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The Pennsylvania Eminent Domain Code: A Bittersweet Nostrum for the Residential Tenant

I. Introduction

The power of eminent domain,¹ if vigorously exercised, is a devastating device. It is an inherent right of the sovereign,² but traditionally the legislature has delineated its exercise.³ Every state limits the operation of eminent domain by adhering to the constitutional requirement of "just compensation."⁴ The scope of "just compensation," measured by common, statutory, and constitutional law, defines the procedural and substantive rights of the condemnor⁵ and condemnee.⁶

Thrust into the eminent domain proceeding as an unwitting condemnee, the residential tenant seeks damages for a small compensable claim,⁷ but is burdened by a lack of legal sophistication⁸ and a practical inability to finance litigation expenses.⁹ Further disadvantaging the tenant, is the conflict between his interest and the

1. The power of eminent domain must be distinguished from the use of police power, which, although resulting in a taking, injuring, or destruction of property, is not compensable under the Pennsylvania Eminent Domain Code. *Commonwealth v. Appointment of Viewers*, 399 Pa. 586, 593, 160 A.2d 715, 718 (1960).

2. *Lazarus v. Morris*, 212 Pa. 128, 130, 61 A. 815, 816 (1905).

3. *Id.*

4. The United States Constitution provides the standard that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V. In Pennsylvania, just compensation is extended to cover private property taken, *injured*, or *destroyed*. PA. STAT. ANN. tit. 26, §§ 1-201(1), 1-601 (Purdon Supp. 1979-80). Thus, Pennsylvania requires compensation for both direct and consequential damages.

5. "'Condemnor' means the acquiring agency, including the Commonwealth of Pennsylvania, taking, injuring, or destroying private property under the authority of law for a public purpose." PA. STAT. ANN. tit. 26, § 1-201(3) (Purdon Supp. 1979-80).

6. "'Condemnee' means the owner of a property interest taken, injured, or destroyed, but does not include a mortgagee, judgment creditor, or other lienholder." PA. STAT. ANN. tit. 26, § 1-201(2) (Purdon Supp. 1979-80). A lessee is the owner of a property interest and may therefore qualify as a condemnee. *See, e.g., Hoffman v. Commonwealth*, 422 Pa. 144, 221 A.2d 315 (1966).

7. *See* notes 51-52 and accompanying text *infra*.

8. The poor man enters the legal system only when his rights are clear. Valid claims remain untried and damages unredressed because of his fear of the system. *See Comment, Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 652-54 (1974).

9. Of all households displaced between 1973 and 1976 almost half had incomes of less than \$5,000. 7 HOUSING & DEV. REP. 333 (1979). The survey included both homeowners and tenants.

interests of both the landlord and condemnor.¹⁰ Conceivably, however, a statutory eminent domain code can adequately protect the residential tenant's interests while giving due consideration to the interests of other condemnees and the condemnor.

In balancing the various interests, the Pennsylvania Eminent Domain Code¹¹ supplies the residential tenant with remedies enforceable only through recourse to the judicial process. To test the adequacy of these remedies, one must examine both the sufficiency of the award and the procedure involved in its recovery.¹² The acid test of the Code is whether it permits the tenant a quick and simple recovery of his just compensation.

II. Determination of the Tenant's Recovery

A. General Principles of Just Compensation

Compensation is based on a valuation of the property interest. Valuation, however, centers on the application of the principles of "just compensation" for property taken, injured, or destroyed. Though "just compensation" could be based on the value to the condemnor or the value to the condemnee, courts frequently utilize a hybrid approach considering the fair market value of the property condemned.¹³

10. When a property is condemned, owners of easements, rights of way, leaseholds, and other interests could have a compensable interest. This comment focuses on the multiple interest situation concerning the landlord, as the fee simple owner, and the tenant. *See* notes 28-31 and accompanying text *infra*.

11. *See generally* PA. STAT. ANN. tit. 26, §§ 1-201 to 1-902 (Purdon Supp. 1979-80) [hereinafter referred to as the Code].

12. The following is an outline of the Pennsylvania condemnation procedure.

To initiate a condemnation proceeding, the condemnor must file a declaration of taking, which describes the property condemned, the title sought to be acquired, and the purpose of the condemnation. PA. STAT. ANN. tit. 26, § 1-402 (Purdon Supp. 1979-80). Thereafter, notice must be sent to the condemnee, and the condemnee must file preliminary objections to the proposed taking within thirty days after receiving notice. *See* notes 108-09 and accompanying text *infra*.

At any time, the condemnor and condemnee may stipulate to an agreement concerning the damages for each property interest affected. Alternatively, the parties may petition for a hearing of the viewers or proceed directly to court. The purposes of the viewers' hearing are to provide a forum accessible to the layman and to avoid the costly expense of litigation. *See* notes 110-18 and accompanying text *infra*.

The decision of the viewers may be appealed by either party as a matter of right. The appeal is a trial de novo in the court of common pleas. The Code does not establish a unique procedure for subsequent appeals. *See* notes 119-26 and accompanying text *infra*.

13. *See, e.g.,* Olson v. United States, 292 U.S. 246, 255-57 (1933); Redevelopment Auth. of Philadelphia v. Liebermann, 461 Pa. 208, 218, 336 A.2d 249, 255 (1975).

The "fair market value" approach reflects the value of the property both to the condemnor and to the condemnee. The condemnation is considered a "sale." If the property interest condemned is a type regularly bought and sold, the test of comparable sales is used. When the property is unique, however, a different method of valuation, replacement cost, reproduction cost, or substitute facilities cost, is used. *See generally* Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63, 67-70 (1970); Jones, *Just Compensation via Fair Market Value May not Include the Kitchen Sink—It Could be Noncompensable*, 46 MISS. L.J. 1, 1-6 (1975); 92 HARV. L. REV. 514, 514-23 (1978). For a discussion of the Pennsylvania definition of fair market value, see note 20 *infra*.

The courts have been reluctant to base just compensation on the value to the condemnor for several reasons.¹⁴ First, the value to the condemnor is difficult to ascertain.¹⁵ Second, because the value to the condemnor depends on his use of the property, the compensation paid varies in no logical relationship to the common notions of value attaching to the property. Third, dissatisfaction with the amount of the award may cause the condemnee to pursue needless litigation. Last, to redress perceived inequities caused by the application of the rule, courts will discover exceptions to the rule and thereby complicate the application of an already unpredictable rule.

Although the subjective value to the condemnee is a better basis for determining just compensation, this method also entails difficulties in application. Determination of the peculiar value that a condemnee attaches to a property interest requires the means to quantify and ascertain a value personal to the condemnee. The subjectivity of measurement causes inconsistent results, and the difficulty in disproving a peculiar value alleged by a condemnee encourages fraud.¹⁶

Although preferring to err on the side of the condemnee,¹⁷ courts hold that sentimental value is noncompensable and that the standard of valuation must be the economic value of the property interest.¹⁸ *Olson v. United States* contains the following classic statement on valuation: “[The owner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole, but is entitled to no more. It is *property* and *not the cost* that is safeguarded by state and federal constitutions.”¹⁹ The “fair market value” test²⁰ provides an objective standard and pro-

14. See, e.g., *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Singer v. Oil City Redev. Auth.*, 437 Pa. 55, 66, 261 A.2d 594, 600 (1970) (condemnee should be made economically whole).

15. The value to the condemnor of many “public goods” is measured by their value to the general public. This collective value, what those who use the public good would pay for its use over an extended period of time, is a matter of pure speculation.

16. If *X* and *Y* own identical, contiguous plots, upon condemnation both *X* and *Y* should receive the same amount of compensation. Suppose *X* is awarded more money than *Y* because of the subjective value *X* attaches to his property. Certainly *Y* or future parties cognizant of *Y*'s plight will litigate and argue that their property also has an enhanced subjective value. No basis of proof exists to prove or disprove conclusively this subjective estimation of value. But compare PA. STAT. ANN. tit. 26, § 1-704 (Purdon Supp. 1979-80) (the condemnee is qualified as an expert witness to value his property interest).

17. Three reasons for favoring the condemnee exist. First, the condemnee is forced to relinquish his property. Second, the condemnor determines which land is to be taken. Last, the condemnee, being in a weaker financial position than the condemnor, will suffer more harm if not made whole. *In re Apportionment of Easement for Highway Purposes*, 169 Ohio St. 291, 298-99, 159 N.E.2d 612, 617 (1959).

18. *Olson v. United States*, 292 U.S. 246, 255 (1933).

19. *Id.* at 255 (emphasis supplied).

20. The Code adopts fair market value as the test for valuation and defines fair market value as follows:

[T]he price which would be agreed by a willing and informed seller and buyer, taking into consideration but not limited to the following factors:

motes a consistency and predictability achieved by no other methods. Because more consistent awards limit litigation and its consequent expense, the taxpayer or consumer, who must ultimately pay for the condemned property, gains when courts use the fair market value approach.

B. Multiple Interest Valuation

Condemnation of property with multiple interests²¹ complicates the application of the fair market value test. In applying the test in a multiple interest situation, courts espouse one of three techniques. Some courts value the property as a fee simple unencumbered by any other interests, the "unencumbered fee" rule. Other courts value each interest separately, applying the "aggregate of interests" rule. Still others value the property as a whole, while giving due consideration to the various interests in the property. The last method is the technique adopted by the Code.²²

1. *"Unencumbered Fee" Method.*—Application of the "unencumbered fee" rule presents several advantages. First, no evidence concerning the separate interests need be heard in order to value the property. Second, since the evidence heard is simpler, a speedier trial results. Last, physically identical properties are valued equally.

The rule, though easy to apply, fails by considering real property as essentially a physical entity, rather than a complex array of interests associated with that physical entity. Consequently, an owner of a property interest may be undercompensated.²³ Additionally,

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

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

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

PA. STAT. ANN. tit. 26, § 1-603 (Purdon Supp. 1979-80).

One commentator argues that this definition of fair market value is an economic definition rather than a legal one. Additionally, he criticizes the definition as contemplating a willing buyer and seller, when, in fact, neither exists in a condemnation proceeding. E. SNITZER, PENNSYLVANIA EMINENT DOMAIN § 603.1 (1965) [hereinafter referred to as SNITZER]. Nevertheless, the Code adequately describes fair market value. The purpose in calculating just compensation is to legally determine the economic value of the condemnee's property interest without centering on the unique value to the condemnor or condemnee. The interests of the hypothetical buyer and seller are simply the objective, quantifiable interests of the condemnee and the condemnor.

21. When addressing the issue of multiple interests the courts provide tests that are easy to repeat but difficult to apply. See, e.g., *Olson v. United States*, 292 U.S. 246, 255 (1933) (the owner must be made whole but not be overcompensated); *Redevelopment Auth. of Philadelphia v. Liebermann*, 461 Pa. 208, 218, 336 A.2d 249, 254 (1975) (just compensation derives as much content from the equitable principles of fairness as it does from the technical concepts of property law).

22. PA. STAT. ANN. tit. 26, §§ 1-507, 1-602, 1-603 (Purdon Supp. 1979-80).

23. Consider a situation in which *X* and *Y* own two properties that are physically identical. *Y*, however, rents the residence on his lot, a ramshackle, dilapidated shack, to an eccentric billionaire at \$400 per month for a term of twenty years. Without this rental *Y*'s property is worthless. A buyer would pay more for *Y*'s interest than for *X*'s. The "unencumbered fee" method, however, fails to recognize this distinction. See *Garella v. Redevelopment Auth.*, 413

the rule provides no guide for the allocation of the award.²⁴ Therefore, the "unencumbered fee" method is not a viable mode of analysis.

2. *The "Aggregate of Interests" and Code Methods.*—Both the "aggregate of interests" approach and the Code method consider all interests in valuation. To determine the total award under the "aggregate of interests" rule the values of the various interests are determined separately and added together. The Code method requires valuation of the whole property, considering the separate existing interests. These methods avoid a multiplicity of lawsuits by requiring that all claims of any interested parties be heard together.²⁵ Though some commentators criticize the use of the "aggregate of interests" rule in certain situations,²⁶ when properly applied both methods yield the same result.²⁷

In practical application, use of the Code rule works to the detriment of the residential tenant. Generally, the landlord carries the burden of presenting evidence at trial.²⁸ In establishing the value of the total property, the landlord presents evidence of contract rent and fair rental value. If the contract rent is greater than or equal to the fair rental value of the leasehold interest, the lessee will be uncompensated for his interest.²⁹ If the contract price is less than the

Pa. 181, 187-88, 196 A.2d 344, 348 (1964). *But compare* dictum in *Olson v. United States*, 292 U.S. 246, 255 (1933) (the public is not required to bear the burden or compensate the benefit of the owner's bargain).

Moreover, expert real estate appraisers, the primary source of valuation at trial, soundly reject this method. *North Side Deposit Bank v. Urban Redev. Auth. of Pittsburgh*, 1 Pa. Commw. Ct. 274, 277-78, 274 A.2d 215, 217 (1971).

24. The difficulties of allocation are especially pronounced in the case of a partial taking. *See generally* Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 499-523 (1962). *See also* note 57 *infra* expressly dealing with these difficulties.

The interests of all property owners must be protected, even at the expense of judicial efficiency. *See Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 595, 305 A.2d 877, 882 (1973).

25. PA. STAT. ANN. tit. 26, § 1-507 (Purdon Supp. 1979-80).

26. When a long-term lease has a restrictive covenant that severely limits the use of the property its value to the lessee is correspondingly reduced. Since the owner does not have the benefit of use and enjoyment of the land for an extended period of time, his interest is also limited. Some commentators suggest that in this situation use of the "aggregate of interests" method undervalues the property, but the "willing and informed" buyer takes the restrictive lease into account and pays less for the property.

When the rent paid by the lessee exceeds the going market rate, the leasehold has a "negative value." The value of the lessor's interest is greater than the value of the entire property. No court has yet required the lessee to pay the lessor the "negative value." Instead, the lessor's recovery has been correspondingly reduced. Thus, the lessor's recovery does not equal the value of his interest. The Code method produces the same result. *See* Polasky, *supra* note 24, at 490-93; Comment, *Condemnation, Compensation, and "Negative" Interests*, 43 FORDHAM L. REV. 841, 841-56 (1975).

27. *See* Committee on Leases, *Condemnation of Leasehold Interests*, 3 REAL PROP., PROBATE, & TRUST J. 225, 232-33 (1968).

28. *Id.* at 231. Because the residential tenant's interest is so small, the costs involved in presenting evidence at trial may be prohibitive.

29. *See* notes 48-49 and accompanying text *infra* for a discussion of leasehold valuation.

fair market price, however, the lessee may recover the "bonus value."³⁰ The greater the landlord's recovery, the smaller the tenant's recovery will be.³¹

The "aggregate of interests" rule eliminates any conflict between the landlord and tenant since the tenant's award is distinct from the landlord's and both have an interest in establishing a higher fair market value.³² Moreover, each party is guaranteed a hearing. The Code incorporates several provisions that are similar in character to the "aggregate of interests" method.³³ This incorporation clouds any simple explanation of the Code rule.

The Code fails to provide a method for allocating the award among the multiple interests.³⁴ Moreover, the leading Pennsylvania case discussing the valuation of multiple interests, *Garella v. Redevelopment Authority*,³⁵ expressly rejects the "unencumbered fee" and "aggregate of interests" rules without elucidation or substantial justification.³⁶ Nevertheless, support does exist for using the Code approach. The Code method considers all owners of property interests and postpones the difficulties of apportionment until the end of the trial. In addition, the court, rather than the jury, determines the technical and complex problem of allocation.

The difficulties in applying the Code rule to multiple interest valuations can be overcome. By appointing a panel of impartial expert appraisers as viewers the separate interests could be quickly and authoritatively evaluated.³⁷ On appeal their findings would be presented as evidence.³⁸ In addition, a clear method of allocation

30. See note 49 *infra* for a discussion of "bonus value."

31. Suppose *X* and *Y* have identical properties except that *X* has a tenant who pays \$200 rent per month and *Y* has a tenant who pays only \$100 per month. Further suppose the fair rental value of either is \$150 per month. Upon condemnation, the total award for all the interests in *Y*'s property would equal the total award for all interests in *X*'s property. (Remember "negative leasehold" value). *X*, however, recovers more than *Y* because *Y* must share the award with his tenant.

32. The landlord will recover an award based on the capitalization of fair rental value of the leasehold or contract rent, whichever is less, plus the value of his reversionary interest. See Polasky, *supra* note 24, at 490-91. The tenant has an interest in establishing "bonus value." Bonus value occurs when the fair rental value is greater than contract rent. Therefore, the landlord has no economic interest in preventing the tenant from establishing that the fair rental value is greater than contract rent.

33. See PA. STAT. ANN. tit. 26, § 1-607 (Purdon Supp. 1979-80) (value of machinery, equipment, and fixtures is separately determined if removed from the property); *Id.* § 1-705(2) (expert witness may testify about his separate valuation of the various property interests).

34. See generally SNITZER, *supra* note 20, at §§ 601-603.

35. 413 Pa. 181, 196 A.2d 344 (1964).

36. The case does not indicate any means whereby allocation can be made among the multiple interests. The two classic methods, the "subtraction" and "ratio" methods, are examined in note 39 *infra*. See Polasky, *supra* note 24, at 477-537.

37. For a discussion of the advantages and disadvantages in using experts as viewers, see notes 136-37 and accompanying text *infra*.

38. Under the Code the viewers' findings have no evidentiary value on appeal. For a description of the merits of this approach, see notes 137-38 and accompanying text *infra*.

must be announced.³⁹ This will lead to greater predictability in result, which in turn supplies a rational basis for deciding whether to pursue the claim initially or whether to file a subsequent appeal.⁴⁰

C. Elements of the Tenant's Compensation

1. *The Leasehold Interest.*—The complexities of allocation are frequently avoided through the use of a condemnation clause, a lease provision that defines the respective rights⁴¹ of the lessee and lessor upon condemnation. Generally, the clause terminates the leasehold interest upon condemnation, and the lessee cannot maintain an action for the destruction of the leasehold.⁴² Conversely, if the lease is not terminated, the tenant will be entitled to compensation for the taking of his interest.⁴³

Courts will interpret the clause in the light most favorable to the lessee.⁴⁴ This is a recognition of the unequal bargaining positions of the landlord and residential tenant⁴⁵ and the harsh effect that the

39. Commentators and courts recognize two methods of apportionment. In the "subtraction" method the interest of the lessee is calculated and subtracted from the total award. The "apportionment" or "ratio" method prorates the award between the lessor and lessee. The variables of the proration formula, complex capitalization and expense allocation factors, are tricky to apply and may lead to inconsistent results. Because of its simplicity, the subtraction method is preferable. See generally Polasky, *supra* note 24, at 477-537.

40. At trial the landlord's and tenant's interests still conflict, but any evidence presented is considered together with the findings of the viewers. See notes 136-38 and accompanying text *infra*.

41. Residential leases, when properly drafted, contain a condemnation clause. The clause can describe the method of allocation between the lessor and lessee upon condemnation. Usually the clause is drafted to allow the lessor to recover the full award, which denies the lessee any recovery.

The provisions of the condemnation clause should be aggressively negotiated. Unfortunately, the lessee is often uninformed or in a poor bargaining position and the clauses are written favoring the lessor. Address by Fred M. Lange, Esq., SOUTHWESTERN LEGAL FOUNDATION, INSTITUTION ON PLANNING, ZONING, AND EMINENT DOMAIN 289, 299 (1975).

When the condemnation clause is properly drafted much unnecessary litigation can be avoided. The clause may answer what type of allocation method is to be used on full or partial taking, whether the lessee must continue to pay full rent in the event of a partial taking, and whether the lessee can collect any portion of leasehold value in the event of condemnation. If no condemnation clause exists, the lessee must continue to pay full rent in the event of a partial taking, but is relieved from the obligation to pay rent upon a full taking. See generally Committee on Leases, *supra* note 27, at 242-55; SNITZER, *supra* note 20, at § 201(2)-9.

42. *In re* Condemnation by Commonwealth of Pa., Dep't of Transp., 38 Pa. Commw. Ct. 535, 542, 394 A.2d 657, 661 (1978); cf. Boteler v. Philadelphia & Reading Terminal R.R., 164 Pa. 397, 405, 30 A. 303, 303-04 (1894) (sublessee is not bound by a condemnation clause in the lease agreement of the lessee and lessor).

43. *In re* Condemnation by the Commonwealth of Pa., Dep't of Transp., 38 Pa. Commw. Ct. 535, 542, 394 A.2d 657, 661 (1978).

44. Gulf Oil Corp. v. Faller, 399 Pa. 607, 611, 161 A.2d 6, 8 (1960).

45. The validity of the condemnation clause has been upheld in Scholl's Appeal, 292 Pa. 262, 141 A. 44 (1928). Recent case law, however, has begun to erode the validity of the clause. The residential lease is a contract, governed by contract law. Pugh v. Holmes, ___ Pa. ___, ___ 405 A.2d 897, 903 (1979). In comparison with the landlord, the tenant has a vastly inferior bargaining position. *Id.* at ___, 405 A.2d at 903. Because of the tenant's weak bargaining position, the condemnation clause strongly favors the landlord. A contract clause will be overturned when it imposes unreasonable liabilities or burdens upon those persons financially ill-equipped to assume the burdens and who are without significant bargaining power. Fair v. Negley, 257 Pa. Super. Ct. 50, 59, 390 A.2d 240, 245 (1978). Under this standard, the condem-

clause may have on the tenant if strictly construed. Special damages, however, eliminate any hardship that may be caused by the enforcement of the condemnation clause.⁴⁶

Absent lease provisions barring recovery, the lessee is entitled to just compensation for the taking, injuring, or destruction of his leasehold interest.⁴⁷ Courts enunciate two formulas to determine just compensation for the lessee's interest, the "fair market value"⁴⁸ method, and the "bonus value" method.⁴⁹ In practice, the methods are interchangeable. Compensation is awarded for a partial or full taking⁵⁰ or for consequential damages to the leasehold interest.

nation clause will survive attack since the burden on the tenant is slight. In addition, when the lease is signed, the chance of condemnation is normally insignificant. Furthermore, through the mechanism of special damages the Code permits the tenant to recover an amount often greatly in excess of the value of the leasehold interest.

46. Since an equitably drafted condemnation clause can limit litigation and no party suffers significant harm because of its use, properly drafted and thoroughly negotiated condemnation clauses should be encouraged. The Code, consonant with Pennsylvania case law, does encourage the use of such clauses. Because the courts interpret the clause in the light most favorable to the tenant, the Code allocation method encourages the landlord to include a clause that clearly protects his interest. The landlord will write a strong and clear condemnation clause in an attempt to insure a maximum recovery while avoiding unnecessary litigation. Ideally, however, the clause should protect the interests of both the landlord and tenant.

47. PA. STAT. ANN. tit. 26, § 1-601 (Purdon Supp. 1979-80). The measure of just compensation varies in theory and in practice. Compare the following: "Just compensation" means the full monetary equivalent of property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1972).

"The compensation for the value of the leasehold covers the loss from premature termination except in the unusual situation where there is higher cost for present relocation than for a future [relocation]." *United States v. Petty Motor Co.*, 327 U.S. 372, 379 (1946) (only in unusual circumstances is loss from premature termination actually considered).

Without a statutory provision providing for relocation expenses, they are not included in the compensation. When they are paid, though, the disruption caused by the condemnation is less severe.

48. *See Boteler v. Philadelphia & Reading Terminal R.R.*, 164 Pa. 397, 30 A. 303 (1894) (the value of the leasehold is what it can be sold for on the marketplace). *But see James McMillan Printing Co. v. Pittsburgh, Carnegie, & W. R.R. Co.*, 216 Pa. 504, 511, 65 A. 1091, 1094 (1907) (market value is not the test of lease value since a lease rarely has a market value).

When the court correctly applies the fair market test it compensates the tenant for the taking of the right of occupation, the right of excluding others, and the right of disposition. *Redevelopment Auth. of Philadelphia v. Liebermann*, 461 Pa. 208, 213, 336 A.2d 249, 252 (1975).

49. "Bonus value" or "leasehold advantage" is the difference between the fair rental value of the leased premises and the rent actually reserved in the lease for the remainder of the unexpired term. The amount is discounted to present value. *See Redevelopment Auth. of Wilkes-Barre v. Santucci*, 20 Pa. Commw. Ct. 376, 380, 341 A.2d 533, 535 (1975). Therefore, the lessee whose rent is greater than the fair market value has no compensable interest unless a statute specifies otherwise. *See Pittsburgh Urban Redev. Auth. v. Cleban*, 216 Pa. Super. Ct. 269, 280, 264 A.2d 187, 193 (1970).

50. In addition to a full or partial taking, the condemnor could take for a term of years. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945). This rarely occurs.

A condemnee may also be a victim of a de facto taking, which exists if the property owner can demonstrate the existence of "extraordinary circumstances" caused by the condemnor that have substantially deprived the owner of the beneficial use and enjoyment of his property when no declaration of taking has been filed. *Helms v. Chester Redev. Auth.*, 32 Pa. Commw. Ct. 377, 378, 379 A.2d 660, 661 (1977) (evidence that the property has remained vacant for some time and that the condemnor's plan to acquire nearby property has received publicity is not enough to establish a de facto taking); *Reingold v. Urban Redev. Auth. of Pittsburgh*, 20 Pa. Commw. Ct. 266, 267-69, 341 A.2d 915, 915-16 (1975) (evidence that the city had con-

a. *Full taking.*—A full taking occurs when the lessee's entire property interest is taken. The length of the unexpired term at the time of the taking determines the extent of the compensable interest. Thus, a tenant at will has no compensable interest,⁵¹ while a tenant from month to month is entitled to compensation only for the right of occupancy for the remainder of the month in which the property is condemned.⁵² Thus, the typical residential tenant possesses a very small compensable interest upon condemnation.

b. *Partial taking.*—A partial taking of a leasehold occurs when only part of the property subject to the leasehold is taken.⁵³ In valuing the interest taken, the Code requires the application of the same general principles that are employed in the event of a full taking.⁵⁴

Partial taking cases raise particular problems in the method of payment. The Code does not specify a particular manner of payment. All three commonly used payment techniques,⁵⁵ payment to the lessee with no reduction in rent, reduction in rent coupled with payment to the landlord, and payment held in trust⁵⁶ have serious drawbacks.⁵⁷ One solution is to allow the alternative remedies of abatement of rent or payment to the lessee. Although resolving

demned buildings surrounding Reingold's property and that because of deteriorating conditions no tenants could be found to rent the Reingold property was sufficient to prove a de facto taking). The *Reingold* case underscores the dilemma facing the residential tenant suing on a theory of de facto taking. If he stays in possession, his action may be construed as a waiver of the de facto taking. If he leaves, however, he must litigate before he receives any compensation.

The Code establishes a procedure for valuation of the interest taken and compensation upon the condemnee's proof of a de facto taking. PA. STAT. ANN. tit. 26, § 502(e) (Purdon Supp. 1979-80). In a multiple interest setting the method used to allocate damages will depend on whether the taking is full or partial.

51. *Riedel v. Plymouth Redev. Auth.*, 361 Mass. 680, —, 241 N.E.2d 852, 854 (1968); SNITZER, *supra* note 20, at § 201(2)-9.

If a statute provides that the tenant at will must be given notice before termination, the tenant has a compensable interest for the period of the notice if a condemnation occurs. The expectancy of a continued leasehold relationship in a tenancy at will, however, is not compensable. *United States v. Petty Motor Co.*, 327 U.S. 372, 380 (1945).

52. *See Pittsburgh Urban Redev. Auth. v. Cleban*, 216 Pa. Super. Ct. 269, 280, 264 A.2d 187, 194 (1970).

53. The landlord's interest may be partially taken, while the tenant's is fully taken. The allocation problems discussed in this section apply when both the landlord and tenant suffer a partial taking. If the tenant is forced to move, he has suffered a full taking.

54. *See* PA. STAT. ANN. tit. 26, § 1-602(a) (Purdon Supp. 1979-80). An exception to the general principles is the apportionment between the landlord and tenant when the lease has a "negative value," *i.e.* the fair market rent is less than the contract rent. In a full taking the landlord absorbs the negative value. In a partial taking the lessor and lessee often share the inadequate award on a pro rata basis. L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 123 (1953).

55. *See generally* Polasky, *supra* note 24, at 499-511.

56. Only Massachusetts has adopted this method. MASS. GEN. LAWS ANN. ch. 79, §§ 24-25 (West 1969).

57. The award is reduced to present value using an acknowledged capitalization discount rate. If the discount rate is too low the award recipient, with adequate investment, reaps a windfall. Conversely, if the rate is too high, a loss is incurred. The recipient of the award carries the burden of investment. Since the award is considered as income to the recipient, an

some problems, the solution raises the specter of judicial intervention in every partial taking involving a leasehold interest to determine which is the better alternative.

A second solution is to amend the trust procedure, empowering the trustee to collect additional funds from the condemnor if deficiencies occur. Any excess would be returned to the condemnor. Unless a trustee is willing to work for nothing, however, the trust res must still be greater than when the award is paid either to the landlord or to the tenant.

The best solution is to require the condemnor to assume payment of the portion of the rent abated. The condemnor is more financially secure, will continue to be in existence for the duration of the payments, and, in fairness, should bear all consequential costs of condemnation. The landlord will have a sounder assurance of payment, and the tenant will be relieved of any obligation to pay for what has been taken. No party will suffer an investment loss or reap a windfall profit. Property law, through the mechanism of the ground rent, provides a model for this payment scheme.

c. Consequential damages.—Consequential damages do not arise when the property is taken, as in a full or partial taking, but when an injury to the property occurs as the natural result of an act by an agency empowered with eminent domain.⁵⁸ When a leasehold is damaged, the tenant may have a compensable right.⁵⁹

The Pennsylvania Constitution requires that municipal and other corporations authorized to exercise the power of eminent domain redress any consequential injuries caused by the exercise of this power.⁶⁰ In certain circumstances, the Code extends this liability to the state and its agents.⁶¹ Unlike the “taking” situation in which the

intriguing problem is raised if tax considerations are included as a variable in calculating the amount of the award.

In many cases, payment to the lessee is unattractive. The tenant, often the less sophisticated party, is more burdened by the need to invest than the landlord. If the tenant is successful his taxes increase. If he fails, his income diminishes. The landlord, however, pays higher taxes only if his investments yield a windfall. The technique also deprives the landlord of the security of the lease. If the tenant absconds with the funds, the landlord's only cause of action is against the tenant.

Payment to the landlord and abatement of rent also presents problems. The landlord must bear the risk of an inadequate return on the award. Additionally, if the risk that a financially secure tenant would fail to pay the landlord full rent is less than the risk the landlord takes in investing the funds, the landlord would prefer that the tenant receive the award and pay full rent.

The solution of holding the award in trust and investing the trust res to enable full payment to the lessor leaves unanswered the question of who bears the net loss or reaps the net gain from the investments. Furthermore, the trustee's fees diminish the corpus available for investment.

58. *In re Soldiers' & Sailors' Memorial Bridge*, 308 Pa. 487, 490, 162 A. 309, 310 (1932).

59. *See, e.g., Coons v. McKees Rocks Boro.*, 243 Pa. 340, 90 A. 141 (1914).

60. PA. CONST. art. 16, § 8.

61. All condemnors are liable for damages to the property abutting the area of the im-

cause of action arises when the declaration of taking is filed, the cause of action for consequential damages arises when the actual damage occurs.⁶² Problems regarding allocation of the award between the landlord and tenant similar to those encountered in partial takings also accompany consequential damages.

2. *Special Damages.*—The essence of just compensation is the adequacy of the award. To be adequate the award must be sufficient to safeguard the varied interests of the condemnor and condemnees. The tenant, because of an unfair bargaining position and a lack of legal sophistication, usually enters a lease agreement that contains a condemnation clause eradicating his interest upon a taking. The Code encourages these condemnation clauses since litigation is diminished and the problems of allocation are circumvented. To redress the inequity suffered by the tenant, the Code provides for special damages that articulate compensatory and social purposes. These special damages include a replacement housing allowance, moving expenses or dislocation allowance, and, in limited circumstances, delay compensation.

a. *Replacement housing allowance.*—The tenant has a noncompensable expectancy to have the option to renew, especially in a month to month tenancy with an established history of peaceful occupation and timely rental payments. The Code redresses the inequity of not awarding compensation for this expectancy by providing a replacement housing allowance⁶³ to the qualifying tenant. To qualify for the replacement housing allowance, the tenant must be a

provement that results from a change of grade of a road or highway, permanent interference with access thereto, or injury to the surface support. This liability arises whether or not any property is taken. PA. STAT. ANN. tit. 26, § 1-612 (Purdon Supp. 1979-80). Additionally, when a public road, street, or highway is vacated, the affected owner may recover damages for any injuries suffered as a result thereof, even though no land is taken. *Id.* § 1-613.

Noncompensable injury includes the loss of future trade or business, a change in the traffic pattern, or the need to travel farther to reach a street going in the same direction. *Iron City Auto. Co. v. City of Pittsburgh*, 253 Pa 478, 491, 98 A. 679, 685 (1916) (damage to future trade or business is too speculative to be compensable); *Commonwealth of Pa., Dep't of Trans. v. Kasner*, 13 Pa. Commw. Ct. 525, 532, 320 A.2d 146, 148 (1975) (injury caused by change in traffic pattern too small to be compensable).

62. *Commonwealth of Pa., Dep't of Transp. v. Gayeski*, 21 Pa. Commw. Ct. 273, 275-76, 344 A.2d 730, 731-32 (1975). The reasons why the cause of action arises when damages occur are threefold. First, the condemnor is given added flexibility to terminate an unwise project without a prohibitive extension of liability. Second, before the damage occurs, it is impossible to estimate the extent, if any, of the damage. Last, when damages are the prerequisite to recovery, many legitimate claims may be barred by the statute of limitations.

63. Relocation housing allowance, moving expenses, and dislocation allowance are special damages provided by the Code. The Code provisions mirror the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs. 42 U.S.C. §§ 4601-4634 (1976). *See* PA. STAT. ANN. tit. 26, §§ 1-601A to 1-604A (Purdon Supp. 1979-80).

displaced person.⁶⁴ A tenant who is not a condemnee but who is legally in occupancy of the property at the time of condemnation may still qualify for this special allowance as a displaced person.⁶⁵ Tenants not qualifying as displaced persons include a tenant holding an expired lease at the time of condemnation⁶⁶ and a tenant forced to move by an agency acting as a private owner.⁶⁷

Before he may receive the allowance, the displaced tenant must rent or purchase a suitable dwelling.⁶⁸ The tenant cannot be required to relocate in an area not readily accessible to the tenant's place of employment and not as generally accessible to public and commercial facilities as the former leasehold. The award is limited to \$4000.⁶⁹

The replacement housing allowance is a statutory award redressing the inequities tenants suffer when they receive little or no award for the destruction of the leasehold. It is based on need or out of pocket expense rather than being awarded as a matter of right.⁷⁰

64. 'Displaced person' means any condemnee or other person not illegally in occupancy of real property who moves or moves his personal property as a result of the acquisition for a program or project [of the acquiring agency] . . . or as a result of written notice from the acquiring agency of intent to acquire or order to vacate such real property

PA. STAT. ANN. tit. 26, § 1-201(8) (Purdon Supp. 1979-80) (emphasis added).

65. *Id.* This commonly occurs when the condemnation clause eliminates all of the tenant's interest upon condemnation. See notes 41-45 and accompanying text *supra*.

66. *Fisher v. Pittsburgh Pub. Parking Auth.*, 433 Pa. 113, 115, 248 A.2d 849, 850 (1969).

67. *Alexander v. United States Dep't of Hous. & Urban Dev.*, 441 U.S. 39, __ (1979) (acquiring agency not procuring the property for a project or program).

Any extension of the definition of "displaced person," though, must be carefully considered. Cushing N. Dolbeare, president of the National Law Income Housing Coalition, advocates the extension of the federal definition of a displaced person (currently the same as the Pennsylvania definition) to include "the involuntary movement of people from dwellings because of circumstances beyond their control." 7 HOUSING & DEV. REP. 333 (1979). While implementation of this proposal may be meritorious despite its obvious cost and the distinct chance for fraud, its social welfare purpose is inconsistent with the purpose of the Code. If the proposal is incorporated in the Code, a "taking" will often occur without the exercise of the eminent domain power.

68. PA. STAT. ANN. tit. 26, §§ 1-603(A)(a)(1), (2)(b) (Purdon Supp. 1979-80). See *Patterson v. County of Allegheny*, 15 Pa. Commw. Ct. 228, 238, 325 A.2d 484, 489 (1969).

69. The replacement housing allowance for a suitable rental unit is determined by the following formula promulgated by the Attorney General:

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

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

(b) if such monthly rental is not reasonably equal to market rentals for similar dwellings . . . 48 times the economic rent; or

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

37 PA. CODE § 151.6 (1979).

70. Potential for abuse exists in awarding recovery based on gross income since the unscrupulous, hoping to gain four years of cheap rent, may speculate on the possibility of condemnation. Those with lower incomes, however, probably will not speculate on leases.

Since a condemnation is generally unexpected, defining gross income to include the in-

Since it primarily serves a social purpose, the award is made separately from the leasehold valuation.⁷¹

Several deficiencies, however, erode the efficacy of the replacement housing allowance. First, the displaced tenant may be forced to move before finding an adequate replacement dwelling.⁷² Second, the Code provides no alternative to the allowance.⁷³ Last, the Code does not provide for a maximum coordination of state and federal benefits,⁷⁴ and the tenant may not receive a timely notification of his rights.⁷⁵

Nevertheless, these deficiencies can be remedied. With little additional cost the tenant can be informed of all potential benefits to which he is entitled. The tenant must not be dispossessed before he finds an adequate replacement dwelling. Additionally, when feasible the tenant should have the option of remaining in possession.⁷⁶

come of all adult family members does not have the disruptive effect on the family unit of a similar provision of a welfare law.

71. If the tenant recovers both the leasehold advantage and the replacement housing allowance, a partial duplication of payment will exist. They are, however, distinct. The landlord's award will not be reduced by the payment of this special assistance to the tenant.

The Code requires the separation of special and general damages. PA. STAT. ANN. tit. 26, § 1-518(b) (Purdon Supp. 1979-80). The replacement housing allowance is a special damage. The purpose of the allowance is not to compensate the tenant for his interest, but to help him relocate.

If the award is not made separately from the leasehold valuation, the landlord's award, the complement of the tenant's, varies depending on the tenant's gross income. This would erode the concept of fair market value. To maintain a consistent definition of fair market value, the Code provides that all special damages are considered as supplementary payments and not as part of the general compensation for the leasehold interest.

72. To take possession the condemnor need only make an offer to pay the tenant its estimated just compensation. If the tenant contests the award, payment will be delayed even longer. See notes 96-101 and accompanying text *infra*.

No tenant should be forced to move until he has been offered an adequate replacement dwelling. See UTAH CODE ANN. § 57-12-7 (1973); 5 HOUSING & DEV. REP. 1079 (1978). This provision has the advantages of saving the condemnor storage costs (see note 102 *infra*), of reducing the demoralization cost caused by the condemnation, and of guaranteeing the displaced tenant a replacement dwelling. The primary disadvantage is the inability to guaranty with certainty a time when possession can take effect. But see note 107 *infra* on the emergency right to possession.

73. The primary motivation for establishing replacement housing allowances was to alleviate the hardship caused tenants who were forced to move during the large-scale clearance projects of the 1950's. Currently, many projects involve rehabilitation, which does not necessitate the tenant's displacement. In these situations HUD has proposed giving the tenant the option of staying in the rehabilitated project or moving and collecting the replacement housing assistance. See generally 5 HOUSING & DEV. REP. 1034-35 (1978). If this proposal is adopted cost savings will result because fewer special damages are paid and administrative costs are reduced. Moreover, the tenants will not suffer the trauma of relocation.

74. The Code does not establish an agency to coordinate federal and state payments as Rhode Island provides in R.I. GEN LAWS § 37-6.1-2 (1977). The purpose of the Rhode Island statute is to prevent duplicate payments.

75. Except in emergency situations, Oregon law requires that the "displaced person" be informed in writing of all available benefits, federal, state, or local, to which he is entitled before he is required to move. OR. REV. STAT. § 281.055 (1977). Regulations promulgated by the Pennsylvania Attorney General only require that the acquiring agency inform the condemnee of his rights to special damages. 37 PA. CODE § 151.11. See notes 92-93 and accompanying text *infra*.

76. The suggestion that the tenant should not be dispossessed until the condemnor offers

If these changes are adopted, the replacement housing allowance will better protect the interests of both the condemnor and condemnee.

b. Moving expenses and dislocation allowance.—Without statutory authorization no right to a dislocation allowance or to moving expenses exists.⁷⁷ Under the Code the tenant has a qualified right to recover moving expenses and to receive a dislocation allowance whether or not the displaced tenant can recover for damages to his leasehold interest.⁷⁸ To qualify for the dislocation allowances or the reimbursement of reasonable moving expenses, the tenant must be a displaced person, but need not be a condemnee.⁷⁹ The qualifying tenant may then elect to be reimbursed for reasonable moving expenses incurred,⁸⁰ or in lieu of this reimbursement collect a \$200 displacement allowance and a moving expense allowance not exceeding \$300.⁸¹ By defining special damages in this manner, the Code refines the meaning of “fair market value” used in valuation of the leasehold interest.⁸²

him an adequate replacement dwelling is thoroughly discussed in notes 96-102 and accompanying text *infra*.

77. Delaware County Redev. Auth. v. Carminatti, 18 Pa. D. & C.2d 704, 706 (C.P. Del. 1959).

78. PA. STAT. ANN. tit. 26, §§ 1-601A(a), 1-603A (Purdon Supp. 1979-80).

Arguably, moving expenses and dislocation allowance should be considered as part of the compensated leasehold value. The willing and informed buyer and seller consider the factors of moving expenses and dislocation hardship in their bargain for the leasehold price, and each lessee incurs these expenses when he moves anyway. The lessee should only be able to collect damages over and above the leasehold valuation if it would be less expensive to move at the expiration of the lease. Finally, payment of a fixed sum regardless of expense encourages fraud.

Three points, however, favor the separate valuation. First, the condemnation is not an actual sale. Dislocation demoralization is difficult to quantify. The award of the dislocation allowance, therefore, is in the nature of a liquidated damages clause. Second, a separate award of these damages helps blunt the effect of condemnation clauses. Last, the separate award recognizes the unique definition of fair market value under the Code. See note 82 *infra*. See, e.g., United States v. Petty Motor Co., 327 U.S. 372 (1946) (arguing against inclusion); Housing Auth. v. Savannah, 91 Ga. 881, 87 S.E.2d 671 (1955) (favoring inclusion).

79. For a definition of condemnee, see note 6 *supra*. See also Fisher v. Pittsburgh Pub. Park Auth., 433 Pa. 113, 115, 248 A.2d 849, 850 (1969); Redevelopment Auth. of Wilkes-Barre v. Santucci, 20 Pa. Commw. Ct. 376, 380, 341 A.2d 533, 535 (1975).

80. PA. STAT. ANN. tit. 26, § 1-601A(a)(1) (Purdon Supp. 1979-80).

The moving expense provision in the old Pennsylvania Eminent Domain Code required that the court consider both the distance moved and the total amount of money expended in determining reasonableness. Additionally, the expenses could not exceed the fair market value of the personal property. PA. STAT. ANN. tit. 26, § 1-610 (repealed 1971).

Under the present Code any move of fifty miles or less is presumed reasonable. The displaced person has the burden of proving that a move greater than fifty miles is reasonable. 37 PA. CODE § 151.4(2) (11). No absolute ceiling is set on the total amount of damages.

81. PA. STAT. ANN. tit. 26, § 1-601A(a)(2) (Purdon Supp. 1979-80).

The new Code approach is a vast improvement over the old approach. For small claims the qualifying tenant can collect the displacement and moving expense allowance without becoming embroiled in a time-consuming process of proving expenses. The condemnor saves the costs of investigating and defending these small claims. In addition, the focus of reasonableness does not turn on the difficult and volatile issue of the fair market value of the personal property, and the distance presumption eases the tenant's burden of proof.

82. By distinguishing between property value and damages to the condemnee, the Code provides for a separate valuation of the property based primarily on real estate appraisal tech-

c. *Delay compensation.*—The date from which delay compensation is calculated is determined by the viewers.⁸³ Formerly, interest accrued from the date of filing until the date the award was paid to the condemnee.⁸⁴ Under the Code no interest accrues on the funds paid on account or into the court⁸⁵ or on special damages.⁸⁶ If the condemnee is entitled to delay compensation and has a compensable interest and the condemnor has not paid the condemnee estimated just compensation or paid a like amount into the court, no delay compensation can accrue and no rent is due.⁸⁷ The tenant is entitled to delay compensation only upon relinquishment of possession.⁸⁸ Therefore, if the tenant stays in possession, he is not entitled to delay compensation and rent is due.⁸⁹

III. Procedure In Gaining Recovery

The condemnee's interests are best protected if the award is sufficient in amount and can be easily obtained. If the award is too easily acquired, however, excessive or fraudulent claims will invariably be made. Thus, the procedure must balance the ease of recovery against the chance of fraud to equitably weigh the interests of both the condemnor and the condemnees. Because the essence of the process is the taking of property, the procedure must satisfy the due process requirements of notice and opportunity to be heard.⁹⁰

A. *Elements of Notice.*

To fulfill the requirements of due process, notice "must be reasonably calculated under all circumstances to apprise the interested

niques. Thus, the Code does not work the condemnee an injustice since special damages are separately valued and awarded. Payment of special damages, therefore, allows a more objective estimation of leasehold value by the landlord, tenant, and condemnor.

83. Delay compensation is interest awarded on limited circumstances for delay in payment of the compensation by the condemnor. If awarded, the interest is calculated at a rate of 6% per annum. See PA. STAT. ANN. tit. 26, § 1-611 (Purdon Supp. 1979-80).

84. See, e.g., *Kelly v. Allegheny County Redev. Auth.*, 411 Pa. 210, 213, 191 A.2d 393, 394 (1963); *Scott v. Stewart*, 44 Pa. D. & C. 174, 178 (C.P. Dauph. 1941).

85. PA. STAT. ANN. tit. 26, § 1-611 (Purdon Supp. 1979-80).

86. See *Pittsburgh Urban Redev. Auth. v. Cleban*, 216 Pa. Super. Ct. 269, 264 A.2d 187 (1970); *Redevelopment Auth. of Chester v. Swager*, 12 Pa. Commw. Ct. 437, 316 A.2d 136 (1974). See generally SNITZER, *supra* note 20, at § 611-2.1.

87. PA. STAT. ANN. tit. 26, comment to § 1-611 (Purdon Supp. 1979-80).

88. *Pittsburgh Urban Redev. Auth. v. Cleban*, 216 Pa. Super. Ct. 269, 278, 264 A.2d 187, 192 (1970).

89. *Id.*

90. The seminal case involving due process and the deprivation of property in a civil proceeding is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), wherein the Court stated as follows:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313.

parties of the [pending action].”⁹¹ Notice under the Code probably satisfies the technical requirements of due process.⁹² In addition, a notification procedure that the acquiring agency is mandated to follow helps to prevent surprise to the condemnee and provides him with adequate time to prepare his case.⁹³ Nevertheless, a more substantial, educative notice would insure a fairer trial.⁹⁴

B. Factors Affecting Opportunity to be Heard.

Due process requires a legitimate opportunity to be heard in addition to adequate notice of the pending action.⁹⁵ If a complicated

91. *Id.* at 314; *Curtis v. Redevelopment Auth. of Philadelphia*, 27 Pa. Commw. Ct. 360, 364-65, 367 A.2d 401, 403 (1976).

92. The Code allows service to be made personally *or* by certified mail. PA. STAT. ANN. tit. 26, § 1-405(b) (Purdon Supp. 1979-80). This comports with the standard enunciated in *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956). *But cf.* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process is satisfied if service is made by personal service whenever possible). *See also* UNIFORM EMINENT DOMAIN CODE § 406 (1975) (adopts the *Mullane* standard).

The code requires that all preliminary objections to the declaration of taking be filed within thirty days after the condemnee's receipt of notice or be deemed waived. PA. STAT. ANN. tit. 26, § 1-406(a) (Purdon Supp. 1979-80). One of these objections is to sufficiency or lack of notice. The Code requires the condemnor to establish proof of service of notice, but not proof of the adequacy of service. *Id.* § 1-405(e). Thus, if a condemnee receives inadequate notice, a failure to respond constitutes a waiver. If the condemnee never learns of the proceeding, the waiver should be invalid since the notice requirement of due process is unsatisfied. *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956).

93. Regulations promulgated by the Pennsylvania Attorney General stress notification. “[A]t the earliest possible date prior to displacement,” the acquiring agency is required to provide each potentially displaced person with an “information statement” outlining the special damage payments to which he may be entitled. This statement must also inform the potentially displaced person of a grievance procedure during which grievances about eligibility for payments will be heard by the acquiring agency. The agency must make available a responsible person who can advise the displaced person about the payments for which he may apply and provide assistance in filling out and filing the necessary forms to receive these payments. 37 PA. CODE §§ 151.11, 151.12.

These regulations suffer the practical disability of being unenforceable. No means for relief before dispossession exists if the acquiring agency does not abide by these regulations. Additionally, even if the agency follows the regulations, the paper work and procedure required to get payment may preclude recovery for all but the most diligent.

94. Notice required under the Code must contain a statement to the effect that [if] the condemnee wishes to challenge the power or right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the declaration of taking, he shall file preliminary objections within thirty days after being served with notice of the condemnation. PA. STAT. ANN. tit. 26, § 1-405(c)(12) (Purdon Supp. 1979-80). No requirement exists that the notice be made understandable or genuinely informative.

The notice of condemnation should include a statement of all damages to which the condemnee may be entitled and a list of available free legal aid or an office where they may inquire for assistance. *See* OR. REV. STAT. § 281.055(2) (1977). *Cf.* PA. R. CIV. P. 1018.1 (every complaint filed by a plaintiff must contain this wording in bold type: “You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.”). In addition, it should furnish the condemnee with the opportunity to make a reasoned and intelligent choice of whether to engage an attorney and pursue litigation. The object of notice is to afford the opportunity to be fully and fairly heard. Thus, the condemnee must be provided with ample opportunity to object to the sufficiency of notice at the viewers' hearing or subsequent trial. Notice should not be waived by failing to file a preliminary objection.

95. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

and lengthy procedure or lack of resources precludes a complete adjudication of a claim, ample opportunity to be heard is severely compromised. Most condemnation cases that are actually litigated concern commercial tenants who have access to legal counsel and can better afford to litigate because they possess sufficient financial assets. Since the residential tenant lacks these resources, he needs greater protection.

C. Analysis of Code Procedure

1. *Condemnor's Right to Possession.*—If the condemnee is dispossessed he encounters additional constraints on the exercise of his rights.⁹⁶ If forced to choose between litigating for a greater award or accepting a smaller offer of payment of damages, the poorer condemnee is pressured to accept the condemnor's offer. The Code permits the condemnor to take possession thirty days after the written notice to the condemnee simply upon a written offer to pay "estimated just compensation."⁹⁷ Some jurisdictions require prepayment⁹⁸ or a longer waiting period⁹⁹ before the right to possession vests in the condemnor.

Under the Code, required prepayment harms both the condemnor and condemnee.¹⁰⁰ To redress this harm without prejudicing the rights of either party *pro tanto* payments of damages should be made.¹⁰¹ In addition, an increased waiting period helps both the

96. The condemnor need only make an offer to pay estimated just compensation to be entitled to possession. The offer can be accepted, however, without prejudice to the condemnee's right to any future recovery. If the condemnee refuses to relinquish possession, the court will order a writ of possession unless the condemnee can show cause why the possession should not be granted. If the condemnor has made payment to the condemnee or court and no preliminary objections have been filed, the condemnee carries a heavy burden to show cause. See PA. STAT. ANN. tit. 26, § 1-407(a) (Purdon Supp. 1979-80). The right to possession will not vest until the disposition of any preliminary objections. *Valley Forge Golf Club v. Upper Merion Twp.*, 422 Pa. 227, 231-32, 221 A.2d 292, 293 (1966) (concurring opinion); PA. STAT. ANN. tit. 26, § 407(a) (Purdon Supp. 1979-80).

97. Federal courts have consistently held that no right of review of the condemnor's estimate of just compensation exists. The rationale is that a separate review of the estimate and the trial are duplicative. Pennsylvania courts have not adjudicated the question of judicial review of the condemnor's estimate. See SNITZER, *supra* note 20, at § 402(a)-6. Nevertheless, the tenant must have some mechanism to insure that the estimate is adequate since accepting it may be his only practical alternative.

98. See, e.g., IND. CODE ANN. § 32-11-1-7 (Burns 1973) (possession upon payment to the condemnee); cf. MONT. CODE ANN. § 70-30-311 (1979) (possession upon payment to the court of estimated just compensation).

99. MASS. GEN. LAWS ANN. ch. 79, § 8B (West 1969) (four months); OR. REV. STAT. § 281.055 (1977) (ninety days).

100. When the condemnor overestimates payment to the condemnee and that payment is made, the condemnee is never required to repay the excess. PA. STAT. ANN. tit. 26, § 1-407(c) (Purdon Supp. 1979-80). Therefore, to protect its interest the condemnor would rationally undervalue the award. The condemnee must then litigate to receive full compensation.

101. By right, every tenant who qualifies as a displaced person is entitled to at least a \$200 dislocation allowance and a moving allowance not exceeding \$300. PA. STAT. ANN. tit. 26, §§ 1-601A(a)(2), 1-604A(4) (Purdon Supp. 1979-80). Currently, however, no payment is re-

condemnee and condemnor. The additional time affords the tenant a greater opportunity to find a suitable replacement dwelling before being dispossessed. Consequently, the award paid by the condemnor may be smaller.¹⁰²

An alternative to forcing the tenant to engage in the difficult search for replacement housing is to require the condemnor to offer adequate housing before dispossession.¹⁰³ The tenant would then be assured a replacement dwelling. He should, however, be able to refuse the condemnor's offer and find his own housing if he so desires.¹⁰⁴ The adequacy of the condemnor's offer of housing must be independently established,¹⁰⁵ and the tenant should be entitled to a *pro tanto* payment prior to dispossession.¹⁰⁶ Nevertheless, in an emergency situation the condemnor must be able to acquire possession quickly.¹⁰⁷

ceived until the condemnee occupies an adequate replacement dwelling, unless he files and qualifies under the "hardship" exemption. Payments under this exemption are made jointly to the displaced condemnee and to an interested third party (e.g., lending institution or lessor) to insure that the funds are used exclusively for resettlement. 37 PA. CODE § 151.8(a)(2).

Rather than being the exception, the early payments could be made as a matter of right. A statement of information that notifies the condemnee of this right should be included in the notice. The increased availability of the payment, however, will heighten the possibility of fraud. Thus, the policy of joint payments should be continued. Additionally, if a payment is fraudulently induced, both payees should suffer criminal sanctions.

102. If the tenant finds replacement housing before being dispossessed, no storage costs, which are paid by the condemnor, are incurred. Redevelopment Auth. of Wilkes-Barre v. Santucci, 20 Pa. Commw. Ct. 376, 380, 341 A.2d 533, 535 (1975) (storage costs are payable as reasonable moving expenses).

103. See UTAH CODE ANN. § 57-12-8 (1974) (supporting this requirement).

104. Were this alternative adopted the method of paying the relocation housing allowance should be changed in the event the tenant accepts the condemnor's offer. The allowance should be based on the actual rent paid rather than being based on the cost of renting a comparable dwelling. For methods of payment in other situations, see note 69 *supra*.

105. To qualify for the replacement housing allowance, the tenant must occupy an adequate replacement dwelling. Under the Code, the condemnor initially determines whether the replacement dwelling is adequate. See PA. STAT. ANN. tit. 26, § 1-603A(b) (Purdon Supp. 1979-80); 37 PA. CODE §§ 151.11, 151.12. If the condemnor alone determines the adequacy of its offer, the condemnee's interests are clearly jeopardized. Adequacy, then, must be measured by some independent device.

The best method is to require that all dwellings offered meet the standards of the local housing code or a model housing code promulgated by the state if no local code exists. Additionally, the new dwelling must be comparable in size to the former dwelling and provide reasonable access to the condemnee's place of employment and to public and commercial facilities. The condemnor should be entitled to protection only upon filing affidavits with the court that prove that an offer was made in compliance with these standards or an affidavit signed by the condemnee swearing that he has found a replacement dwelling. If the affidavits are later proven to be false, the condemnee should be entitled to costs and attorney's fees. If the condemnor's offer is adequate, he should not be required to pay storage fees. Since the affidavits are easy to prove or disprove both the condemnor and tenant are protected.

106. See notes 100-101 and accompanying text *supra*. Adoption of the requirement that the condemnor offer adequate replacement housing to the condemnee if he will be displaced should not preclude the alternative of allowing the condemnee to remain in possession in lieu of special damages.

107. See, e.g., United States v. General Motors Corp., 323 U.S. 373 (1945) (warehouse taken because of wartime emergency).

2. *Condemnee's Right to Payment.*—Under the Code the tenant's right to payment of estimated just compensation vests sixty days after the declaration of taking if the condemnee tenders possession.¹⁰⁸ The condemnor and condemnee, however, may agree to any and all damages at any time,¹⁰⁹ but the tenant can never be guaranteed payment before dispossession.

3. *The Hearing of the Viewers.*—Any condemnee who is dissatisfied with the condemnor's estimate of just compensation may file for an appointment of viewers.¹¹⁰ Unless preliminary objections to the validity of the condemnation or to jurisdiction¹¹¹ are pending, and warranting delay, the court will appoint three viewers,¹¹² at least one of whom must be an attorney.¹¹³ Two of the viewers must actually "view" the property.¹¹⁴ Traditional due process adheres to the service of notice and the viewers' hearing.¹¹⁵

The viewers' hearing is conducted without strict adherence to formal rules of evidence.¹¹⁶ At the hearing, the condemnor must present expert testimony concerning the amount of damages suffered by the condemnee.¹¹⁷ The significance of the viewers' hearing, how-

108. PA. STAT. ANN. tit. 26, § 1-407(b) (Purdon Supp. 1979-80).

If the condemnor refuses to pay, the court, upon the petition of the condemnee, may order the condemnor to file a declaration of estimated compensation. If the condemnor refuses to comply, the court may order an impartial expert appraiser to estimate just compensation, costs to be paid by the condemnor. After a hearing the court may enter judgment of the estimated just compensation. *Id.*

109. PA. STAT. ANN. tit. 26, § 1-501 (Purdon Supp. 1979-80).

Generally, the condemnor wisely refuses separate settlement in a multiple interest valuation. If one party settles and is overcompensated, the other parties' rights are not prejudiced. Thus, the condemnor may pay more for the separate interests than the value of the entire property. See SNITZER, *supra* note 20, at § 501.2.

If the condemnor cannot determine proper distribution of payment in a multiple interest condemnation, it may petition the court to determine proper allocation. PA. STAT. ANN. tit. 26, § 1-522 (Purdon Supp. 1979-80).

110. PA. STAT. ANN. tit. 26, § 1-502 (Purdon Supp. 1979-80).

111. Preliminary objections are filed after the notice of declaration of taking or after the notice of the appointment of viewers. See *id.* §§ 1-406, 1-504. The preliminary objections that may prevent an appointment of viewers are those directed to the declaration of taking. Note, however, that an objection to jurisdiction in a de facto taking is filed after the appointment of viewers. See *Kattenbach v. City of Erie*, 100 Pa. Super. Ct. 132 (1930).

112. PA. STAT. ANN. tit. 26, § 1-504 (Purdon Supp. 1979-80).

113. *Id.* § 1-503.

114. *Id.* A "view" consists of going to the condemnation site and actually looking at the property.

115. See *id.* § 1-505 (the wording mirrors the language of other code notice sections).

116. *Id.* § 1-701. Because of the relaxed rules of evidence, the tenant can present evidence at the viewer's hearing without the aid of an attorney.

117. *Id.* § 1-702 (damages include special damages and leasehold valuation). The purpose of this section is to force the condemnor to present evidence at the hearing. Under prior law, the condemnor did not have this obligation. Therefore, the condemnee would hear the condemnor's evidence for the first time on appeal, having previously disclosed all of his figures at the hearing. This section eliminates that patent unfairness. *Id.* § 1-702 comment. By forcing the condemnor to present an expert witness, the condemnee is either forced to hire an expert witness or testify himself if he cannot afford the expert witness. The relaxed rules of evidence encourage the condemnee to make a *pro se* presentation. The condemnee's presentation will

ever, is grossly undercut because the viewers' findings cannot be presented as evidence on appeal.¹¹⁸

4. *Appeal from the Viewers' Award.*—Either party may appeal the viewers' findings as a matter of right.¹¹⁹ The appeal is a trial de novo in the court of common pleas.¹²⁰ All objections other than to amount are settled preliminarily by the court.¹²¹ At the request of either party the judge, or the judge and jury in a jury trial,¹²² may view the property.¹²³ The view is evidentiary.¹²⁴ Additionally, the condemnee, without further qualification, may testify as an expert concerning the question of just compensation.¹²⁵ Even if the residential tenant can afford the appeal, however, the result is unpredictable because of the methods of valuation and allocation.¹²⁶

5. *Costs.*—A cost requirement, though valid on its face, may offend due process because it forecloses a particular party's opportunity to be heard.¹²⁷ In certain circumstances, the Code provides for reimbursement of all reasonable expenses and costs incurred.¹²⁸ Normally, the condemnee can receive up to \$500 for reasonable attorney, appraisal, or engineering fees actually incurred.¹²⁹ The indigent claimant can utilize free legal services,¹³⁰ and if he is without the means to pay at the appellate level, can appeal in forma

be inferior to the condemnor's because of the condemnor's familiarity with the procedure and its use of legal counsel and expert witnesses.

118. *Id.* § 1-703(3) (the report of the viewers and the amount of their award are inadmissible as evidence). If the condemnor does not prevail at the viewers' hearing, it has a natural incentive to threaten appeal since even the threat of a costly appeal may force the tenant to accept settlement because of his small compensable claim.

119. See Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955).

120. See, e.g., Stoner v. Metropolitan Edison, 439 Pa. 333, 266 A.2d 718 (1970).

121. PA. STAT. ANN. tit. 26, § 1-517 (Purdon Supp. 1979-80).

122. The eminent domain proceeding is poorly suited for a jury trial since questions of allocation and fair market value are beyond the ken of the average juror. If consistent results are a priority, the jury trial makes little sense.

123. PA. STAT. ANN. tit. 26, § 1-704 (Purdon Supp. 1979-80).

124. *Id.* § 1-703 comment. If the condemnor has destroyed a building on the property, however, no view should be taken. Redevelopment Auth. of Erie v. Pulakos, 17 Pa. Commw. Ct. 251, 262, 330 A.2d 869, 878 (1975).

125. PA. STAT. ANN. tit. 26, § 1-704 (Purdon Supp. 1979-80). See also Hoffman v. Commonwealth, 422 Pa. 144, 149, 221 A.2d 315, 319 (1966) (a lessee testifying on the basis of expert reports qualifies as an expert). How much probative value the condemnee's own testimony will have is questionable.

126. See notes 35-36 and accompanying text *supra*.

127. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

128. See PA. STAT. ANN. tit. 26, §§ 1-408, 1-609 (Purdon Supp. 1979-80) (when the condemnor discontinues the proceeding or when the condemnee proves a de facto taking the condemnee is entitled to costs and expenses).

129. *Id.* § 1-610. Without statutory authorization, engineering and attorney's fees are not reimbursed. *In re Kling*, 433 Pa. 118, 121, 249 A.2d 552, 554 (1969).

130. The efficacy of free legal services is diminished because the poor often solicit aid at the eleventh hour. Furthermore, free legal service programs suffer from a high turnover and are staffed by young and inexperienced attorneys. Katz, *Lawyers for the Poor in Transition*, 12 LAW & SOC. REV. 275 (1978). Free legal aid, therefore, is no panacea.

pauperis.¹³¹ Under no circumstances should the condemnee be denied access to the courts because of his inability to pay the costs.

Providing for an automatic reimbursement of costs will not best protect the tenant's interests. This practice encourages needless and protracted litigation. Instead, the emphasis of the Code must be on a quick and equitable disposition of the case, a goal that can be achieved by altering the viewers' hearing.

IV. A Modest Proposal

The essential purposes of the viewers' hearing are to provide an accessible forum to adjudicate condemnation disputes quickly and to avoid unnecessary and costly litigation. The nature of the proceeding itself, however, pressures the condemnor to appeal, which forces the condemnee to settle. The condemnor is not required to make any real effort to negotiate, and can dispossess the condemnee after only an offer to pay an estimated just compensation. If the result of the viewers' hearing is undesirable, an appeal resulting in a trial *de novo* can be taken by the condemnor. For the residential tenant, the costs of court litigation may exceed the potential recovery. An early settlement is the rational choice. The condemnor can with little restraint determine the "just" compensation for the residential tenant.¹³² Therefore, only an alteration in procedure will effectuate the essential purposes of the viewers' hearing.

The procedure must encourage an equitable pretrial settlement. Under the Code the condemnee is induced to settle his claim by the potential for protracted and costly litigation and a dispossession without payment. Three changes will enhance the prospects of an equitable prehearing settlement. The condemnor must be required to negotiate in good faith.¹³³ Additionally, the condemnor must be denied possession until he offers the condemnee a replacement dwelling.¹³⁴ Finally, *pro tanto* payments must be made as early as is feasible.¹³⁵

131. PA. R. APP. PROC. 551, 552.

132. The landlord may decide to appeal, but if the tenant is impoverished a settlement for ready cash is more beneficial than a higher award postponed until the disposition of the appeal.

133. Negotiations in good faith must include the following steps. First, the condemnor must provide the condemnee with a written statement of its estimated just compensation with an itemized breakdown describing how it arrived at the figure of just compensation. *See* UNIFORM EMINENT DOMAIN CODE § 203 (1975). Second, the condemnor must supply the condemnee with a schedule of special damages or other benefits, state or federal, for which he may be eligible. Third, the condemnor must supply the addresses and telephone numbers of free legal services in the area. By requiring the condemnor to provide a basis for the condemnee to make an informed judgment on potential recovery and projected costs, society avoids unnecessary litigation and unfair settlements.

134. If the condemnee needs money to move, dispossession could force an inadequate settlement. *See* notes 103-07 and accompanying text *supra*.

135. *See* notes 100-01 and accompanying text *supra*.

Moreover, greater significance must be attached to the viewers' hearing. The panel should be composed of two expert real estate appraisers and an attorney.¹³⁶ Their findings on damages and allocation must not be excluded from evidence at a subsequent trial.¹³⁷ The legislature¹³⁸ should adopt these changes to encourage fair and equitable pretrial settlement.

IV. Conclusion

To adequately perform its function, the eminent domain procedure must guarantee the opportunity for the condemnee to receive just compensation for his property that is taken, injured, or destroyed. With valuation of his leasehold interest uncertain, the resi-

136. Having appraisers as viewers is advantageous in several ways. Condemnation involves questions best handled by appraisal experts since the method of valuation is primarily economic and not legal. The Code recognizes this by making the experts key witnesses at trial. Appraisers can articulate reasoned results that can be the basis of later valuation and allocation settlements.

The Code correctly recognizes the importance of having an attorney on the board of viewers. The viewers are empowered to rule on questions of fact and conclusions of law, an inquiry requiring legal expertise. PA. STAT. ANN. tit. 26, § 1-511(9) (Purdon Supp. 1979-80). Additionally, since the viewers' hearing could be a final determination of the rights of the parties, due process must be observed. Only the attorney is aware of the subtleties of due process.

These appraisal services are costly, however. If the condemnee is required to pay for the expert appraisers the cost may effectively preempt the option of utilizing expert appraisers as viewers. The cost should be paid by the state with reimbursement by the condemnor if negotiations are not made in good faith. Little difficulty will arise when the state is the condemnor since the appraisers are appointed by the court and payment is made regardless of outcome. The Code also recognizes that impartial expert appraisers can be appointed by the court and paid by the state as condemnor. *See id.* § 1-407(b). Procedures must be established to assure that the state pays only reasonable appraisal fees. To receive payment, the appraiser should be required to file a strict accounting of the hours spent both on the appraisal and at the hearing.

Both parties, however, should still pay reasonable costs to prevent an automatic petition for the appointment of viewers and a derogation of the settlement process. Reasonable costs should not be so high as to preclude either party's option of petitioning for a viewers' hearing.

137. Circulation and publication of the viewers' findings provides a standard for future reference. Because of the predictability of result, settlement will become more reasoned and recourse to both the viewers' hearing and trial less likely. Thus, the cost of appraisal fees should not be burdensome on the state. *See Levy, The Role of the Real Estate Appraiser in Arbitration*, 33 ARB. J. 10 (1978). The standard for admitting the viewers' findings should be the same as that governing the admissible testimony of expert witnesses at trial. *See PA. STAT. ANN. tit. 26, § 1-705(2)* (Purdon Supp. 1979-80). Additionally, since the viewers' findings would be admissible, improvident resort to trial would be less likely.

138. If the legislature does not have the power to make these changes, arguments over the merits of the changes are moot. In analyzing whether it has this power, a comparison with the medical malpractice arbitration system is instructive. *See PA. STAT. ANN. tit. 40, §§ 1301.101-1006* (Purdon Supp. 1979-80). The central issue is whether separation of powers is violated by the admission of the viewers' findings as evidence at a trial de novo. Under the medical malpractice arbitration system the findings of the arbitration board are admissible at a trial de novo. The standard is that if the burden is not shifted and the jury is the final arbiter of the issues raised, the admission of evidence is constitutional. *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 122-23, 394 A.2d 932, 940-41 (1978). To fit within this test, the admission of viewers' findings must simply be governed by the standard by which the expert witness testifies. *See PA. STAT. ANN. § 1-705(2)* (Purdon Supp. 1979-80). The viewers' findings admitted at trial must have the same evidentiary value as the testimony of an expert witness. Thus, the indigent condemnee appellee can use the evidence of the viewers' findings in place of the costly expert's testimony.

dential tenant is denied ready access to just compensation by a costly, complex procedure.

The procedure can be changed without disrupting the process. The key to this change is the adoption and dissemination of a clear method of valuation and allocation in a multiple interests context. A rational basis for pretrial settlement is then established, and the focus of the procedure can be shifted from litigation to pretrial settlement with a resultant savings in time and expense for all parties concerned.

The Code does not safeguard the fragile interests of the residential tenant. The suggested changes guarantee the residential tenant the opportunity to receive just compensation.

DON A. LEATHERMAN

