been separately determined. Transfer of title is accomplished by a "transfer order" after the judgment has been paid. See Section 1209.

Subsection (a) provides for the contents of the judgment in terms designed to supplement existing state practice as to the form of judgments. The subsequent transfer order may be a short and succinct instrument incorporating this judgment by reference. See Section 1209. Thus, all operative terms of the adjudication disposing of the condemnation action ordinarily should be included in the judgment described in the present section.

Subsection (b) authorizes the court to enter a preliminary judgment that is appealable, without disposing of apportionment issues the resolution of which will require a delay. The condemnor, for example, could appeal from a judgment under this subsection without having to wait for the court to apportion the total award as between two or more defendants asserting conflicting claims. In addition, under Section 1208(b), the condemnor may satisfy the judgment entered under Subsection (b) by paying the total amount into court for the defendants, and then obtain a transfer order under Section 1209, even though apportionment issues remain to be tried and resolved by a supplemental judgment of apportionment.

§ 1202. [Interest on Compensation Awarded]

(a) Except as provided in subsection (b), the judgment shall include interest at the [legal] rate [of % per year] upon the unpaid portion of the compensation awarded. The interest shall (1) commence to accrue upon the earlier of the date of valuation or date on which the plaintiff takes physical possession of the defendant's property, and (2) be calculated to the earlier of the date of payment or date of [entry] [filing] of the judgment.

(b) The judgment may not include interest upon the amount represented by funds deposited by the plaintiff for the period after the date on which the deposited funds were available for withdrawal by the defendant.

COMMENT

Section 1202 prescribes standards for determining the amount of pre-judgment interest to be added to the compensation awarded in the action. Post-judgment interest is governed by Section 1203.

While most states expressly provide for an award of pre-judgment interest, the statutes contain many variations with respect to the terms and conditions of the award. It is, however, generally recognized in both statutory and decisional law that an allowance of interest is a reasonable method for reimbursing the property owner for constitutionally compensable losses he may sustain by reason of unavoidable delay between the date of taking of his property and the actual receipt by him of the just compensation to which he is entitled. See 3 Nichols, *The Law of Eminent Domain* § 8.63 (rev. 3d ed. 1965). Some state statutes, however, call for interest to run from the date of taking (sometimes even from the date of commencement of the action) to the date on which the award of compensation is paid to the defendant. The present draft rejects this approach, and treats pre-judgment interest as part of the compensation attributable to the taking that should be included in the amount

awarded by the judgment.

The rate of interest is a matter for sound legislative judgment in the adopting state, limited only by the constitutional requirement that it be fair compensation. See Nichols, supra, § 8.63[3]. Six percent is specified in many state statutes.

Subsection (a) specifies the time at which interest begins to accrue. The date of valuation is the primary point of reference for this purpose, since compensable losses sustained by the property owner prior to that date will ordinarily be assimilated into the amount of compensation awarded, while interest will provide compensation for losses that accrue thereafter and prior to judgment. If the condemnor takes or is authorized to take possession of the property before the date of valuation, interest accrues from the earlier point of time. Compare Section 1003 (date of valuation).

Subsection (b) precludes interest upon amounts deposited by the plaintiff for the period after the funds deposited are available for withdrawal by the defendant. Thus, by making a deposit under Section 601, the condemnor ordinarily may stop the running of interest on the ultimate award, whether or not the defendant actually withdraws the amount deposited. On the other hand, if the court concludes that funds deposited but not withdrawn were not available for withdrawal (i.e., that a motion to withdraw under Section 404 either was made and properly denied, or if made would have been denied), subsection (b) does not apply and interest continues to run.

This section provides only for an award of pre-judgment interest upon compensation awarded to the defendant which is unpaid at the time judgment is entered. Prejudgment interest does not run under this section upon a judgment against a defendant for repayment of the amount by which his withdrawal of deposited funds exceeds the amount of compensation awarded. See Section 1206(b).

§ 1203. [Interest on Judgment]

The unpaid portion of the amount awarded by the judgment shall bear interest at the [legal] rate [of % per year] computed from the date of [entry] [filing] of the judgment to the date of payment. "Judgment," within the meaning of this section, means a judgment under Section 1201(a) or a preliminary judgment under Section 1201(b).

COMMENT

Section 1203 provides a special rule for awarding interest upon the amount of the judgment. The subject of pre-judgment interest upon the amount of compensation awarded is covered in Section 1202.

Present practice among the states as to post-judgment interest appears to vary, with some states providing for interest on the award of compensation from the date of taking to the date of payment, and others authorizing interest on the award to the date of judgment and thereafter on the judgment to the date of payment. The latter approach, which is adopted by this section, involves a partial compounding of interest, since the judgment already includes interest on the awarded compensation. This result, however, is supported by persuasive authority, on the ground that "once final judgment has been entered, the condemnee possess[es] a clear, unqualified right to the full amount set forth in that judgment. Thus any postponing of payment in full satisfaction thereof should

be compensated for by the imposition of interest thereon." *Atlantic Refining Co. v. Director of Public Works* (1968) 104 R.I. 436, 244 A.2d 853, 856-57, cited in 3 Nichols, *Law of Eminent Domain* § 8.63[5] (1972 Cum.Supp.). The rate of interest allowed is left to sound legislative discretion.

This section authorizes post-judgment interest to be allowed with respect to the portion of the judgment which is "unpaid." Section 1208 provides that payment may be made by a delivery of money directly to the defendant, or by a deposit of money into court in satisfaction of the judgment. Under the latter option, the condemnor may stop the running of interest on the award made by a preliminary judgment under Section 1201(b), even though the award has not yet been apportioned as between the defendants. If the judgment is in favor of the plaintiff for recovery of funds withdrawn from deposit, in excess of the amount awarded, postjudgment interest runs under this section in favor of the plaintiff. See Section 1206(b).

§ 1204. [Adjustment of Taxes]

(a) The judgment shall require the plaintiff to pay to the defendant, in addition to any other amount awarded, the prorated portion of taxes paid by the defendant to any public agency properly allocable to the tax period following the earlier of (1) the date upon which the plaintiff took possession of the property condemned, or (2) the date of [entry] [filing] of the judgment.

(b) If the current taxes payable on the property being condemned have not been paid before [entry] [filing] of the judgment, the court shall deduct from the award in favor of the defendant the prorated portion of the unpaid taxes properly allocable to the part of the tax period preceding the earlier of (1) the date upon which the plaintiff took possession of the property condemned, or (2) the date of [entry] [filing] of the judgment, and shall order the amount so deducted to be paid to the appropriate taxing authority.

(c) After the earlier of (1) the date upon which the plaintiff took possession of the property condemned, or (2) the date of [entry] [filing] of the judgment, neither the defendant nor any property of the defendant not taken in the action is liable for payment of taxes upon, and the plaintiff is exclusively liable to the appropriate taxing authorities for all unpaid taxes relating to, the property taken, subject to any exemption, cancellation, or rebate provided by law.

(d) The adjustment of taxes required by this section shall be determined by the court. Upon motion of a party or its own motion, the court may give reasonable notice to the appropriate taxing authorities and an opportunity for them to be heard with respect to the adjustment of the taxes. If the notice and opportunity to be heard are given, the court's determination is conclusive as to the respective tax liabilities of the plaintiff and defendant.

(e) The term "taxes," as used in this section, includes ad valorem property taxes, ad valorem special assessment taxes, and water, sewer, or other service charges which are collected together with, or in substantially the same manner as, ad valorem taxes. It does not refer to special assessments upon benefited property that are secured by a specific lien on that property.

COMMENT

Section 1204 provides the basic rules governing the proration of property taxes and similar charges (but

not benefit assessments for special improvements) in the judgment entered under Section 1201. The owner of the property being taken for public use is only liable for the share of the current taxes payable which are properly allocable to the part of the year which precedes the taking of possession by the condemnor, or the date of judgment, whichever is earlier. In some states, absent this proration provision, the property owner might be charged for the entire amount of the taxes on the theory that the record owner at the beginning of the taxing year is liable for the whole year's taxes. The rule of proration here provided is consistent with Section 303 of the Federal Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894 (1971) and the similar provision in Section 211(a) of this Uniform Code.

Under this section, the court's determination with respect to the adjustment of tax liabilities is conclusive as between the parties and the taxing agencies if notice and an opportunity to be heard has been given to the latter. Because the determination of the amounts to be prorated is often a matter on which the parties can readily agree, nothing in this section requires a formal hearing; the court has discretion to determine the matter on such notice and proof as it deems appropriate in the circumstances of the case.

§ 1205. [Recoverable Costs]

(a) If the judgment determines that the plaintiff has the right to take all or part of the defendant's property, the costs incurred by the defendant shall be claimed, taxed, and allowed to the defendant by the same procedure as in other civil actions, except as otherwise provided in this section.

(b) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under Section 708, the court shall allow the defendant his costs under subsection (a) and in addition his litigation expenses in an amount not exceeding the greater of [] dollars or [25] percent of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under Section 203 or 708.

[(c) If the amount of compensation awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or less than the amount specified in the last offer of settlement made by the plaintiff under Section 708, the defendant shall not be entitled to his costs incurred after the date of service of the offer.]

COMMENT

Section 1205 provides the basic rules governing the award and allocation of costs. For the definition of "costs," see Section 103(8) (expert witness fees included in costs).

The general principle underlying Subsection (a) is that when the condemnor is determined to have the right to take the property in question, the recoverable costs of litigation should ordinarily be awarded to the defendant property owner. This rule appears to be generally accepted among American courts, and in some states is regarded as constitutionally required. See *Levey, Condemnation in U.S.A.* § 47, pp. 463-64 (1969).

Subsections (b) and (c) are designed to correlate with the provisions of Section 708, under which either party may tender a final offer of settlement prior to trial. If such an offer by the defendant is not timely accepted, an award of litigation expenses is made to the defendant if he obtains an award equal to or more favorable than

his final settlement offer. Subsection (b) Non-acceptance of a final offer of settlement by the plaintiff may result in a denial of costs to the defendant under Subsection (c), if the plaintiff obtains a result equal to or more favorable than the offer. Subsection (c), however, is in brackets to indicate that it should be omitted if a withholding of costs in the adopting state would violate state constitutional requirements.

§ 1206. [Crediting Amounts Paid or Withdrawn from Deposited Funds]

(a) The judgment shall credit against the total amount awarded to the defendant any payments made before the date of [entry] [filing] of the judgment by plaintiff to the defendant as compensation for the property taken, plus any funds which the defendant withdrew from money deposited by the plaintiff.

(b) If the amount to be credited against the award under subsection (a) exceeds the total amount awarded, the judgment shall require the defendant to pay the excess to the plaintiff or other person entitled thereto.

COMMENT

Section 1206 is intended to protect the rights of the plaintiff by requiring the judgment to credit against the amount of the award any payments to the defendant, and any withdrawal by the defendant of sums on deposit, prior to entry of the judgment. In the event of an excess of previous payments and withdrawals over the amount awarded, the court is required to enter judgment against the defendant for the excess. As to interest on the judgment, see Section 1203.

§ 1207. [Performance of Work to Reduce Amount of Award]

(a) If the court finds that the plaintiff and defendant have entered into an agreement under which the plaintiff has completed, or has undertaken to perform, described work, or if a pretrial order required the performance of work by the plaintiff, the court may include in the judgment a determination that the plaintiff has satisfied, or may satisfy, the judgment in whole or in part by performing the work as described.

(b) The provisions included in the judgment under subsection (a) shall describe or incorporate the terms and conditions of the agreement or pretrial order, and to the extent the agreement or order fails to provide therefor shall include requirements relating to:

(1) the location and nature of the work and the time for its commencement and completion; and

(2) the amount of compensation awarded which is or will be satisfied by performance of the work by the plaintiff, rather than by payment in money together with any proper adjustments in the amount of interest allowable on the amount awarded.

(c) For good cause, the court may require the plaintiff to deposit funds with the court, or to execute and file with the clerk a bond with sureties approved by the court, in an amount not less than the estimated cost of the work, to guarantee its faithful and timely performance; and the court may impose other reasonable terms and conditions including a reservation of continuing jurisdiction to assure that the work will be properly performed in accordance with the judgment.

COMMENT

Section 1207 provides authority for judicial implementation of an agreement between the parties, or a pretrial order, for the condemnor to perform described work in partial satisfaction of the award. For the definition of "work," see Section 103(19). This section, for example, may encourage the plaintiff to try to satisfy the judgment, in whole or in part, by providing an agreed "physical solution" designed to mitigate all or some of the severance damages that would otherwise be included in the amount of compensation to be paid. The amount credited against the judgment need not be the actual or estimated cost of the specified work. In some circumstances, a relatively inexpensive "physical solution" may avoid a very large amount of damage to the remainder.

Upon a showing of good cause, the court is authorized under Subsection (c) to include appropriate provisions to enforce the work requirement, including a retention of continuing jurisdiction to enforce an agreement which is to be performed after the date of trial. For example, an agreement or pre-trial order might call for the construction by the condemnor of a retaining wall, or of new drainage facilities, in a pretrial taking case, in order to mitigate damage to the remainder. But the reduced cash award that results would necessarily be premised upon the expectation that the plaintiff will fully and promptly discharge its obligation to construct the promised physical improvements after the trial. Retention of continuing jurisdiction in the trial court to enforce this obligation may facilitate compliance without the necessity of newly initiated litigation in the event of a dispute.

§ 1208. [Payment of Judgment by Plaintiff]

(a) Within [30] days after [entry] [filing] of the judgment, or within [10] days after the judgment has become final, whichever is later, the plaintiff shall pay the full amount required by the judgment after crediting all amounts withdrawn by the defendant after judgment from funds on deposit. The court for good cause may extend the time within which payment must be made for an additional period not exceeding [90] days.

(b) Payment may be made by the plaintiff by paying money personally to the defendant, or to the legal representative of the defendant, taking a receipt therefor and filing a copy with the court; or by depositing the amount of the award with the court for the defendant. By making a deposit under this section, the plaintiff does not waive its right to review.

(c) Within [ten] days after a deposit of the award under subsection (b), the plaintiff shall give written notice thereof to each defendant for whom a disclaimer is not on file and who has not received personal payment in full. If the plaintiff fails to give the prescribed notice to a defendant entitled thereto, interest shall be added to that defendant's undistributed share of any funds on deposit with the court for the purpose of payment, at the [legal] rate [of % per year], from the date of deposit of the award under subsection (b) to the date on which the written notice is served, or to the date on which the defendant actually receives from the clerk of court the amount to which he is entitled under the judgment, whichever is earlier. The court may make any proper orders reasonably necessary to enforce the plaintiff's obligation to pay interest as provided in this subsection.

COMMENT

Section 1208 requires payment of the judgment entered under Section 1201(a) or 1201(b) within a

specified period of time after its effective date, or after it has become final, whichever is later. The judgment is not regarded as final, for this purpose, during the time an appeal is pending or a post-trial motion is pending. If the condemnor wishes to enter into actual possession of the property pending completion of post-judgment proceedings, it may do so by paying the amount of the award to the court, subject to the property owner's right of withdrawal. See Section 1211.

In some circumstances, e.g., when the condemnor must complete necessary procedures, such as bond election, in order to obtain the funds necessary to satisfy the judgment, the court may extend the period for payment. The Code provides that any such delay in payment is compensated by an award of interest upon the unpaid portion of the award. See Section 1203.

When payment has been completed, a transfer order may be entered pursuant to Section 1209. On the other hand, if payment in full is not timely made, the property owner may elect to regard the action as abandoned or seek to enforce it. See Section 1210.

§ 1209. [Order Transferring Title]

(a) Upon proof that the plaintiff has fully satisfied the judgment, the court shall make an order transferring to and vesting in the plaintiff the title to property taken.

(b) The transfer order shall:

(1) describe the property taken, recite or incorporate by reference the provisions of the judgment, and set forth the court's determination that it has been satisfied; and

(2) declare that title to the defendant's property as described therein is transferred to and vested in the plaintiff upon the effective date of the order.

(c) The party obtaining the transfer order shall promptly serve a copy of the order upon each party [and may file a copy for record in the place and manner provided by law for the recordation or registration of deeds and conveyances].

COMMENT

Under Section 1209, the title to the property taken is vested in the condemnor by a transfer order when the court is satisfied that the judgment has been satisfied in full by the plaintiff. For the methods of payment allowed, see Section 1208. If, due to an excessive withdrawal of deposited funds by the defendant, the judgment requires the defendant to make reimbursement, the transfer order need not be postponed pending payment by the defendant; this section requires that only the plaintiff must have fully satisfied the judgment.

Subsection (c) includes a mandatory requirement for service and an optional provision for recordation of the transfer order. The bracketed words in this subsection may be omitted if these matters are already appropriately covered by applicable statutes in the adopting state. Prompt service of the transfer order, however, is essential so that all parties will have notice of passage of title—an event that may have legal significance for various purposes.

It should be noted, however, that this section does not purport to deal with problems of tort or contractual liability that may arise if the condemnor fails to take immediate possession, or fails to serve notice of transfer of title, or if the property owner remains in possession, after passage of title.

§ 1210. [Effect of Failure to Pay Judgment]

(a) If the plaintiff fails to make full payment of the judgment, or of the full amount awarded for any separate item or parcel of property described therein, within the time allowed under Section 1208, the defendant:

(1) may treat the failure to make payment as an abandonment of the condemnation action with respect to the property for which payment has not been made, and may move to vacate the judgment and for a dismissal under Section 1301; or

(2) may apply to the court for enforcement of the judgment by any appropriate enforcement process authorized by law [, including levy of execution, foreclosure of a vendor's lien on the property taken, or issuance of a mandatory injunction or writ of mandamus to compel payment].

(b) In determining questions arising under subsection (a), the court may make appropriate orders to adjust the rights of the parties, including orders with respect to the possession and use of the property and the performance of any work thereon, and may award damages, interest, and costs to the defendant as justice requires.

COMMENT

Section 1210 provides alternative remedies to the property owner if the condemnor fails to pay the amount awarded within the time allowed by Section 1208. The property owner may elect either to treat the failure to pay as an abandonment, and invoke the provisions of Section 1301, or he may apply to the court for enforcement of the judgment by appropriate process. The selection of the appropriate enforcement process is left to the sound discretion of the court, depending upon local law and the relevant circumstances of the case.

The court is given broad discretion under Subsection (b) to adjust the rights of the parties and to make orders in enforcement proceedings under Subsection (a) as justice may require. For example, if the court were to issue a writ of execution or a mandatory injunction to compel payment of the judgment, it could restrain the condemnor from taking or remaining in possession, or from commencing or proceeding with improvement work on the property until the judgment has been satisfied.

§ 1211. [Payment after Judgment from Funds Deposited with Court]

(a) After the [entry] [filing] of the judgment, stating the amount of the award to which a defendant is entitled, and subject to the limitations of this section, that defendant may apply to the court for payment to him of the amount to which he is entitled under the judgment from funds deposited with the court by the plaintiff, whether the deposit was made before or after judgment, and whether or not the judgment has been appealed or a motion for new trial or to vacate or set aside the judgment has been made.

(b) The court shall direct that payment be made to the defendant of the amount to which he is entitled

under the judgment, less any amount previously paid to him as shown by receipts filed with the court, upon the filing by the defendant of a receipt. Acceptance by the defendant of the money waives all the defendant's objections and defenses in the action except his claim to greater compensation.

(c) For good cause shown, the court may permit payment under this section before the date on which the judgment is final upon condition that the defendant provide security for the repayment of any amount received by him which exceeds the amount to which he is finally determined to be entitled.

(d) A defendant who receives money under this section in excess of the amount to which he is finally determined to be entitled shall repay the excess to the plaintiff, or to any other party entitled thereto, without interest.

(e) If the defendant fails to pay any amount required by the judgment within [30] days after the judgment becomes final, the court on motion may enforce payment out of the security, if any, provided under subsection (c), or issue any appropriate process.

COMMENT

Section 1211 permits the defendant to apply for and obtain payment of the unpaid part of the judgment in his favor, from funds deposited by the plaintiff, whether or not the judgment is final. Acceptance of payment, however, waives all claims or defenses except for a claim to greater compensation.

If the defendant obtains payment under this section before the judgment is final, Subsection (b) provides that the order may be conditioned upon the filing of security for repayment of the excess if it is ultimately determined that the defendant is entitled to a lesser amount. See Subsection (e).

§ 1212. [Order for Possession after Judgment]

(a) At any time after judgment, the plaintiff may apply to the court for an order of possession. The application may be granted whether or not the judgment has been appealed or a motion for new trial or to vacate or set aside the judgment has been made.

(b) The court shall authorize the plaintiff to take possession of the property if:

(1) the judgment determines that the plaintiff is entitled to take the property; and

(2) the plaintiff has paid the full amount required by the judgment in the manner provided by Section 1208(b).

(c) The court shall specify the date after which the plaintiff is authorized to take possession of the property. Unless the defendant consents in writing to an earlier date, possession may not be taken earlier than [ten] days after the date on which the order is served or 90 days after notice to terminate occupancy was given under Section 205 if that section is applicable, whichever is later. The court may enforce the order for possession by an appropriate writ or proceeding, including contempt.

(d) The plaintiff does not abandon or waive the right to appeal from the judgment, move for a new trial, or vacate or set aside the judgment, by making application for or taking possession under this section.

COMMENT

Section 1212 provides the procedural mechanism by which the plaintiff, following entry of the judgment, may enter into possession of the property being taken.

Taking possession does not constitute a waiver of the plaintiff's right to attack the judgment by appeal or by motion; similarly, the acceptance of payment by the defendant out of funds deposited by the plaintiff does not require a waiver of the defendant's right to attack the judgment and seek greater compensation. See Section 1211(b).

The taking of possession, absent a stipulation between the parties, must be by court order. The order, under Subsection (c), must specify the date on which possession may be taken, but may not authorize possession before 10 days after its date or before the expiration of the 90 days notice required by Section 205.

ARTICLE XIII

DISMISSAL AND ABANDONMENT

Section

1301. [Involuntary Dismissal].

1302. [Voluntary Dismissal].

1303. [Award of Litigation Expenses].

1304. [Restitution of Property and Damages].

§ 1301. [Involuntary Dismissal]

On motion of the defendant, the court shall dismiss the action in whole or in part, as justice requires, if:

(1) upon sustaining a preliminary objection to the plaintiff's complaint, the court determines that a dismissal is required;

(2) the plaintiff, by amending the complaint, so changes the extent, scope, or nature of the property sought to be taken that a dismissal of the action is required as to the superseded portion of the original action;

(3) the plaintiff has unjustifiably failed to exercise reasonable diligence in prosecuting the action;

(4) the plaintiff has failed or refused to comply with an order for deposit made under Section 601 or an order to increase the amount on deposit made under Section 603(c); or

(5) the plaintiff has failed to pay the full amount required by the judgment within the time allowed.

COMMENT

Section 1301 catalogs the five principal circumstances under which the court is authorized to dismiss the condemnation action on defendant's motion. Dismissal is not mandatory, however, but is determined by the court's judgment whether "justice may require" that result.

Under paragraph (1), an involuntary dismissal is authorized if the court determines that plaintiff does not have the right to take the property, or some part of it, involved in the action. An objection to the right to take, if pleaded in a timely answer, must be determined by the court prior to trial. See Section 508.

Paragraph (2) gives the court power to dismiss, as to superseded portions of the action, if the plaintiff by filing an amended complaint substantially changes the scope of the "take." Ordinarily, this power of dismissal will be used when the amendment substantially decreases the scope of the "take," thereby making much of defendant's preparation for trial unnecessary. In some cases, a change that takes other property, even though of the same or greater size, will warrant a like result. If the scope of the "take" is merely expanded to embrace additional property, while continuing to include the property originally described, however, a dismissal will seldom be required by the interests of justice.

Under paragraph (3), unjustified delay caused by the plaintiff's failure to prosecute the action diligently may be grounds for dismissal. This paragraph carries out the general policy, reflected in Section 901 (priority on trial calendar), that condemnation actions should be expedited as much as possible.

Paragraph (4) implements the provisions of Sections 601 and 603(c), under which the plaintiff's unjustified failure to comply with an order to make a deposit of estimated compensation, or to increase the amount on deposit, may be treated by the defendant as an abandonment of the action.

Paragraph (5) implements the rule of Section 1210, under which the plaintiff's failure to pay the judgment in full, within the time allowed to do so, may be treated as an abandonment by the defendant.

§ 1302. [Voluntary Dismissal]

(a) The court may dismiss the action in whole or in part upon motion of the plaintiff at any time prior to payment of the judgment. In its order of dismissal, the court may impose any conditions that are just and equitable, including a requirement of restitution of property or money.

(b) The plaintiff's motion to dismiss the action may be denied if the court determines, after noticed hearing, that because of the condemnation action the defendant has substantially changed his position to his detriment.

COMMENT

Section 1302 authorizes, but does not make mandatory, a dismissal of the action upon plaintiff's motion. Instead of an unqualified dismissal, the court may, in appropriate cases, grant a dismissal upon specified conditions, under Subsection (a). See Section 1304 (restitution and damages). Subsection (b) provides equitable guidelines for the court's determination of the motion, which should ordinarily be granted unless the special circumstances described are shown to exist.

§ 1303. [Award of Litigation Expenses]

(a) The court shall award the defendant his litigation expenses, in addition to any other amounts authorized by law, if the action is wholly or partly dismissed for any reason.

(b) If the scope of the property to be taken is reduced as the result of (1) a partial dismissal, (2) a dismissal of one or more plaintiffs, or (3) a final judgment determining that the plaintiff cannot take part of the property originally sought to be taken, the court shall award the defendant the portion of his litigation expenses attributable to the property within the scope of the reduction.

(c) Costs and litigation expenses authorized by this section may be claimed, taxed, and awarded under the same procedures that apply to costs in other civil actions.

COMMENT

Section 1303 requires plaintiff to pay defendant's litigation expenses in the event of a dismissal of the

action, in whole or in part, or a judgment that he did not have the right to take all or part of the subject property. If the dismissal or judgment does not affect all of the property or all of the plaintiffs, subsection (b) limits the allowance of litigation expenses to those which were unnecessarily incurred by the defendant because the scope of the take, as originally contemplated by the plaintiff, included property deleted by the court.

This section conforms to the requirement of Section 304 of the Federal Acquisition Policies Act, Public Law No. 91-646, 84 Stat. 1894 (1971) [42 U.S.C.A. § 4601 et seq.], requiring payment of litigation expenses under the described circumstances in connection with federally funded state or local government projects. Compare Article II.

§ 1304. [Restitution of Property and Damages]

If the action is dismissed for any reason, and the defendant has vacated the property under an order of possession or in reasonable contemplation of its taking by the plaintiff, the court, upon demand of the defendant, shall order the plaintiff to (1) deliver possession of the property to the defendant or other person entitled thereto, and (2) pay damages to the defendant as justice requires, including damages for any injury to or impairment of the value of the property not within the reasonable control of the defendant.

COMMENT

Section 1304 authorizes an order for restoration of possession and an award of damages in conjunction with a dismissal in cases where the plaintiff took possession before the dismissal was ordered or it was adjudged that plaintiff had no right to take. The damages may include losses sustained as a result of either the taking of possession or the contemplation of it (i.e., vandalism, loss of rentals, etc.). Recovery under this section is in addition to the litigation expenses awarded under Section 1303.

ARTICLE XIV

RELOCATION ASSISTANCE

Section

- 1401. [Declaration of Policy].
- 1402. [Definitions].
- 1403. [Moving and Related Expenses].
- 1404. [Replacement Housing for Homeowners].
- 1405. [Replacement Housing for Tenants and Certain Others].
- 1406. [Relocation Assistance Advisory Program].
- 1407. [Replacement Housing Prerequisite to Requiring Person to Move].
- 1408. [Implementing Regulations].
- 1409. [Fund Availability].
- 1410. [Administration].
- 1411. [Payments Not Income or Resources].
- 1412. [Review of Application of Aggrieved Person].

PRELIMINARY COMMENT

Article XIV has been included in the Uniform Eminent Domain Code to satisfy the provisions of Title II of the Federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 (P.L. 91-646) [42 U.S.C.A. § 4601 et seq.]. Under Section 210 of the Federal Act [42 U.S.C.A. § 4630], conformity with the requirements of the Federal Act is necessary in order to assure eligibility of state or local agencies for federal financial assistance with respect to "all or part of the cost of any program or project which will result in the displacement of any person."

While the Federal Act is limited in scope to federally assisted projects and programs, this Article is intended to extend the same benefits and requirements to all projects or programs conducted or directed by both public and private condemnors, whether or not federal financial assistance is being provided. This broader approach is believed not only to be more consonant with an equitable and even-handed state policy, but should eliminate potential special legislation and equal protection problems under the state and federal constitutions that could attend a statutory scheme of more selective scope.

§ 1401. [Declaration of Policy]

(a) The purpose of this Article is to establish a uniform policy for the fair and equitable treatment of persons displaced by public and private condemnors in order that they will not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. All costs under this Article are part of the costs and expenses of the project or improvement which caused the displacement.

(b) If, as a condition of the eligibility of a condemnor for federal assistance of any kind, payments are required by federal law in amounts greater than or under circumstances not authorized by this Article, the condemnor shall comply with the requirements of federal law instead of this Article.

COMMENT

This section establishes a statutory basis for administrative and judicial interpretation of Article XIV. It is based on Section 201 of the Federal Uniform Relocation Assistance, etc. Act [42 U.S.C.A. § 4621]. Two important principles are declared: (1) Relocation assistance is to be administered uniformly and in a manner which is fair and equitable to displaced persons. (2) Article XIV applies to displacements caused by both public and private condemnors, without reference to the availability of federal funding. In this respect, Article XIV goes beyond the Federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, which extends only to federally assisted public projects.

The reference to "condemnors" does not imply that Article XIV pertains only to dislocations caused by an exercise of the power of eminent domain. On the contrary, as Section 1402(1) makes clear, this Article applies with respect to any acquisition of real property, whether by eminent domain or by negotiated purchase. The term "condemnors" is used to limit the Article to public entities and to private agencies that are generally authorized to exercise the power of eminent domain. See Section 103(7). However, nothing in this Article limits its application solely to displacements caused by a project for which the power of eminent domain is or could be used. Acquisitions for which eminent domain is not available or, if available, is not used, are also covered.

Subsection (b) is designed to assure ample authority for condemnors to comply with federally prescribed prerequisites to federal assistance programs.

§ 1402. [Definitions]

As used in this Article:

(1) "Displaced person" means a person who moves from real property, or who moves his personal property from real property:

(i) as a result of the acquisition of the real property in whole or in part by a condemnor;

(ii) as a result of a written order by the acquiring condemnor to vacate the real property for a program or project undertaken by it; or

(iii) solely for the purposes of Sections 1403(a) and (b) and Section 1406, as a result of the acquisition of, or as the result of the written order of the acquiring condemnor to vacate other real property, on which the person conducts a business or farm operation, for the program or project.

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

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

(ii) for providing services to the public;

(iii) by a nonprofit organization; or

(iv) solely for the purposes of Section 1403(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, whether or not such display is located on the premises on which any of above activities are conducted.

(3) "Mortgage" includes any form of lien or security interest given to secure advances on or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

COMMENT

The definitions in Section 1402 are based upon those contained in Section 101 of the Uniform Relocation Assistance etc. Act [42 U.S.C.A. § 4601].

The wording has been modified where necessary to conform to the expanded scope of this Article to make it applicable to both public entities and private agencies that are authorized to exercise the power of eminent domain. As the definition of "displaced person" makes clear, however, this Article applies to any acquisition by a public or private condemnor "for a program or project" it is undertaking, whether or not the acquisition is within its authorized power of eminent domain.

§ 1403. [Moving and Related Expenses]

(a) Whenever the acquisition of real property for public use by a condemnor results in the displacement of any person, the condemnor shall pay the displaced person as part of the cost of acquisition:

(1) his actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property to a new location, not exceeding the cost of moving a reasonable distance;

(2) his actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, not exceeding an amount equal to the reasonable expenses that would have been required to relocate the property within a reasonable distance; and

(3) his actual reasonable expenses in searching for a replacement business or farm.

(b) The condemnor shall pay to a displaced person eligible for payments under subsection (a), who moves from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a), a reasonable moving expense allowance, but not more than \$300, and in addition a dislocation allowance of \$200.

(c) The condemnor shall pay to a displaced person eligible for payments under subsection (a), who moves or discontinues his business or farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (a), a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, but the payment shall be not less than \$2,500 nor more than

\$10,000. [In the case of a business, payment shall be made under this subsection only if the business (1) cannot be relocated without a substantial loss of patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired which is engaged in the same or similar business.] For purposes of this subsection, "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 the business or farm operation moves from the real property being acquired or during any other more equitable period for establishing earnings, including any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during the two-year or other period.

COMMENT

Section 1403 is intended to satisfy the requirements of Section 202 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4622], Public Law No. 91-646, 84 Stat. 1895 (1971). The language of this section thus follows that of the federal statute, and is intended to convey the same meaning. Uniformity in the application of this section may be promoted by the promulgation of detailed regulations under Section 1408.

The bracketed language in Subsection (c) is suggested for omission in the interest of greater equity. However, this language appears in the federal statute, and its omission may impair eligibility for federal aid in certain projects.

§ 1404. [Replacement Housing for Homeowners]

(a) In addition to payments required by Section 1403, the condemnor shall pay an amount not exceeding \$15,000 to any person displaced from a dwelling actually owned and occupied by him for not less than 180 days before the initiation of negotiations for acquisition of the property.

(b) The additional payment required by subsection (a) shall include the following elements:

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

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

(3) reasonable expenses incurred by the displaced person for evidence of title, recording

fees, and other closing costs incident to the purchase of the replacement dwelling, but not including prepaid expenses.

(c) The additional payment authorized by this section shall be made only to a displaced owner who purchases or enters into a contract for rehabilitation or construction of a decent, safe, and sanitary replacement dwelling which is to be occupied not later than the end of the one year period beginning on the date on which he receives final payment of the award or proceeds of the acquired dwelling, or on the date on which he moves from the acquired dwelling, whichever is later.

COMMENT

Section 1404 follows the requirements of Section 203 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4623]. Thus, for example, the \$15,000 figure under Subsection (a) is identical to the federal requirement, in order not to jeopardize eligibility for federal assistance. Similarly, the 180 day previous ownership rule of this section adheres to the federal rule, and is designed to avoid speculative buying with knowledge of the project.

A displaced person who is not eligible for payments under this section may qualify for benefits under Section 1405.

§ 1405. [Replacement Housing for Tenants and Certain Others]

(a) In addition to payments required by Section 1403, the condemnor, as part of the cost of acquisition of real property improved with a dwelling, shall make a payment to or for any displaced person not eligible to receive a payment under Section 1404 who is displaced from any dwelling which was actually and lawfully occupied by the displaced person for not less than 90 days before the initiation of negotiations for acquisition of the property.

(b) The payment shall be either:

(1) the additional amount, in excess of his current rent, reasonably necessary to enable the displaced person to lease or rent, for a period not to exceed four years, a decent, safe and sanitary dwelling adequate to accommodate him in areas not generally less desirable in regard to public utilities and public, commercial, and farming facilities, and reasonably accessible to his place of employment, not exceeding \$4,000; or

(2) the amount necessary to enable the displaced person to make a down payment, including incidental expenses described in Section 1404(b)(3), on the purchase of a decent, safe, and sanitary dwelling adequate to accommodate him in areas not generally less desirable in regard to public utilities, and public, commercial and farming facilities, not exceeding \$4,000, but if the amount exceeds \$2,000, the displaced person must match any amount exceeding \$2,000 in making the down payment.

COMMENT

Section 1405 adheres to the pattern of Section 204 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4624]. The benefits of this section are available only to displaced persons not eligible for payments under Section 1404 of the Code.

§ 1406. [Relocation Assistance Advisory Program]

(a) A condemnor shall provide a relocation assistance advisory program to aid any person, business, or farm operation displaced because of its acquisition of real property. If the condemnor determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, it may offer that person relocation assistance advisory services under the program.

(b) A public entity may establish local relocation assistance offices to assist in obtaining replacement housing and other facilities for persons who find it is necessary to relocate their dwellings, businesses, or farm operations because of the acquisition of real property.

(c) Relocation assistance advisory programs shall include measures, facilities or services necessary or appropriate in order to:

(1) determine the need, if any, of displaced persons for relocation assistance;

(2) provide current and continuing information on the availability, prices and rentals, of comparable decent, safe and sanitary sale and rental housing for displaced persons, and of comparable locations for displaced business or farm operations;

(3) assure, to the extent reasonably feasible, that within a reasonable time before displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities, and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, equal in number to the number of, and available to, displaced persons who require those dwellings and reasonably accessible to their places of employment;

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

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

(6) provide other advisory services to displaced persons in order to minimize hardships to them in adjusting to relocation; and

(7) secure, to the greatest extent practicable, the coordination of its relocation assistance program with the project work necessitating the displacement and with other planned or proposed activities of public entities in the community or nearby areas which may affect the implementation of its relocation assistance program.

COMMENT

Section 1406 is the counterpart of Section 205 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4625]. Like other provisions of the present Code, this section applies to private as well as to governmental condemnors. If the condemnor does not have the personnel or competence to provide the required relocation services, it may contract for them under Section 1410.

§ 1407. [Replacement Housing Prerequisite to Requiring Person to Move]

No person shall be required to move from his dwelling because of its acquisition by a condemnor, unless replacement housing, as described in Section 1406(c)(3) is available.

COMMENT

Section 1406 follows the provisions of Section 206(b) of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4626(b)].

§ 1408. [Implementing Regulations]

The State [Department of Administration] shall adopt regulations to assure that:

(1) the payments and assistance authorized or required by this Article shall be administered in a fair and reasonable manner and as uniformly as practicable;

(2) a displaced person who makes proper application for a payment authorized by this Article will be paid by the condemnor promptly after a move, or, in hardship cases, will be paid in advance; and

(3) any person aggrieved by a determination of a public entity as to eligibility or lack of eligibility for, or as to the amount of, any relocation assistance service or payment authorized by this Article, may have his application reviewed by the [governing body or other head of the public entity] [Department of Administration].

COMMENT

Section 1408 is designed to assure statewide uniformity in the administration of the relocation assistance provisions of the Uniform Code. Its language should be adapted to the form and terminology of state administrative procedures.

Under paragraph (3), relocation assistance decisions by private condemnors are excluded from administrative review. These private determinations, however, are reviewable under Section 1412.

§ 1409. [Fund Availability]

(a) Funds appropriate or otherwise available to a condemnor for the acquisition of property for a particular program or project shall be available to, and the condemnor may, obligate and expend those funds to carry out the provisions of this Article in connection with the program or project. Expenditures under this section are costs

of the program or project.

(b) If comparable replacement housing is not available and the condemnor determines that the required housing cannot otherwise be made available, the condemnor may obligate and expend funds authorized for the project for which the property is being acquired to provide the housing.

COMMENT

Section 1409(a) is intended to eliminate any doubt as to the authority of the condemnor to expend project funds to discharge its relocation assistance obligations. In the absence of this section, such expenditures by a public entity might be challenged as ultra vires. See Section 211(c) of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4631(c)]. Section 1409(b) is the counterpart of Section 206(a) of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4626(a)].

§ 1410. [Administration]

In order to prevent unnecessary expense and duplication of functions and to promote uniform and effective administration of public relocation assistance programs for displaced persons, a condemnor may contract with any public entity, individual, firm, association or corporation for relocation assistance services required by this Article, carry out its obligations under this Article by providing relocation assistance in whole or in part by its own personnel, or utilize the services of state or local housing agencies or other agencies having experience in the administration or conduct of similar relocation or housing assistance activities.

COMMENT

Section 1410 is the counterpart of Section 212 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4632].

§ 1411. [Payments Not Income or Resources]

Payment received by a displaced person under this Article shall not be considered as income or resources for the purpose of (1) determining the eligibility or extent of eligibility of, or the amount of aid to be given to, any person for public assistance purposes under any law of this State, or (2) applying any state [or municipal] income tax, corporation tax, or other tax law of this State.

COMMENT

Section 1411 is the counterpart of Section 216 of the Uniform Relocation Assistance Act [42 U.S.C.A. § 4636]. The cited federal provisions preclude treating relocation assistance as income for federal income taxes or federal social security and assistance programs. This section extends the same policy to state tax and public assistance programs.

§ 1412. [Review of Application of Aggrieved Person]

After exhaustion of administrative remedies, a determination by a condemnor as to eligibility or lack of

eligibility for, or as to the extent of, any relocation assistance service or payment authorized by this Article, may be reviewed by a court of competent jurisdiction and modified or set aside, if it is found to be arbitrary, unreasonable, or an abuse of discretion.

COMMENT

Section 1412 does not have a counterpart in the Uniform Relocation Assistance Act. While Section 213(b) of that Act [42 U.S.C.A. § 4633(b)] authorizes a form of administrative review of relocation assistance decisions, judicial review is not explicitly authorized. The limited judicial review contemplated by the present section is believed to provide a needed measure of protection against arbitrary decisions by condemnors. As to private condemnors, moreover, this section provides the only means of review available in such cases. Compare Section 1408(3) (administrative review limited to decisions by public condemnors).

ARTICLE XV

ARBITRATION OF COMPENSATION

Section

- 1501. [Arbitration of Compensation Authorized].
- 1502. [Enforceability of Agreement].
- 1503. [Timing of Arbitration].
- 1504. [Effect of Pending Condemnation Action].
- 1505. [Absence of Concurrent Condemnation Action].
- 1506. [Arbitration Procedure].
- 1507. [Abandonment of Acquisition].
- 1508. [Recordation of Agreement].

PREFATORY COMMENT

This Article authorizes voluntary arbitration of the issue of the amount of compensation for property taken under the power of eminent domain. Arbitration may prove to be a useful technique for resolving issues between condemnor and condemnee with speed and economy in cases where the amount in dispute may not make a court trial economically attractive. By submitting the issue to a disinterested appraiser as arbitrator, for example, the parties could avoid the burden of legal and expert fees that ordinarily arises in litigation. Even in complex cases that involve substantial amounts, arbitration may be a means for reducing the delay and expense of normal court proceedings.

While most states already recognize arbitration proceedings as an alternative to court adjudication of many, if not all, kinds of disputes, the prevalence of special statutory provisions governing eminent domain actions may create doubts as to the authority of condemnors to submit compensation issues to arbitration in the absence of explicit authority.

The provisions of this Article are framed on the assumption that the adopting state has presently in effect a general body of law relating to arbitration of disputes, either in statutory form (e.g., the Uniform Arbitration Act) [see U.L.A. Master Edition, Volume 7] or as part of the state's common law. It may be necessary, upon adoption, to modify either this Article or the existing state law of arbitration in the interest of consistency.

§ 1501. [Arbitration of Compensation Authorized]

(a) A condemnor and a condemnee or two or more condemnees may enter into and comply with the terms of an agreement in conformity with this Article for the arbitration of any issue relating to the amount or the apportionment of compensation for the taking of property.

(b) An agreement to arbitrate does not constitute and shall not be construed as a waiver of or excuse for noncompliance with any requirement of Article II or III relating to the acquisition of property except to the extent expressly provided in the agreement.

COMMENT

Subsection (a) provides the basic authority of condemnors and condemnees to submit compensation or apportionment issues to arbitration. Since many public condemnors only possess the powers given to them by statute, an express authorization will avoid any question as to their authority to arbitrate.

Subsection (a) includes, within the authority of the parties to the agreement, the power to carry out any of its terms that are "in conformity" with this Article, even though they may be inconsistent with other statutes. See Section 1502. Subsection (a), however, does not attempt to specify who should be joined as parties to the arbitration agreement. Since the agreement and award operate solely as a contract between the parties to it, the condemnor will have practical incentive to make sure that the agreement is made with all persons who have an interest in the property it is seeking to acquire. In addition, this section does not attempt to specify the formalities associated with the execution of the agreement to arbitrate, but leaves these matters to existing law.

Under paragraph (a), the agreement to arbitrate could, where appropriate, be simplified by reference to the standard procedures for eminent domain arbitrations promulgated by the American Arbitration Association. These Eminent Domain Arbitration Rules are reprinted in 7 P. Nichols, *Law of Eminent Domain*, Appendix pp. 345-352 (rev. 3d ed. 1972).

Subsection (b) makes it clear that an agreement to arbitrate does not, except as expressly provided therein, preclude the necessity for compliance with other applicable statutory duties or conditions precedent relating to the acquisition of the property. For example, Sections 201 to 214, inclusive, of the Code prescribe the general statutory duties of persons seeking to acquire property for public use (e.g., the duty to make an offer to purchase at not less than the full appraised value of the property), while Sections 306 and 309 respectively require good faith purchase negotiations, and the adoption of a formal authorization, as conditions precedent to the commencement of a condemnation action. Subsection (b) contemplates that a waiver of these and any other applicable statutory requirements (e.g., the duty to prepare an environmental impact statement) should be declared in express terms and not be implied merely from an agreement to arbitrate the amount of compensation.

§ 1502. [Enforceability of Agreement]

Except as specifically provided in this Article, an agreement to arbitrate under Section 1501 has the same effect, and an arbitration thereunder may be conducted, and the award may be judicially confirmed, in conformity with the same procedures, as in other arbitrations under the law of this State. To the extent that this Article and any agreement in conformity with it are inconsistent with any other law, this Article prevails.

COMMENT

Section 1502 makes it clear that, in general agreements to arbitrate the amount of compensation are subject to the general arbitration law of the state. The present Article supersedes the general state law only to the extent specific provisions inconsistent with the general law are included in this Article.

The phrase "may be conducted in conformity with the same procedures" is intended to incorporate by reference any procedural provisions governing the conduct of arbitration proceedings under state law, including the means for selecting arbitrators, the availability of subpoenas for witnesses, the use of depositions and discovery procedures as an aid to arbitration, the conduct of the arbitration hearings, and confirmation of the award. But see Section 1506 for specific procedural rules that would prevail over this section, absent agreement

to the contrary.

§ 1503. [Timing of Arbitration]

An arbitration agreement under this Article may be made and carried into effect either before or after a condemnation action has been commenced. The agreement does not waive or restrict the right to commence and prosecute a condemnation action, including the taking of possession before judgment, except to the extent expressly provided in the agreement.

COMMENT

Section 1503 is designed to encourage arbitration of compensation issues without interfering with the adjudication of other issues typical of eminent domain litigation (e.g., right to take) in prior or concurrent court proceedings. Thus, an agreement to arbitrate may be made either before or after a condemnation action has been commenced. Special provisions defining the powers of the court with respect to the arbitration proceeding, when a condemnation action is pending, are set out in Section 1504.

§ 1504. [Effect of Pending Condemnation Action]

If a condemnation action has been commenced and is pending between the parties to an arbitration agreement under this Article:

(1) a petition, motion, or other proceeding thereafter initiated in connection with the arbitration shall be filed in and determined by the court in the condemnation action;

(2) the court in the condemnation action may stay the determination of an issue of compensation in the action until arbitration pursuant to the agreement has been concluded; and

(3) the total or apportioned amounts of compensation as determined by the arbitration award and confirmed by the court shall be included in the judgment of condemnation as the amount of compensation for the property.

COMMENT

Section 1504 prescribes the functional relationship between an arbitration proceeding and a pending condemnation action relating to the same property. In general, judicial supervision of the arbitration proceedings and of proceedings relating to the arbitral award is vested in the court in which the condemnation action is pending, with authority to stay the judicial determination of compensation while arbitration is proceeding.

§ 1505. [Absence of Concurrent Condemnation Action]

In the absence of a pending condemnation action relating to the property, a petition, motion, or other proceeding initiated in connection with arbitration pursuant to an agreement under this Article shall be filed in and determined by a court that would have both jurisdiction and proper venue of the condemnation action if it had been commenced immediately prior thereto. Unless the agreement for arbitration otherwise provides, the

total or apportioned amounts of compensation as determined by the arbitration award and confirmed by the court shall be entered as a judgment with the same effect and subject to the same terms and conditions as a judgment of condemnation of the property.

COMMENT

Section 1505 applicable when no condemnation action has been commenced, requires that judicial supervision of arbitration proceedings be in the same court in which a condemnation action concerning the same property could be properly filed. Subject to the terms of the agreement, the court is authorized to enforce the award, after it has been confirmed, by entering a judgment based on it that has the same force and effect as a judgment in a condemnation action. As to the powers of the court when a condemnation action is pending, see Section 1504.

§ 1506. [Arbitration Procedure]

Unless the arbitration agreement provides otherwise, the conduct of the arbitration shall be subject to the following rules:

(1) The locale for the arbitration is the county in which the subject property, or the major portion of that property, is located.

(2) The law of this State relating to the criteria for ascertaining just compensation and damages, and the elements thereof, shall be applied.

(3) The arbitration tribunal shall be the judge of the relevancy and materiality of the evidence offered, and conformity to the legal rules of evidence shall not be required.

(4) The amount of compensation determined by the arbitration award must be within the range of the evidence presented by the parties.

(5) The condemnor shall pay the compensation of and all expenses and fees incurred by the arbitrators.

COMMENT

Section 1506 sets forth general rules of procedure governing the arbitration proceedings. These rules, which are based in part upon the Eminent Domain Arbitration Rules of the American Arbitration Association (in effect June 1, 1968), are controlling only to the extent that the arbitration agreement does not otherwise provide. Under Section 1502, these requirements would prevail over any inconsistent provisions of state law, absent a provision in the arbitration agreement to the contrary.

§ 1507. [Abandonment of Acquisition]

(a) Subject to the requirements of subsection (b), an arbitration under this Article may specify the terms and conditions, if any, under which the condemnor may abandon acquisition of the property.

(b) Unless the arbitration agreement expressly waives the property owner's right to reimbursement, in the event of abandonment of acquisition after an arbitration agreement has been entered into, he is entitled to recover from the condemnor:

(1) the same litigation expenses that would be recoverable upon dismissal of an action for the acquisition of the property; and

(2) all other expenses, not included in recoverable litigation expenses, reasonably and necessarily incurred by him in preparation for and in participating in the arbitration and in judicial proceedings in connection with the arbitration, including reasonable attorney, appraisal, and engineering fees.

(c) If abandonment of acquisition occurs after the rendition of an award in the arbitration proceedings, the amount of the expenses payable under this section shall be determined as an additional issue in the arbitration, unless the arbitration agreement expressly provides otherwise. If the abandonment occurs before the rendition of the award, the amount shall be determined by the court in a condemnation action, if one is commenced, or in an independent action brought against the condemnor.

COMMENT

Section 1507 provides for the consequences of an abandonment of the property acquisition undertaking, in the context of an arbitration agreement. In general, the "condemnee" is entitled to recover litigation expenses (as defined in Section 103(14) of this Act) as well as to recover any non-duplicated expenses incurred in preparing for and participating in the arbitration proceedings.

While Subsection (a) permits the subject of abandonment to be treated in the arbitration agreement (e.g., the agreement may stipulate that the condemnor will not abandon the acquisition, or that abandonment will not be permitted after a specified point in time), these stipulations are declared to be "subject to the requirements of Subsection (b)." Subsection (b) makes it clear, consistent with the policies reflected in Section 213, that the condemnor ordinarily must reimburse the property owner for litigation and arbitration expenses incurred by him as the result of the abortive attempt to acquire the property, unless the right to recover is expressly waived by written agreement between the parties. Subsection (c) specifies how the amount of expenses to be reimbursed is determined.

§ 1508. [Recordation of Agreement]

(a) An agreement under this Article, or a memorandum summarizing its terms and describing the subject property, after being executed and acknowledged by the parties, may be recorded, or rerecorded, in the same manner and with the same effect as a conveyance of real property.

(b) The record of the agreement or summary of agreement ceases to be notice to any person for any purpose after two years following the date of recordation or rerecordation under subsection (a).

COMMENT

Section 1508 permits an agreement for arbitration, or a summary thereof, to be recorded for the purpose of providing constructive notice to subsequent lienors and purchasers. This procedure will make it unnecessary, where arbitration is agreeable to the parties, for the condemnor to commence a condemnation action merely for the purpose of obtaining the protection of the filing of a notice of lis pendens.

ARTICLE XVI

EFFECTIVE DATE AND REPEALER

Section

1601. [Time of Taking Effect].

1602. [Application].

1603. [Uniformity of Application and Construction].

1604. [Severability].

1605. [Repealer].

§ 1601. [Time of Taking Effect]

This Code shall take effect [_____].

§ 1602. [Application]

(a) Articles I through V of this Code apply only to condemnation actions commenced on or after its effective date.

(b) Article I and Articles VI through XV of this Code apply to the fullest extent practicable to pending condemnation actions commenced before its effective date with respect to issues on which a judgment has not been entered, and with respect to issues that are retried on or after its effective date pursuant to an order of a trial or appellate court.

(c) In any condemnation action in which an appeal or a motion to modify or vacate the verdict or judgment, or to grant a new trial, was pending on the effective date of this Code, the law applicable before the effective date of this Code governs the determination of the appeal or motion.

COMMENT

Under Subsection (a), the acquisition policies in Article II and the procedural requirements of Articles III, IV, and V of the Uniform Code are applicable to condemnation actions commenced after the effective date of the Code, but not to those earlier initiated or commenced. Every state already has adopted statutory provisions similar, although in most cases less sweeping in purview, to Article II, and all states have existing condemnation procedures that will have been invoked in previously commenced actions. Thus, no compelling public policy appears to require a retrospective application of these Articles.

Articles VI through XV, however, introduce into the Uniform Eminent Domain Code procedures and principles of eminent domain practice that are not found in the present law of many states. In most pending condemnation litigation, except perhaps for actions that are being tried or are awaiting imminent trial on the effective date of the Code, the immediate application of these Articles would not obstruct the parties or court in proceeding to judgment. Immediate application, moreover, would prevent inconsistencies of result as between actions commenced just prior to the effective date of the Code, and those commenced shortly thereafter. The phrase "to the fullest extent practicable" in Subsection (b) is intended to give the court ample discretionary power

to adapt the application of Articles VI through XV to the circumstances of the individual case, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases effect an injustice.

Subsection (c) provides, in the interest of fairness, that any decision on a post-trial motion or appeal pending on the effective date of the Uniform Code should be based upon the law that was in effect when the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. If the motion or appeal results in a new trial, however, the Uniform Code would govern the further proceedings in the action under Subsection (b).

§ 1603. [Uniformity of Application and Construction]

This Code shall be applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Code among states enacting it.

COMMENT

This is a standard provision on uniformity and construction.

§ 1604. [Severability]

If any provision of this Code or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Code that can be given effect without the invalid provision or application, and to this end the provisions of this Code are severable.

§ 1605. [Repealer]

The following acts and all other acts and parts of acts inconsistent with this Code are hereby repealed:
[Here should follow the acts to be specifically repealed, including any acts regulating the procedure for condemnation actions.]