

#36

1/4/67

Memorandum 67-4

Subject: Study 36 - Condemnation Law and Procedure (Possession Prior to Final Judgment and Related Problems)

At the last meeting, the Commission determined not to submit a recommendation on this subject to the 1967 legislative session. Instead, the Commission determined to prepare a tentative recommendation that could be published in a pamphlet with the research study (which will be printed in the Santa Clara Lawyer). It was assumed, I believe, that we would follow the procedure we followed on the Evidence Code: We will publish a series of tentative recommendations and research studies covering the entire field of eminent domain and will consider the comments on those tentative recommendations when we incorporate them into a recommendation proposing a new eminent domain statute.

Generally speaking, we received an unfavorable reaction to our proposal to extend the power of immediate possession to additional entities for additional purposes. Basically, the objections are based on the failure of the existing procedure to provide adequate protections to the property owner. First, the existing law provides for ex parte orders determining the amount of compensation and the right to possession. Second, the improvements on the property may be destroyed prior to trial and this creates problems of proof for the property owner. The objections to the tentative recommendation were not restricted to the extension of possession to additional entities and for additional purposes; the same objections were made to the right of immediate possession under existing law.

We believe that it would be profitable to reexamine the basic statutory scheme on immediate possession. The staff suggests a statutory scheme which

is set out below. To a considerable extent it is based on the Ohio Uniform Eminent Domain Act which took effect on January 1, 1966. The Ohio Act is contained in the folder we are sending you which contains Statutory Provisions of California and Other Jurisdictions. Attached is a copy of a law review note that discusses the Ohio Act insofar as it relates to immediate possession and related problems. Also attached are the Illinois provisions on immediate possession.

The scheme we suggest is outlined below:

1. The condemnor, whether or not entitled to take immediate possession, is authorized to deposit the amount it believes to be the probable just compensation. Upon making such a deposit, the condemnor shall serve on each party having an interest in the property a notice that the deposit has been made and a copy of the appraisal report upon which the deposit is based. (We see no need to obtain an ex parte order fixing the amount of the original deposit since in practice the deposit is the amount determined by the condemnor.) Upon motion of the condemnor or any party having an interest in the property, the court shall determine the amount of probable just compensation and the condemnor shall thereupon deposit such additional amount, if any, as is required to bring the deposit into conformity with the court's determination. Withdrawal would be permitted as under existing law.

2. After a deposit of probable just compensation has been made (the amount originally deposited or as determined by the court), the condemnor may apply on noticed motion for an order for immediate possession. (Notice of the motion should be given to all parties interested in the property and to the person in possession.) Provisions should be included to permit

the court to grant an order of possession in cases where parties not in possession cannot be expeditiously served. See Illinois, Section 2.2(a). The purpose of a noticed motion is to give the court, owner, and person in possession notice of the condemnor's desire to take immediate possession and to provide a procedure for determining whether the right to take immediate possession exists.

3. The court shall hear such motion within five days after the filing thereof, shall determine the amount of probable just compensation, and shall fix the effective date of the order of possession. See Illinois, Section 2.2. Where possession of structures is not sought, the effective date of the order shall be 30 days after the date that the notice of the motion for the order of immediate possession was served on the party in possession of the property (unless the condemnor requests a later date) and the court in exceptional circumstances may shorten the time to not less than three days after such service but not in any event before the hearing of the motion.

4. Where immediate possession of structures is sought, the effective date of the order shall not be less than 60 days nor more than 90 days after the date that the notice of the motion for the order for immediate possession was served on the party in possession of the property. See Ohio, Section 163.06. This special treatment of structures is based on two reasons that are discussed in the law review note on pages 533-534. First, the landowner needs a reasonable time to relocate his home or business. Second, the agency's possession or removal of structures before trial interferes with the valuation of the property. The proposed statute should have provisions comparable to those in Ohio Section 163.06 which provides that upon motion

the court shall have appraisals made, shall cause pictures to be taken, and shall complete a complete description of the structures, if they are to be removed before trial. For these reasons, the Ohio distinction between permitting an agency to take immediate possession of land and permitting it to take immediate possession of structures on land is sound.

5. Security should be required for any amount withdrawn that exceeds the amount originally deposited by the condemnor.

We urge you to read Ohio Section 163.06 and the attached note (at least pages 525-534) prior to the meeting. All of the note is worth reading, however, because it discusses other problems that are dealt with in our tentative recommendation.

We do not plan to discuss Memorandum 66-68 or the attachments thereto at the meeting. We will consider the matters dealt with in that memorandum at a later meeting after we have disposed of the policy question presented by this memorandum. It should be noted, however, that much of what has already been drafted in the legislation contained in the previous tentative recommendation would be retained if the staff scheme set out above were adopted.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

## EXHIBIT I

### NOTES

#### OHIO'S UNIFORM EMINENT DOMAIN ACT: TRANSFER OF TITLE AND POSSESSION

The enactment of the Ohio Uniform Eminent Domain Act by the last general assembly revolutionized eminent domain procedure in Ohio.<sup>1</sup> The act has been designated the Uniform Eminent Domain Act because its primary purpose is to provide a uniform judicial proceeding whenever private property is taken for public use.<sup>2</sup> The purpose of this note is to examine the objectives of the act and to evaluate provisions relating to transfer of title and possession in terms of these objectives.<sup>3</sup>

##### I. OBJECTIVES OF THE ACT

In order to understand the objectives of the act, it is first necessary to appreciate the function of the courts in the exercise of eminent domain. Essentially, eminent domain is the taking of private property for public use without the consent of the owner.<sup>4</sup> Hence, the law of eminent domain represents an attempt to reconcile a fundamental conflict between private property owners and the power of the state. This conflict is clearly recognized in article I, section 19 of the Ohio Constitution which provides: "Private property shall ever be held inviolate, but subservient to the public welfare." Since the exercise of eminent domain does produce such direct conflict between private property and the power of the state, it comes as no surprise that the judiciary has traditionally played an important role in its exercise. At one time the judiciary was the primary arbiter of the conflict. Armed with the concept of public use, it determined when the public interest

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<sup>1</sup> Amended Senate Bill No. 94 enacted §§ 163.01-.22, amended one hundred and ten sections, and repealed one hundred and four sections of the Ohio Revised Code effective January 1, 1966.

<sup>2</sup> Ohio Rev. Code § 163.02 provides: "All appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to §§ 163.01 to 163.22, inclusive of the Revised Code."

The exceptions set forth in § 163.02 permit the director of highways to appropriate pursuant to §§ 5319.01-.06; a conservancy district to appropriate pursuant §§ 6101.01-.24; and a sanitary district to appropriate pursuant to §§ 6115.01-.79 of the Ohio Revised Code. It is hoped that each of these agencies will choose to utilize the uniform procedure so that complete uniformity can be attained.

<sup>3</sup> For a thorough section by section analysis of the act, see Kirkwood, *Ohio Uniform Eminent Domain Act (1966)*.

<sup>4</sup> 1 Nichols, *Eminent Domain* § 1.11 (3d ed. 1964).

required that a man's property be wrested from him.<sup>5</sup> Since that time, public use has become almost entirely a legislative or administrative question.<sup>6</sup> This change in the judiciary's role resulted partly from the general acceptance of new ideas about the proper relationship between the judiciary and the other branches of government. But also, the need for public land has rapidly increased under the pressure of expanded governmental services, urban renewal projects, and highway construction. As a result, the determination of public need has arguably become too complex for the judicial process. Although the judiciary may no longer be responsible for determining when private property shall be converted to public use, it still plays an important role in the exercise of eminent domain. In the first place, the Ohio Constitution, like many other state constitutions, requires that a land owner be justly compensated for his property and that the amount of compensation be determined by a jury.<sup>7</sup> Thus, the courts are entrusted with the function of ensuring that a land owner is paid just compensation for his property. The courts have also been delegated the equally important function of administering the transfer of title and possession from private persons to the appropriating agency. The performance of this second function by the courts is required because the exercise of eminent domain is an involuntary transfer of property. While a voluntary transfer can be administered by the parties themselves, the involuntary transfer requires the intervention of the court to harmonize the competing interests of the parties. Both the function of administering the transfer of title and possession and the function of ensuring just compensation require balancing the interests of land owners and the public. The courts are responsible for striking the proper balance.

The functions of the judiciary are carried out within the framework of an appropriation proceeding prescribed by the legislature. The appropriation procedures in existence prior to the effective date of the recent Ohio act demonstrated that unfair and inefficient procedures could prevent the courts from properly performing their functions. An examination of the state of the law prior to the passage of the new act

<sup>5</sup> Nichols, "The Meaning of Public Use in the Law of Eminent Domain," 30 B.U.L. Rev. 615 (1940).

<sup>6</sup> *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N.E.2d 725 (1951).

The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpably and manifestly arbitrary and incorrect.

*Id.* at 92, 100 N.E.2d at 231. See Comment, "The Public Use Limitation on Eminent Domain: An Advance Requirment," 58 Yale L.J. 599 (1948).

<sup>7</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

reveals the reasons for its enactment. The Ohio legislature had granted the power of eminent domain to fifteen different private and governmental agencies.<sup>8</sup> The number and variety of appropriation procedures used by these agencies had multiplied haphazardly as the need for public lands grew. At the time of the enactment of the Uniform Act there were fourteen separate, distinct, and complete procedures by which eminent domain could be exercised,<sup>9</sup> making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure.<sup>10</sup> Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised.<sup>11</sup> Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners.<sup>12</sup> The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act. Whether the act permits the courts to perform properly their functions of ensuring just compensation and administering transfer of title and possession is yet to be determined.

Since the fairness and efficiency of Ohio's Uniform Act are deter-

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<sup>8</sup> Ohio Legal Center Instit., Reference Manual for Real Estate Conference III: Eminent Domain 1.01 (1966).

<sup>9</sup> Ohio Legis. Serv. Comm'n, Research Report No. 14, Eminent Domain in Ohio 4 (1956).

<sup>10</sup> The Legislative Service Commission concluded: "Ohio's Eminent domain law is confusing even to the most experienced lawyer because it consists of hundreds of sections scattered throughout the Revised Code." *Id.* at 3.

<sup>11</sup> The Ohio Legislative Service Commission recommended the adoption of a uniform procedure in its research report on the law of eminent domain submitted in 1956. Research Report No. 14, *op. cit. supra* note 9, at 16. The eminent domain committee of the Ohio Bar Association then undertook the task of drafting the proposed bill and urging its enactment. Kirkwood, *op. cit. supra* note 3, at 2. Several other states have also recently felt the need for a uniform procedure. See, e.g., Kentucky Research Comm'n, Research Report No. 24, Eminent Domain Procedure (1965); Joint State Gov't Comm'n, Pennsylvania Proposed Eminent Domain Law (1962); Virginia Advisory Legis. Council, House Document No. 11, Revision of Eminent Domain Laws (1961); Comment, "Modernizing Illinois Eminent Domain Procedures," 48 Nw. U.L. Rev. 484 (1953).

<sup>12</sup> Ohio Legis. Serv. Comm'n, *op. cit. supra* note 9, at 13; Comment, "Eminent Domain: Corduroy Road to Ohio's Super Highways," 9 W. Res. L. Rev. 457 (1958). For examples of the recent movement for reform in other states see the articles and pamphlets cited in note 11, *supra*. See also California Law Revision Comm'n, Possession and Passage of Title in Eminent Domain Proceedings (1960); Highway Research Board, Special Report No. 32, Condemnation of Property for Highway Purposes (1958).

mined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation. Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsman of the Ohio act was to blend these competing interests into a fair and efficient proceeding.

The Ohio Constitution provided the foundation upon which the act was built. The constitution requires that compensation be assessed by a jury.<sup>13</sup> Therefore, one objective of the act is to provide procedures which will increase the probability of a fair and just assessment. The constitution also places restrictions upon the time at which the property can be transferred to the appropriating agency.<sup>14</sup> Except for two specified instances, compensation must be assessed by a jury and paid or secured by deposit before the agency may take possession of the property. An agency may take possession before trial only when the property is "taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads which shall be open to the public without charge."<sup>15</sup> Therefore, a second objective of the Uniform Act is to transfer property to the appropriating agency as quickly as the constitution and a fair consideration of the owner's interests will permit. The succeeding paragraphs will examine the provisions of the act relating to transfer of title and possession and will suggest an interpretation of those provisions which will be consistent with the objectives of the act.

## II. TIME, CONDITIONS, AND EXTENT OF POSSESSION

The voluntary transfer of property by sale or gift is a relatively simple operation because it is based upon the mutual agreement of the parties. But a transfer pursuant to an exercise of eminent domain is more complex because it is an involuntary transfer carried out within the framework of a judicial proceeding. The complexity is enhanced by the necessity of balancing the agency's need for imme-

<sup>13</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

<sup>14</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

<sup>15</sup> Ohio Const. art. I, § 19.



mediate possession against the owner's need for a reasonable time to relocate. The first questions which will be considered are at what time, upon what conditions, and to what extent may an appropriating agency take possession of property under the Uniform Act.

#### A. *Preliminary Surveys*

An appropriation proceeding is commenced when an agency files a petition in the common pleas or probate court of the county where the land is situated.<sup>16</sup> The first question considered is to what extent the agency can enter upon the land before it files its petition. Often the agency needs to make surveys for the preparation of plans and appraisals for use in negotiations with the owner. Can entries be made for these purposes before the appropriation proceeding is formally commenced? Section 163.03 provides that if the agency gives the required notice, its entry for such purposes will not constitute a trespass. Nevertheless, it must reimburse the owner for any actual damage caused by the entry. If the agency and owner are unable to agree upon the amount of damages, the owner may seek to recover his losses in a separate action. This right to make preliminary surveys is valuable to the agency, but the courts should not permit it to be abused. The landowner should be permitted as much privacy as the public interest will permit.<sup>17</sup> Hence, he should be able to recover damages for trespass if he is not given proper notice or if the entry is unnecessary. This interpretation of section 163.03 conforms with the rule that a statute in derogation of personal or property rights should be strictly construed.<sup>18</sup> Furthermore, the agency should not be permitted to leave its equipment on the land any longer than is necessary to accomplish a purpose permitted by the statute. Arguably, such action would constitute a temporary taking.<sup>19</sup> If there is a taking, the constitution requires that the owner be compensated.<sup>20</sup> If section 163.03 were construed to limit a landowner's right to be compensated for a taking, it would violate the constitution.<sup>21</sup>

#### B. *Immediate Possession*

The next question considered is how soon after it files its petition may the agency take possession of the property. The Uniform Act incorporates the restrictions upon immediate possession contained in

<sup>16</sup> Ohio Rev. Code Ann. §§ 163.01(B) and .05 (Page Supp. 1965).

<sup>17</sup> Ohio Legis. Serv. Comm'n, *op. cit. supra* note 9, at 9.

<sup>18</sup> 50 Am. Jur. *Statutes* §§ 399, 400 (1944).

<sup>19</sup> *Schneider v. Brown*, 33 Ohio App. 269, 169 N.E. 307 (1929).

<sup>20</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

<sup>21</sup> *Miami Conservancy Dist. v. Bowers*, 100 Ohio St. 317, 125 N.E. 876 (1919).

the constitution.<sup>22</sup> Thus, section 163.06 permits the agency to take possession before trial only when land is imperatively needed in time of war or other public exigency or when it is taken for the purpose of making or repairing roads open to the public without charge. In all other situations the agency may not take possession until compensation has been assessed by the jury, the amount of the verdict has been paid to the owner or deposited with the court, and an order granting possession to the agency has been entered by the court.<sup>23</sup>

Even if an agency is permitted by the constitution to take immediate possession, it may not do so until it has complied with the requirements of section 163.06. The first requirement is that the agency must file a declaration of intention with its petition. The purpose of the declaration is to give the court and the owner notice of the agency's desire to take immediate possession. If the agency does not desire immediate possession it need not file a declaration. But if it does file, it should be bound by its manifestation of intention.<sup>24</sup> The owner should be entitled to know what the agency intends and to rely upon its manifestations of intention so that he can adjust his relocation plans accordingly. Although section 163.06(B) expressly provides for the filing of a declaration in the case of a taking for the purpose of making or repairing roads, section 163.06(A) fails to mention the declaration in the case of a taking in time of war or other public exigency. Since the reasons for filing a declaration are equally persuasive in both cases, the failure to mention the declaration in the latter instance was undoubtedly a legislative oversight.<sup>25</sup> A declaration should be required whenever an agency takes immediate possession.

<sup>22</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

<sup>23</sup> Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

<sup>24</sup> For example, § 163.21 provides that if an agency abandons the proceedings it is liable for such amounts of witness fees, attorney fees, and other actual expenses as the court deems just. Arguably, other actual expenses could include reimbursement for relocation costs made in reliance upon the agency's declaration of intention. *Smith v. Erie Rd. Co.*, 134 Ohio St. 135, 16 N.E.2d 310 (1938), recognized that recovery for damages resulting from an abandonment might be permitted if a wrongful act and resulting injury were shown. The California Code permits the court to prohibit abandonment if a party's position has substantially and detrimentally changed in justifiable reliance upon the proceedings. Cal. Civ. Proc. Code 1255a(b) (West Supp. 1965).

<sup>25</sup> This interpretation is supported by an analysis of related sections which indicate that a declaration of intention must be filed in order for an agency to obtain default judgment. Section 163.09 provides for default judgment in the amount of the deposit as set forth in the petition. Since § 163.05 does not require this amount to be set forth in the petition, and since § 163.12 clearly indicates that it should not be set forth in the petition because of its possible misuse by the jury, § 163.09 is obviously referring to the amount required to be set forth in the declaration of intention.

After it files its declaration of intention, the agency must comply with two other requirements before it may take immediate possession under section 163.06. It is required to deposit with the court an amount which it considers to be just compensation for the property.<sup>26</sup> The purpose of requiring a deposit is to provide immediate compensation which the owner can withdraw and use to finance the cost of his relocation. The amount withdrawn is deducted from the amount of the final verdict. In order to protect the agency against possible loss if the deposit should exceed the amount of the verdict, the act provides that the land owner may not withdraw more than eighty per cent of the deposit.<sup>27</sup> It would seem that in addition the landowner should be protected against the possibility of an unreasonably small deposit.<sup>28</sup> The purpose of requiring a deposit would be defeated if an agency could take possession after making a nominal deposit. Therefore, a court should refuse to enter an order granting possession to the agency if it finds that the deposit was not a reasonable and good faith estimate of just compensation. This interpretation of the court's power is supported by the language of the statute. Section 163.06 provides that the deposit shall be the value of the property as determined by the agency. On the one hand, this section seems to require that the value of the property be deposited. On the other hand, it seems to give the agency the right to determine the amount. Considering the agency's interest in a minimal determination, there is sufficient ambiguity in the provision to permit the courts to construe it to mean that the agency shall make the initial determination of value subject to the power of the court to deny the right of immediate possession if the amount deposited is not a good faith and reasonable estimate of value. This interpretation is supported by decisions construing section 258(a) of the United States Code.<sup>29</sup>

The final requirement for immediate possession under section 163.06 is the court's entry of an order of possession. Although section 163.06 does not expressly make a court order a prerequisite to pos-

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<sup>26</sup> According to the language of the statute, which is based on prior case law, just compensation includes the value of the property taken plus the damages, if any, to the residue. Damages to the residue arise when there is a taking of part of a larger parcel. The jury is asked to determine the shrinkage in value to the remainder caused by the partial taking. 1 Richards and Knepper, *Ohio Judicial Conveyances and Eminent Domain*, §§ 746-48 (1960).

<sup>27</sup> Ohio Rev. Code Ann. § 163.06(C) (Page Supp. 1965).

<sup>28</sup> Several other states afford this protection to the owner. See, e.g., Cal. Civ. Proc. Code 1243.5 (West Supp. 1965); Ill. Ann. Stat. tit. 47, § 2.2 (Smith-Hurd Supp. 1965).

<sup>29</sup> *United States v. 51.8 Acres of Land*, 147 F. Supp. 356 (E.D.N.Y. 1956); *United States v. 48,752.77 Acres of Land*, 50 F. Supp. 563 (D. Neb. 1943).

session, section 163.15 provides that when an agency is entitled to possession the court shall enter an order to such effect upon the record, and, if necessary, process shall be issued to place the agency in possession. For the reasons hereafter mentioned, the date of the agency's right to possession should be fixed by court order. Therefore, section 163.15 should be construed to require that an order of possession be entered before immediate possession may be taken under section 163.06. Before granting the order, the court should determine if the agency is in fact entitled to immediate possession. The court may find that immediate possession is not allowed by the constitution. The agency may have failed to file a declaration of intention with its petition, or its deposit may not have been a reasonable and good faith estimate of value. If a court should refuse to consider these questions, great harm could be inflicted upon the owner by an agency's unlawful entry upon his land. Both the landowner and the agency are protected if the court considers these questions before entering an order granting possession to the agency.<sup>30</sup> When determining whether an order of possession should be granted, the court should also consider whether immediate possession would cause undue hardship to the owner. It may be apparent that the agency's right to possession should be postponed for several weeks while the owner has an opportunity to locate elsewhere. An obvious purpose of the act is to preclude either party from obtaining an unfair advantage in negotiations. The courts should not permit an agency to use its right of possession to compel the owner to concede to an unjust settlement. A liberal interpretation of the courts' discretion would further the objectives of the act.

### C. Structures

Even though an agency is permitted by the constitution to take immediate possession and even though it has complied with the three requirements of section 163.06, the extent of the agency's right to possession may be limited. This limitation relates to the right to take immediate possession of structures situated on the land. Section 163.06 (B) provides that an agency appropriating property for the purpose of making or repairing roads may take possession and remove structures sixty days after service of summons upon the land owner. Although section 163.06(A) does not permit immediate possession of structures in any other situation, section 719.33 allows for possession

<sup>30</sup> Other states have made express provision for a hearing to determine if an agency is entitled to immediate possession. See, e.g., Cal. Civ. Proc. Code § 1243.5 (West Supp. 1965); Ill. Ann. Stat. tit. 47, § 2.3 (Smith-Hurd Supp. 1965); Pa. Stat. Ann. tit. 26, § 1-406 (Supp. 1965); Va. Code Ann. § 25-46.17 (1964).

of structures six months after service where land is taken by municipalities for urban renewal projects. Since section 163.02 provides that "all appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to sections 163.01 to section 163.22," it is apparent that section 719.33 was overlooked by the draftsmen of the act. In order to avoid defeating legislative intent, courts should permit immediate possession of structures pursuant to section 719.33 until the conflict is resolved by appropriate legislation.<sup>31</sup>

The Uniform Act's special treatment of structures is based on two reasons which require further examination. The first reason is that the agency's possession or removal of structures before trial interferes with the valuation of the property. A party is ordinarily entitled to have the jury view the premises. It is felt that if the jury can view the premises with the structures still intact, it is more likely to reach a just verdict.<sup>32</sup> Thus, structures may be removed before trial only in the case of road and urban renewal projects. Moreover, in these two cases, an elaborate procedure is provided for preserving evidence of the structures' value. Section 163.06 provides that upon motion of the agency the court shall have appraisals made, shall cause pictures to be taken, and shall compile a complete description of the structures. It would seem that if the agency attempted to take possession of the structures without first filing the motion, its entry would be unlawful. The procedure was clearly designed for the protection of both parties. Its purpose was to provide a substitute for a party's right to have the jury view the premises with the structures intact. Since neither party is intended to gain an unfair advantage from the removal of structures before trial, the procedure should be construed to be a prerequisite to immediate possession of structures. It may seem curious that the Ohio act places so much importance upon the jury's view of the premises since the Ohio courts have long held that the view is not evidence in the case.<sup>33</sup> Arguably, however, the required data helps the jury understand the testimony of expert witnesses. If it does, the cost of the

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<sup>31</sup> Corrective legislation may be unnecessary for two reasons. First, § 719.33 may be unconstitutional. Whether an urban renewal project constitutes a public exigency within the meaning of article I, § 19 is apparently an unsettled constitutional question. Second, the act is not effective after November 1, 1970. 130 Ohio Laws 1780 (1963).

<sup>32</sup> *In re Appropriation for Highway Purposes*, 90 Ohio App. 471, 107 N.E.2d 387 (1951). See Duffey, "Condemnation of Structures," 16 Ohio St. L.J. 462 (1955); Comment, "Eminent Domain: Corduroy Road to Ohio's Super Highways," 9 W. Res. L. Rev. 457 (1958).

<sup>33</sup> *Zanesville, Marietta & Parkersburg Rd. v. Bolen*, 76 Ohio St. 376, 81 N.E. 681 (1907).

procedure is justified. But if neither party plans to use the data in its presentation to the jury, the procedure should be waivable by mutual consent.

The second reason for the special treatment of structures is that the land owner needs a reasonable time to relocate his home or business. There is a distinction between permitting an agency to take immediate possession of the land and permitting it to take immediate possession of the structures upon the land. While the agency's immediate possession of the land surrounding the structures may be annoying to the owner, the public interest arguably requires that he bear the annoyance. But if he were additionally required to evacuate the structures immediately, he would be forced to move his home or business at a moment's notice. The existence of such a threat would place the owner at a distinct disadvantage in negotiations. For this reason the act recognizes the owner's need for a reasonable time to relocate by postponing the agency's right to take possession of structures. Only when land is taken for roads or urban renewal projects may structures be taken before trial. In both of these cases the statute should be interpreted to permit the owner adequate time to relocate. Section 719.33 provides that the agency shall not take possession of land and structures until six months after service. But section 163.06(B) grants the agency the power to take immediate possession of both land and structures. It also provides, however, that the owner shall vacate the structures within sixty days. In order to strike a just balance between the agency's interest in immediate possession and the owner's interest in a reasonable time for relocation; section 163.06(B) should be construed to postpone the agency's right to take possession of the structures for sixty days.

A problem is raised by permitting the agency to take possession of the land and at the same time postponing its right to take possession of the structures. At what point does the agency's right to the land conflict with the owner's right to the structures? If the reasons for the separate treatment of land and structures are considered, it would seem that the agency should be permitted to do anything it wishes with the land so long as it doesn't substantially interfere with the owner's right to maintain his home or business on the premises during the relocation period. It is suggested that upon motion of either party the courts should determine what constitutes substantial interference. In this manner a just balance can be found between the agency's desire for immediate possession and the owner's need for a reasonable time to relocate.

### III. CONSEQUENCES OF TAKING POSSESSION

The next question considered is what are the consequences of the agency's taking possession. This question raises the crucial problem of determining what event establishes the date of taking. Establishment of the date of taking is important for several reasons: first, section 163.21 provides that if the agency has taken possession, it may not abandon the proceedings. Second, section 163.17 provides that when an agency takes possession before trial, interest on that part of the verdict which was not withdrawable runs from the date of taking. Third, sections 319.20 and 319.201 provide that taxes shall be apportioned as of the date ownership is transferred. Fourth, case law prior to the act established the rule that if possession is taken before trial, the property is valued as of the date of taking. The problem is to choose an ascertainable date of taking which is consistent with the purposes of the act.

#### A. *Date of Taking Before Trial*

According to case law prior to the act, the date of taking is the date of trial unless possession is taken before trial.<sup>34</sup> The first question considered will be what event establishes possession before trial under the new law. Case law prior to the act indicated that a taking may occur in either of two situations: first, an entry upon the land which manifests an intent to exercise dominion over the property,<sup>35</sup> or second, an entry upon the land which constitutes a substantial interference with the owner's right to use and enjoy the property.<sup>36</sup> In either situation a physical entry is required. But the characterization of a particular entry as a taking often involves a difficult factual determination. This difficulty is compounded under the Uniform Act because section 163.03 permits the agency to enter for the purpose of making surveys, soundings, drillings, appraisals, and examinations. The policy behind the law of conveyancing would seem to require that a transfer of property be evidenced by a more formal and definitive event. An event which meets these objections to the prior case law rule is the entry on the record of the court order granting possession to the agency.<sup>37</sup> It is clear that by obtaining the order, the agency manifests an intent to take dominion and substantially interferes with the owner's

<sup>34</sup> *Director of Highways v. Olrich*, 5 Ohio St. 2d 70, 213 N.E.2d 823 (1966).

<sup>35</sup> *Cincinnati v. Smallwood*, 106 Ohio App. 496, 150 N.E.2d 310 (1958).

<sup>36</sup> *Director of Highways v. Joseph Evans Ice Cream Co.*, 167 Ohio St. 463, 150 N.E.2d 30 (1958); *City of Norwood v. Shoen*, 126 Ohio St. 482, 186 N.E. 102 (1933).

<sup>37</sup> Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

right to use and enjoy the property.<sup>38</sup> After the order has been entered by the court, he no longer has any legal right to possession. He can be lawfully evicted at a moment's notice. After that it can no longer realistically be said that he has any dominion or control over the property.<sup>39</sup> For these reasons the courts should hold that the date of taking before trial is established by the court order granting possession to the agency. Therefore, after that date the agency should not be permitted to abandon the proceedings.<sup>40</sup> Moreover, interest should commence,<sup>41</sup> taxes should be apportioned,<sup>42</sup> and the date of valuation should ordinarily be established as of that date.<sup>43</sup>

The above analysis raises a problem which requires further consideration. How can the order granting possession to the lands establish the date of taking if the owner retains the right to remain in the structures? If title vests in the agency at the date of the order of possession, it would seem that an occupant of the structures after that date should be liable for rent.<sup>44</sup> A solution to this problem is reached by balancing the agency's interest in immediate possession against the owner's interest in a reasonable period for relocation. Arguably, the act gives the land owner a tenancy in the structures at the agency's expense during the relocation period. By excusing the payment of rent,

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<sup>38</sup> *In re Appropriation for Highway Purposes*, 90 Ohio App. 471, 104 N.E.2d 186 (1951), held that filing of a resolution and finding by the director of highways did not fix the date of taking. A resolution and finding required by section 5319.01 should, however, be distinguished from the declaration of intention required by § 163.06. The former is used both to initiate the proceedings and to permit immediate possession. The latter is used solely for the purpose of manifesting an intention to take immediate possession. Unlike the resolution and finding the declaration of intention need not be filed if the agency does not desire immediate possession.

<sup>39</sup> See California Law Revision Comm'n, *op. cit. supra* note 12, at B-45:

If the condemnor fails to take physical possession after obtaining an order of immediate possession, the order itself is an effective block to the owner's use of the property. Since the condemnor may at any time thereafter enter upon and use the property, the cloud that hangs over the property clearly prevents the condemnor from doing anything with it. It is an exaggeration to say that he still owns the property.

<sup>40</sup> Ohio Rev. Code Ann. § 163.21 (Page Supp. 1965).

<sup>41</sup> Ohio Rev. Code Ann. § 163.17 (Page Supp. 1965).

<sup>42</sup> Ohio Rev. Code Ann. § 319.20, .201 (Page Supp. 1965).

<sup>43</sup> *Director of Highways v. Olrich*, *supra* note 34, reaffirmed the established case law rule that the property is valued as of the date of trial unless possession is taken prior thereto. But there may be circumstances when the date of valuation should not coincide with the date of taking. *City of Cleveland v. Carrioue*, 118 Ohio App. 525, 190 N.E.2d 52 (1963).

<sup>44</sup> The Illinois act permits a court upon a finding of undue hardship to postpone the agency's right to take possession. But the owner is required to pay a reasonable rental while he remains on the premises. Ill. Ann. Stat. tit. 47, § 2.3 (Smith-Hurd Supp. 1965).



the act affords the owner some compensation for the expense and hardship of relocation.<sup>45</sup> During the land owner's tenancy, the agency has the right to proceed with its project so long as it doesn't substantially interfere with the owner's right to maintain his home or business upon the premises during the relocation period. The entry of a court order of possession should constitute a taking subject to the tenancy granted by the act to the land owner.

B. *Date of Taking at Time of Trial*

Next to be considered is the case law rule that if there is no prior taking, the taking occurs at the time of trial.<sup>46</sup> The constitution expressly provides that except in the two instances where immediate possession is expressly allowed, property may not be taken until compensation is first paid or secured by deposit.<sup>47</sup> Therefore, the case law rule conflicts with the language of the constitution since compensation is ordinarily not paid or deposited with the court until some time after the trial. But aside from its constitutional infirmities, the case law rule seems incompatible with section 163.15 of the Uniform Act. That section provides that the agency shall have no right to take possession until after it either pays the amount of the award to the owner or deposits it with the court. Payment need not occur until months after the trial. In fact possession by the agency might never occur because section 163.21 permits the agency to abandon the proceedings up to ninety days after judgment. If the case law rule were applied to the Uniform Act, the vesting of title to the property would have no relation to the right of possession. Taxes would be apportioned as of the date of trial even though the agency might not take possession until three months later. For these reasons it is clear that if the case law rule is followed under the Uniform Act, it will be based upon a fiction. In a realistic sense, the taking does not occur until the agency has the right to take possession of the property.

A closer examination of the cases enunciating the rule reveals why the date of taking was fixed at the time of trial. These cases were concerned with the date on which the property should be valued.<sup>48</sup>

<sup>45</sup> The traditional rules for arriving at just compensation fail to recognize many losses caused to the owner by an exercise of eminent domain. Comment, "Eminent Domain in an Age of Redevelopment: Incidental Losses," 67 *Yale L.J.* 61 (1957).

<sup>46</sup> *Director of Highways v. Olrich*, *supra* note 34.

<sup>47</sup> Ohio Const. art. I, § 19 and art. XIII, § 5.

<sup>48</sup> *Director of Highways v. Olrich*, *supra* note 34; *Director of Highways v. Joseph Evans Ice Cream Co.*, *supra* note 35; *Nichols v. City of Cleveland*, 104 Ohio St. 19, 135 N.E. 291 (1922); *Board of Educ. v. Hecht*, 102 Ohio App. 521, 130 N.E.2d 107 (1955); *In re Appropriation of Easement for Highway Purposes*, 90 Ohio App. 471, 107 N.E.2d 337 (1951).

The jury must value the property as of a certain date. The valuation date is important because it determines which party must bear casualty losses. It also establishes for what improvements the owner may be compensated. Furthermore, fluctuations in market price are fixed as of the date of valuation. There are sound reasons for making the trial the date of valuation. In the first place, this is the date at which the jury views the premises, and it can be argued that the property should be valued as of the date it is examined by the jury.<sup>49</sup> Furthermore, expediency would seem to require that the property be valued no later than the time of trial. Otherwise the jury would be compelled to speculate on the future value of the property. What if there were a casualty loss after trial but before the date of valuation, or the owner added an improvement? What if the real estate market suddenly collapsed? None of these factors would have been considered by the jury. Arguably, a new trial would be necessary. In order to avoid this difficulty, the date of valuation should continue to be fixed no later than the time of trial. But this does not mean that the taking must occur at the time of trial. Although prior to the act the courts generally assumed that the date of valuation and the date of taking were inseparable, there is no reason why the two dates must coincide under the Uniform Act. Under the act there is clearly no taking until the court enters an order granting possession to the agency.<sup>50</sup> This may not occur until long after the trial. Nonetheless very practical reasons require that the date of valuation be fixed no later than the date of trial. The courts should recognize that the two dates are based on different considerations. An appropriation proceedings serves two functions. One function is to ensure that the owner receives just compensation. The date of valuation relates to this function. A separate function is to administer the transfer of title and possession from the owner to the appropriating agency. The date of taking relates to this second function. The determination of each date should be based on different considerations. The date of taking should be established when the right of possession to the property is transferred to the agency, but the transfer of possession is just one of many factors which should be considered in establishing a fair and expedient date of valuation.

### C. *Date of Valuation*

The failure of the courts to recognize that the date of valuation need not coincide with the date of taking has resulted in injustices and unclear analyses of cases. The reasoning of two Ohio cases will

<sup>49</sup> *In re Appropriation for Highway Purposes*, *supra* note 48.

<sup>50</sup> Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

be compared to illustrate the problem. In both *Akron v. Alexander*<sup>51</sup> and *City of Cleveland v. Carcione*,<sup>52</sup> the jury was asked to value a building which, as of the date of trial, was situated in the midst of a desolate urban renewal project. The building was dilapidated and had been the victim of vandalism. When the urban renewal project was commenced, the building stood in the midst of a busy neighborhood. At that time it was occupied and reasonably maintained. But in both cases the jury was instructed to value the property as of the date of trial. In accordance with a long established rule of valuation, the jury was also told that the property should be valued as if the urban renewal project had never been commenced.<sup>53</sup> In each case the trial court was requested to permit the jury to view the premises. Both *Carcione* and *Alexander* held that despite the apparent mandatory language of the statute, the trial court had power to deny a request that the jury view the premises. The divergent reasoning of the two decisions illustrates the difficulty courts have had in separating the date of taking and the date of valuation. In *Alexander* the supreme court reaffirmed the traditional rule that the property should be valued as of the time of trial since that was the date of taking, but held that a trial court could refuse to grant a request that the jury view the premises if that view would be prejudicial to the owner. The court's application of the traditional rule in *Alexander* was based upon a fiction. The reason for saying that the date of taking occurs at the time of trial is that there are practical reasons for fixing the date of valuation at the time of trial and it is assumed that the date of taking must coincide with the date of valuation. But by denying the jury a view of the premises, the court removed the reason for valuing the property at the time of trial. Therefore, there was no reason why the taking must occur at the time of trial. The reasoning of the court of appeals in *Carcione* is more persuasive. The court held that due to the circumstances of the case the property should be valued at a date just prior to the initiation of the urban renewal project. It recognized the rule that property is valued at the time of trial, but then stated:

However, the application of that rule of law may result in an award of compensation to the owner of the property appropriated, which is unreasonable and unjust under unusual facts and circumstances, as are present at bar. Under such circumstances, the time as of which the valuation of the property should be made must comport with the peculiar facts and circumstances of the case so as to assure

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<sup>51</sup> 5 Ohio St. 2d 75, 214 N.E.2d 89 (1966).

<sup>52</sup> *Supra* note 43.

<sup>53</sup> *Nichols v. City of Cleveland*, *supra* note 48.

the owner of the property compensation in money which is just as contemplated by the constitution of Ohio.

The reasoning of *Carcione* represented a breakthrough in judicial thought and its application should be extended. In contrast the reasoning of the Ohio Supreme Court's recent decision in *Director of Highways v. Olrich*,<sup>54</sup> which reaffirmed the traditional rule, seems oblivious to the real considerations involved in fixing the date of valuation. It is most unfortunate that in *Olrich* the court limited the *Carcione* reasoning to its facts.

In factual situations like *Carcione*, *Olrich*, and *Alexander*, the reasoning of the supreme court is unsatisfactory for several reasons: (1) A practical reason for valuing the property as of the time of trial is that the jury views the premises at that date. But if the jury is not permitted to view the premises because the view would be prejudicial to the owner, what reason remains for valuing the property as of that date? (2) It is impractical to ask expert witnesses and jurors to value property situated in the midst of a neighborhood which has been demolished by a public project as if the project had never been initiated. Value is based to a large extent upon the neighborhood surrounding the property. If a neighborhood has been destroyed by the public project, the jurors and expert witnesses are compelled to guess what the neighborhood would have been like and how the property could have been used if there had been no project. Just compensation should not be based upon mere conjecture. (3) If the property is valued at the date of trial, the owner is compelled to bear the increased risk of vandalism and other casualty losses caused by the urban renewal project. This seemingly conflicts with the rule that the property should be valued as if the project had never been commenced. (4) In order to receive just compensation, the owner must make expenditures to protect, maintain, and improve structures which no longer serve any useful social function. This is economically indefensible. (5) The language of article 1, section 19 of the Ohio Constitution and section 163.15 of the Uniform Act indicate that the agency may not lawfully take possession until after compensation is paid to the owner or secured by deposit with the court. Therefore, neither the constitution nor the statute manifests an intent that the taking must occur at the time of trial.<sup>55</sup> In fact, an entirely different intent is manifested. For these reasons it should be recognized that the date of valuation need not coincide with the date of taking. Nor does the date of valuation have

<sup>54</sup> *Supra* note 34.

<sup>55</sup> *Director of Highways v. Olrich*, *supra* note 34. The supreme court suggested in *Olrich* that the traditional rule is based on constitutional and legislative intent.

to be fixed at the time of trial. It should be based on considerations of fairness and expediency. The rule requiring valuation at the date of trial should be no more sacred than the practical considerations upon which it is based.

#### CONCLUSION

The functions of the courts in an appropriation proceeding are to ensure that the owner receive just compensation and to administer the involuntary transfer of title and possession from the owner to the appropriating agency. Those provisions of the new Eminent Domain Act which relate to the transfer of title and possession should be interpreted to strike a just balance between the agency's interest in immediate possession and the owner's need for a reasonable time to relocate. If either party is permitted to use the proceeding as a club to coerce an unjust settlement, the purpose of the act is defeated. The Uniform Act should also be used as a basis for clarifying present case law relating to the date of taking and the date of valuation. If properly interpreted, the act should effect a vast improvement in the eminent domain law of Ohio.

*Frederick J. Milligan, Jr.*

## ILLINOIS PROVISIONS ON IMMEDIATE POSSESSION

## § 2.1 Motion for taking—Contents

In any proceeding under the provisions of this Act by the State of Illinois for the acquisition of land or interests therein for highway purposes (other than toll highways or toll facilities) the petitioner, at any time after the petition has been filed and before judgment is entered in the proceeding, may file a written motion requesting that, immediately or at some specified later date, the petitioner either be vested with the fee simple title (or such lesser estate, interest or easement, as may be required) to the real property, or specified portion thereof, which is the subject of the proceeding, and be authorized to take possession of and use such property; or only be authorized to take possession of and to use such property, if such possession and use, without the vesting of title, are sufficient to permit the petitioner to proceed with the project until the final ascertainment of compensation; provided, however, that no land or interests therein now or hereafter owned, leased, controlled or operated and used by, or necessary for the actual operation of, any common carrier engaged in interstate commerce, or any other public utility subject to the jurisdiction of the Illinois Commerce Commission, shall be taken or appropriated hereunder by the State of Illinois without first securing the approval of such Commission. The motion for taking shall state: (a) an accurate description of the property to which the motion relates and the estate or interest sought to be acquired therein; (b) the formally adopted schedule or plan of operation for the execution of the petitioner's project; (c) the situation of the property to which the motion relates, with respect to such schedule or plan; (d) the necessity for taking such property in the manner requested in the motion; and (e), if the property to be taken shall be owned, leased, controlled or operated and used by, or necessary for the actual operation of, any interstate common carrier or other public utility subject to the jurisdiction of the Illinois Commerce Commission, a statement to the effect that the approval of such proposed taking has been secured from such Commission, and attaching to such motion a certified copy of the order of such Commission granting such approval. If the schedule or plan of operation is not set forth fully in the motion, a copy of such schedule or plan shall be attached to the motion. 1872, April 10, Laws 1871-72, p. 402, § 2.1, added 1957, July 11, Laws 1957, p. 2003, § 1.

Law Review Commentaries  
Illinois "quick taking" amendment.  
1958 Law Forum 302.

Lease provisions designed to meet  
changing conditions. Raymond H.  
Danz, 1957 Law Forum 344.

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Eminent Domain § 187.  
C.J.S. Eminent Domain § 221.  
L.L.P. Eminent Domain § 131.

#### 1. Validity

Section 1 et seq. of this chapter providing for quick taking under eminent domain power, as with every act of the General Assembly, is attended by a strong presumption of constitutionality. *Department of Public Works and Buildings v. Butler Co.*, 13 Ill.2d 637, 150 N.E.2d 124.

Section 1 et seq. of this chapter providing for prompt vesting of title to land taken under eminent domain power on deposit of 125% of preliminary finding of just compensation, does not violate provision of Const. art. 2, § 13, that property shall not be taken or damaged for public use without just compensation. *Id.*

Section 1 et seq. of this chapter providing for the prompt vesting of title to land under eminent domain power on deposit of 125% of preliminary finding of just compensation, is not unconstitutional on ground that it is incomplete legislation which unlawfully delegates legislative power because of an alleged lack of standards to ascertain necessity of utilizing "quick-taking" provision. *Id.*

#### 2. Purpose of proceedings

Proceeding under section 1 et seq. of this chapter is a proceeding within a proceeding and its primary purpose is to place possession and title in the state prior to a final determination of just compensation while protecting the interest of landowners. *Department of Public Works and Bldgs. v. Dust*, 19 Ill. 2d 217, 166 N.E.2d 36.

#### 3. Nature of proceedings

This section and section 2.2 of this chapter contemplate a written order finding that the requirements for quick-taking have been established. *Department of Public Works and Bldgs. v. Dust*, 19 Ill.2d 217, 166 N.E.2d 36.

Where motion for immediate vesting of title was filed in eminent domain proceeding pursuant to section 1 et seq. of this chapter, issues as to whether trial court erred in that it failed to hear and determine that a reasonable necessity existed for immediate vesting of title, that condemnees were denied a right to present evidence of damages to property not taken, and that other of their constitutional rights had been violated by court's determination that a reasonable necessity existed for taking of property prior to final finding of just compensation and amount of just compensation, were not properly before reviewing court upon appeal from order finding that condemnor might take the property. *Id.*

#### 4. Evidence

In eminent domain proceeding, where in state filed motion for immediate vesting of title pursuant to this section, evidence sustained finding that requirements of quick-taking provisions had been met. *Department of Public Works and Bldgs. v. Dust*, 19 Ill.2d 217, 166 N.E.2d 36.

#### 5. Review

It was not an abuse of discretion to permit jury to view condemned land, which state had taken possession of under "quick-take" provisions of Eminent Domain Act and which had been improved prior to time that it was viewed by jury. *Department of Public Works and Buildings v. Remmerio*, 1963, 29 Ill. 2d 40, 192 N.E.2d 877.

Record disclosed that the trial court properly refrained from making any apportionment of condemnation award between landlord and tenants. *Department of Public Works and Buildings v. First Nat. Bank of Highland Park*, 1963, 26 Ill.2d 163, 186 N.E.2d 273.

### § 2.2 Hearing—Preliminary finding of compensation

(a) The court shall fix a date, not less than five (5) days after the filing of such motion, for the hearing thereon, and shall require due notice to be given to each party to the proceeding whose interests would be affected by the taking requested, except that any party who has been or is being served by publication and who has not entered his appearance in the proceeding need not be given notice unless the court so requires, in its discretion and in the interests of justice.

(b) At the hearing, if the court has not previously, in the same proceeding, determined that the petitioner has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of such right, and that such right is not being improperly exercised in the particular proceeding, then the court first shall hear and determine such matters. The court's order thereon shall be a final order, and an appeal may be taken therefrom by either party within thirty (30) days after the entry of such order, but not thereafter unless the court, on good cause shown, shall extend the time for taking such appeal. However, no appeal shall stay the further proceedings herein prescribed unless the appeal is taken by the petitioner, or unless an order staying such further proceedings shall be entered either by the trial court or by the court to which such appeal is taken.

(c) If the foregoing matters are determined in favor of the petitioner and further proceedings are not stayed, or if further proceedings are stayed and the appeal results in a determination in favor of the petitioner, then the court shall hear the issues raised by the petitioner's motion for taking. If the court finds that reasonable necessity exists for taking the property in the

manner requested in the motion, the court then shall hear such evidence as it may consider necessary and proper for a preliminary finding of just compensation; and in its discretion, the court may appoint three (3) competent and disinterested appraisers as agents of the court to evaluate the property to which the motion relates and to report their conclusions to the court; and their fees shall be paid by the petitioner. The court then shall make a preliminary finding of the amount constituting just compensation.

(d) Such preliminary finding of just compensation, and any deposit made or security provided pursuant thereto, shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid, and shall not be disclosed in any manner to a jury impaneled in such proceedings; and if appraisers have been appointed as herein authorized, their report shall not be evidence in such further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings. 1872, April 10, Laws 1871-72, p. 402, § 2.2, added 1957, July 11, Laws 1957, p. 2003, § 1.

#### Law Review Commentaries

Need for uniform appeal period in Illinois civil cases. 61 Ill.Bar J. 988 (1963).

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Eminent Domain § 180, 198(1), 240.  
C.J.S. Eminent Domain §§ 242, 243, 267, 270, 280.  
I.L.P. Eminent Domain §§ 117, 119, 122.

#### 1. Validity

State has right in first instance to determine what is a public purpose and benefit for condemnation purposes. Department of Public Works and Buildings v. Farina, 1964, 29 Ill.2d 474, 194 N.E.2d 209.

Where landowner attacked constitutionality of section 1 of sec. of this chapter, providing for prompt vesting of title to land taken under eminent domain power, on ground that adequate notice of proceedings was not provided by this section, since all parties had notice and alleged unconstitutional feature, if it existed, was not of a character to render entire act void, alleged violation of due process because of failure to provide for adequate notice would not be considered. Department of Public Works and Buildings v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124.

Section 1 et seq., of this chapter, providing for the prompt vesting of title to land under eminent domain power on deposit of 125% of preliminary finding of just compensation, is not unconstitutional on ground that it is incomplete legislation which unlawfully delegates legislative power because of an alleged lack of standards to ascertain necessity of utilizing "quick-taking" provision; is not violation of due process clause on ground that it makes no provision for ascertainment of damages to remainder of property where only a portion is taken; does not violate constitutional provision of Const. art. 2, § 13, that property shall not be taken or damaged for public use without just compensation; and does not constitute denial of due process on ground that it affords no opportunity of cross-examination, since owner has ample right to be heard on question of just compensation before a final determination is made. Id.

#### 2. Construction and application

Department of Public Works and Buildings has right to institute condemnation proceedings in a proper case. Department of Public Works and Buildings v. Farina, 1964, 29 Ill.2d 474, 194 N.E.2d 209.

This section is controlling as to finality and appealability with respect to proceedings taken under such provisions. Department of Public Works and Buildings v. Dust, 15 Ill.2d 217, 166 N.E.2d 36.

Under this section order entered is immediately final and appealable and Ch. 77, § 83, providing for vacation or modification of judgment within 30 days from date of its rendition has no application. Id.

Proceeding under Ch. 47, § 1 et seq. is a proceeding within a proceeding and its primary purpose is to place possession and title in the state prior to a final determination of just compensation while protecting the interest of landowners. Id.

This section and section 2.1 of this chapter contemplate a written order finding that the requirements for quick-taking have been established. Id.

Under paragraph (c) of this section, it cannot be assumed that trial court, in making preliminary finding of just compensation, would ignore question of damages to remainder. Department of Public Works and Buildings v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124.

Function of court under section 1 et seq. of this chapter, providing for prompt vesting of title to land taken under eminent domain proceedings on deposit of 125% of preliminary finding of just compensation, is to ascertain whether all steps precedent to exercise of powers granted have been taken. Id.

Under paragraph (b) of this section, requiring court to determine whether petitioner has authority to exercise right of eminent domain, where court has not previously made such determination in the same proceeding, statute only eliminates a second determination of necessity on behalf of the same owner. Id.

#### 3. Judicial notice

Trial court properly took judicial notice that Department of Public Works and Buildings has been given authority to exercise right of eminent domain. Department of Public Works and Buildings v. Dust, 15 Ill.2d 217, 166 N.E.2d 36.

#### 4. Findings

Where jury was not able to view property condemned as it existed before the taking and pictures admitted were not an entirely adequate substitute, valuations of the court appointed appraisers could not take the place of a prior "jury view" as a test for the adequacy



of the verdict, for damages. Department of Public Works and Buildings v. Christensen, 1962, 25 Ill.2d 273, 184 N.E.2d 884.

Pending on issues raised by motion made under quick-taking provisions of this chapter with respect to whether petitioner has authority to exercise right of eminent domain, whether property sought to be taken is subject to exercise of such right, and whether right is being properly exercised amounts to determination of whether petitioner has right to take property by eminent domain. Department of Public Works and Bldgs. v. Dust, 19 Ill.2d 217, 166 N.E.2d 36.

#### 5. Review

Error, if any, in permitting condemnor, by leading questions, to bring to attention of jury that its rebuttal witnesses had been appointed by court to appraise property at earlier hearing was corrected by admonition to jury to disregard any reference to fact that witnesses had been appointed by court to appraise property. Department of Public Works and Buildings for and in behalf of People v. First Nat. Bank of Waukegan, App.1965, 209 N.E.2d 21.

Refusal to permit property appraiser to testify on behalf of owners after proofs in condemnation proceeding had been closed was not abuse of discretion, even though condemnor had called another appraiser on its behalf, where appraiser sought to be called was available to testify during trial and his testimony, if given, could not have materially affected outcome of trial. Id.

Authority of Department of Public Works and Buildings in establishing, maintaining, and improving state highways is broad and plenary, and court will interfere only where the authority has been manifestly abused. Depart-

ment of Public Works and Buildings v. Farina, 1964, 29 Ill.2d 474, 194 N.E.2d 209.

Necessity for exercise of right of eminent domain, within constitutional restrictions, is not a judicial question, and its exercise is not proper subject for judicial interference or control unless to prevent a clear abuse of the power. Id.

Courts have right to inquire and render final determination as to whether use or purpose is within limits of a legislative discretion, that is, whether land sought to be condemned is to be used for public or private purpose. Id.

Jury verdict fixing value of land condemned plus damages to remainder at \$21,500 was not shown to be inadequate where the property was used as a trailer camp and the value of the property lay in its potential for commercial development. Department of Public Works and Buildings v. Christensen, 1962, 25 Ill.2d 273, 184 N.E.2d 884.

Under this section court is to find whether a reasonable necessity exists for the taking prior to final finding of just compensation and amount of such just compensation but such findings are interlocutory and not appealable. Department of Public Works and Bldgs. v. Dust, 19 Ill.2d 217, 166 N.E.2d 36.

Under this section stay order does not stay effect of order but stays hearing on issues raised by motion for quick-taking. Id.

Where no appeal was filed by petitioner in eminent domain proceeding and no stay order was entered, trial court properly proceeded to hear issues raised by motion for quick-taking and motion for stay of quick-taking proceedings did not suspend order that petitioner might take property. Id.

### § 2.3 Deposit in court—Order of taking—Possession—Rental—Writ of assistance, injunction or other process

(a) If the petitioner shall deposit, with the clerk of the court, money in the amount preliminarily found by the court to be just compensation, and, in addition shall deposit with the clerk a further sum of money equal to one-fourth of such amount, the court shall enter an order of taking, vesting in the petitioner the fee simple title (or such lesser estate, interest or easement, as may be required) to the property, if such vesting has been requested, and has been found necessary by the court, at such date as the court shall consider proper, and fixing a date on which the petitioner is authorized to take possession of and to use the property.

(b) If, at the request of any interested party and upon his showing of undue hardship or other good cause, the petitioner's authority to take possession of the property shall be postponed for more than ten (10) days after the date of such vesting of title, or more than fifteen (15) days after the entry of such order when the order does not vest title in the petitioner, then such party shall pay to the petitioner a reasonable rental for such property, the amount thereof to be determined by the court. A writ of assistance, injunction, or any other appropriate legal process or procedure shall be available to place the petitioner in possession of the property on and after the date fixed by the court for the taking of such possession, and to prevent any unauthorized interference with such possession and the petitioner's proper use of the property. 1872, April 10, Laws 1871-72, p. 402, § 2.3, added 1957, July 11, Laws 1957, p. 2603, § 1.

#### Library references

Eminent Domain C-76, 187.

C.I.S. Eminent Domain §§ 186 et seq., 231.

I.L.P. Eminent Domain § 131.

#### 1. Validity

Section 1 et seq. of this chapter providing for the prompt vesting of title

to land taken under eminent domain powers on deposit of 125% of preliminary finding of just compensation does not violate due process on ground that by statute puts an unreasonable hazard on owner that he will not receive just compensation. Department of Public Works and Buildings v. Butler Co., 19 Ill.2d 537, 160 N.E.2d 124.

Section 1 et seq. of this chapter providing for prompt vesting of title to land taken under eminent domain power on deposit of 125% of preliminary finding of just compensation, does not violate constitutional provision of Const. art. 2 § 13 that property shall not be taken or damaged for public use without just compensation. *Id.*

#### § 2.4 Withdrawals by persons having an interest—Hearing

At any time after the petitioner has taken possession of the property pursuant to the order of taking, if an appeal has not been and will not be taken from the court's order described in Section 2.2(b) of this Act,<sup>1</sup> or if such an appeal has been taken and has been determined in favor of the petitioner, any party interested in the property may apply to the court for authority to withdraw for his own use his share (or any part thereof) of the amount preliminarily found by the court to be just compensation, and deposited by the petitioner in accordance with the provisions of Section 2.3(a) of this Act,<sup>2</sup> as such share shall have been determined by the court. The court then shall fix a date for a hearing on such application, and shall require due notice of such application to be given to each party whose interests would be affected by such withdrawal. After the hearing, the court may authorize the withdrawal requested, or such part thereof as shall be proper, but upon the condition that the party making such withdrawal shall refund to the clerk of the court, upon the entry of a proper court order, any portion of the amount so withdrawn which shall exceed the amount finally ascertained in the proceeding to be just compensation (or damages, costs, expenses, or attorney fees) owing to such party. The court shall not authorize the withdrawal of any portion of the amount deposited by the petitioner under the provisions of Section 2.3(a) of this Act, which is in excess of the amount preliminarily found by the court to be just compensation. 1872, April 10, Laws 1871-72, p. 402, § 2.4, added 1957, July 11, Laws 1957, p. 2603, § 1.

<sup>1</sup> Section 2.2 of this chapter.

<sup>2</sup> Section 2.3 of this chapter.

Library references  
Eminent Domain ⇨ 157, 245.

C.J.S. Eminent Domain §§ 197, 205,  
336.  
I.L.P. Eminent Domain § 96.

#### § 2.5 Persons contesting the taking not to be prejudiced

Neither the petitioner nor any party interested in the property, by taking any action authorized by Sections 2.1 to 2.4, inclusive, of this Act,<sup>1</sup> shall be prejudiced in any way in contesting, in later stages of the proceeding, the amount to be finally ascertained to be just compensation. 1872, April 10, Laws 1871-72, p. 402, § 2.5, added 1957, July 11, Laws 1957, p. 2603, § 1.

<sup>1</sup> Sections 2.1-2.4 of this chapter.

Library references  
Eminent Domain ⇨ 171.  
C.J.S. Eminent Domain § 228 et seq.

1. In general

Where owners of condemned land first introduced testimony regarding both potential decrease in rental income, and

actual rentals, and also that the improvement caused an actual vacation of the premises, any admission of related evidence on cross-examination was clearly invited by the testimony originally adduced by owners. *Department of Public Works and Buildings v. Remerie*, 1963, 29 Ill.2d 40, 192 N.E.2d 877.

#### § 2.6 Interest payments

The petitioner shall pay, in addition to the just compensation finally adjudged in the proceeding, interest at the rate of six per cent (6%) per annum upon:

(a) Any excess of the just compensation so finally adjudged, over the amount deposited by the petitioner in accordance with the provisions of Section 2.3(a) of this Act,<sup>1</sup> from the date on which the parties interested in the property surrendered possession of the property in accordance with the order of taking, to the date of payment of such excess by the petitioner.

(b) Any portion of the amount preliminarily found by the court to be just compensation and deposited by the petitioner, to which any interested party is entitled, if such interested party applied for authority to withdraw such portion in accordance with Section 2.4 of this Act,<sup>2</sup> and upon objection by the petitioner (other than on grounds that an appeal under Section 2.2(b) of this Act<sup>3</sup> is pending or contemplated), such authority was denied; interest to be

paid to such party from the date of the petitioner's deposit to the date of payment to such party.

When interest is allowable as provided in Subsection (a) of this Section, no further interest shall be allowed under the provisions of Section 3 of "An Act to revise the law in relation to the rate of interest and to repeal certain acts therein named," approved May 24, 1879, as amended,<sup>1</sup> or any other law. 1872, April 10, Laws 1871-72, p. 402, § 2.6, added 1957, July 11, Laws 1957, p. 2603, § 1.

- <sup>1</sup> Section 2.3 of this chapter.
- <sup>2</sup> Section 2.4 of this chapter.
- <sup>3</sup> Section 2.2 of this chapter.
- <sup>4</sup> Chapter 74, § 3.

**Library references**

Eminent Domain § 148, 247(1-4).  
C.J.S. Eminent Domain §§ 176, 333.  
I.L.P. Eminent Domain §§ 82, 128.

Court was dismissed, where amount of just compensation as finally adjudged did not exceed deposit and defendant did not apply for authority to withdraw any part thereof, defendant was nonetheless entitled to 5 per cent interest thereon under the Interest Act. Department of Public Works and Bldgs. v. Larson, 1961, 22 Ill.2d 425, 176 N.E.2d 763.

**1. In general**

Even though no interest was payable under "quick-taking" provisions of Eminent Domain Act on portion of amount deposited in court not paid to defendant until after plaintiff's appeal to Supreme

**§ 2.7 Refund of excess of deposit**

If the amount withdrawn from deposit by any interested party under the provision of Section 2.4 of this Act<sup>1</sup> exceeds the amount finally adjudged to be just compensation (or damages, costs, expenses, and attorney fees) due to such party, the court shall order such party to refund such excess to the clerk of the court, and if refund is not made within a reasonable time fixed by the court, shall enter judgment for such excess in favor of the petitioner and against such party. 1872, April 10, Laws 1871-72, p. 402, § 2.7, added 1957, July 11, Laws 1957, p. 2603, § 1.

- <sup>1</sup> Section 2.4 of this chapter.

**Library references**

Eminent Domain § 165.  
C.J.S. Eminent Domain § 194.

**§ 2.8 Proceedings—Dismissal—Abandonment**

After the petitioner has taken possession of the property pursuant to the order of taking, the petitioner shall have no right to dismiss the petition, or to abandon the proceeding, as to all or any part of the property so taken, except upon the consent of all parties to the proceeding whose interests would be affected by such dismissal or abandonment. 1872, April 10, Laws 1871-72, p. 402, § 2.8, added 1957, July 11, Laws 1957, p. 2603, § 1.

**Library references**

Eminent Domain § 246(2).  
C.J.S. Eminent Domain § 335.  
I.L.P. Eminent Domain § 133.

**1. In general**

Federal District Court lacked jurisdiction of action to enjoin enforcement of Illinois Public Building Commission Act and continuation of eminent domain action pending in Illinois court where plaintiff's claim was based on rights as-

serted under Illinois Eminent Domain Act and involved no rights arising under federal Constitution or laws, and issues could be properly and adequately determined in Illinois court. Peerless Weighing & Vending Mach. Corp. v. Public Bldg. Commission of Chicago, D.C.1962, 299 F.Supp. 377, appeal dismissed 83 S.Ct. 13, 371 U.S. 801, 9 L.Ed. 2d 46.

**§ 2.9 Payment of costs if action goes against petitioner**

If, on an appeal taken under the provisions of Section 2.2 of this Act,<sup>1</sup> the petitioner shall be determined not to have the authority to maintain the proceeding as to any property, which is the subject thereof, or if, with the consent of all parties to the proceeding whose interests shall be affected, the petitioner dismisses the petition or abandons the proceedings as to any such property, the trial court then shall enter an order revesting the title to such property in the parties entitled thereto, if the order of taking vested title in the petitioner; requiring the petitioner to deliver possession of such property to the parties entitled to the possession thereof; and making such provision as shall be just, for the payment of damages arising out of the petitioner's taking and use of such property, and also for costs, expenses, and attorney fees as provided in Section 10 of this Act; and the court may order the clerk of the court to pay such sums to the parties entitled thereto, out of the money

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deposited by the petitioner in accordance with the provisions of Section 2.3(a) of this Act.<sup>2</sup> 1872, April 10, Laws 1871-72, p. 402, § 2.0, added 1957, July 11, Laws 1957, p. 2603, § 1.

- <sup>1</sup> Section 2.2 of this chapter.
- <sup>2</sup> Section 2.3 of this chapter.

### Library references

Eminent Domain  $\S$  263, 265 (1, 5).  
C.J.S. Eminent Domain  $\S$  366 et seq.,  
381 et seq., 385.  
I.L.P. Eminent Domain  $\S$  135-137.

#### 1. In general

Federal District Court lacked jurisdiction of action to enjoin enforcement of Illinois Public Building Commission Act and continuation of eminent domain action pending in Illinois court

where plaintiff's claim was based on rights asserted under Illinois Eminent Domain Act and involved no rights arising under federal Constitution or laws, and issues could be properly and adequately determined in Illinois court. *Peerless Weighing & Vending Mach. Corp. v. Public Bldg. Commission of Chicago*, D.C. 1962, 209 F.Supp. 877, appeal dismissed 33 S.Ct. 13, 371 U.S. 801, 3 L.Ed.2d 46.

### § 2.10 Construction of act

The right to take possession and title prior to the final judgment as prescribed in Sections 2.1 to 2.0 of this Act<sup>1</sup> shall be in addition to any other right, power, or authority otherwise conferred by law, and shall not be construed as abrogating, limiting or modifying any such other right, power, or authority. 1872, April 10, Laws 1871-72, p. 402, § 2.10, added 1957, July 11, Laws 1957, p. 2603, § 1.

- <sup>1</sup> Sections 2.1-2.9 of this chapter.

### Library references

Eminent Domain  $\S$  167(1).  
C.J.S. Eminent Domain  $\S$  210 et seq.

### § 4. Service—Notice

#### 1. Construction and application

As to service of process, proceedings under Eminent Domain Act are governed by Civil Practice Act and Rules of

Supreme Court. *Department of Public Works and Bldgs. v. Lanter*, 413 Ill. 581, 116 N.E.2d 179.