CURRENT PROBLEMS AFFECTING COSTS OF CONDEMNATION†

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Urban blight is neither a problem of recent origin nor one which is confined to the United States. With very few exceptions (notably Billy Penn’s “greene country-town” of Philadelphia), our cities developed uncontrolled and untrammeled by plan. Especially was this true during the nineteenth century, when cities burgeoned to accommodate and house the expanding economy wrought by the Industrial Revolution. The expansion carried within it the seeds of the twentieth century physical deterioration of our urban centers. As the industrial complex grew to meet the war demands of the 1940’s and the frustrated consumer needs of the 1950’s, blight began to threaten the very existence of our cities. However, it is not true, as some believe, that society stood idly by while this urban cancer developed.

Society’s initial attempts to eradicate urban blight were, indeed, as old as its very existence. The common law of public and private nuisances has been and continues to be antipathetic to deteriorating land usage. Of more recent origin, zoning control, building codes, and federal public housing projects aimed at this target. Nevertheless, these piecemeal attempts proved futile in and of themselves to provide an effective solution. The comprehensive power of government to renew, rehabilitate, and redevelop entire geographical areas within its jurisdiction—complementing effective programs of zoning regulation, building code enforcement, slum clearance, and public housing—was exercised to restore our cities and to prevent further blight. This, then, is the sum of today’s tools for effective urban renewal.

Necessarily, comprehensive urban renewal has brought to the fore many new problems both within and without the compass of law. However, some problems are neither new nor peculiar to it alone. Rather, they are encountered at all levels of government and whether or not the concern is urban renewal. One of the latter, the cost attendant to the exercise of the power of eminent domain, is the general subject of this section. Here, the concern is not only how much government will be required to pay when it takes land or property by its sovereign right or pursuant to constitutional or legislative grant, but also the indirect costs that are levied upon government when it operates through traditional condemnation procedures. And it is of relatively minor significance whether the purpose of the taking be for a highway, slum clearance, public housing, industrial development, airport construction, or any other type of project. The question of cost is ever present.

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Implementation of the power to condemn has been, at most, incompletely prescribed by the legislature, despite the fact that nonconsensual property acquisition is one major instance in our society where the private individual is necessarily subservient to the general interest. The property owner has, at best, a limited right to question the general exercise of government prerogative; a more liberal, but nevertheless restricted, right to question the particular taking; and a general right only to question the amount of compensation to be paid for the taking. Inept though it may be at times, the judicial branch of the government has carried the burden of providing a forum in which the individual voice can most effectively be heard. It has had to mold a flexible body of law and procedure to resolve the ever-changing social problems with which condemnation is concerned. This responsibility and its assumption have been well delineated by Judge Roger A. Traynor, as follows:

More than ever social problems find their solution in legislation. Endless problems remain, however, which the courts must resolve without benefit of legislation. The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and courts then can do no more than find what Cardozo called the least erroneous answers to insoluble problems.

It seems self-evident that blind criticism of existing judicial practices and procedures in this field would be unfair and unworthy of the universally recognized desire of the courts to cope with the problem effectively and justly. A particular solution, unjust in itself, may perhaps prove to be the most equitable solution that can be brought about by judicial action alone. Indeed, without corrective legislation or constitutional amendment, even rudimentary justice may be impossible of attainment.

At any event, in considering costs of condemnation, two areas will be explored here. The first is concerned with direct outlays to be paid by the condemning authority. These comprise, among others, the cost of acquisition, interest on the award, and the right to be reimbursed for legal fees. The second involves the

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Footnotes:
1. It is, of course, true that the redevelopment laws passed by virtually every state provide for notice and opportunity to be heard prior to the formulation of the plan of redevelopment. In most jurisdictions, citizens and property owners have the additional right to appear before the legislative body of the city or other governmental unit to express objections to the plan. However, it is obvious that only a judicial arm can make the binding determination in the case of a contest over the amount of compensation which should be paid to the individual property owner (which the great majority of the disagreements involve), or can give effective relief in the event of an unfavorable decision at a political or administrative level with respect to the project itself.

indirect costs levied upon government through the utilization of either the traditional condemnation or the more recently developed quick-taking procedure.

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**Direct Outlays**

There are several methods for judicially determining the proper amount of compensation to be paid a landowner when property is taken for public purposes. When the objective is total acquisition, resort is commonly made to either one of two tests to determine the market value of property. The first centers on value of the property for its “highest and best use.” The other utilizes “replacement or reproduction cost,” where market value cannot be clearly ascertained. When the issue in the litigation is severance damages arising from a taking of a portion of property and not total acquisition, the “before and after value” test has almost universally been applied.

It is obvious that some time must elapse between the actual taking and the receipt of compensation, regardless of the criterion for determining value. Consequently, many problems arise concerning what, if any, interest on the basic award should be allowed. As a result of enabling legislation in a few jurisdictions, the court is permitted to charge the condemnor with the property owner’s attorneys fees—the amount of which may, of course, give rise to controversy.

The presence of these and many other types of controversies substantially affects the ability of a condemning authority to anticipate with any degree of certainty the amount it will be called upon to pay. As a result, in numerous instances where the cost of property acquisition is likely to be the determinative factor in the net project cost, government is hampered and, indeed, oftentimes frustrated because it cannot ascertain the financial feasibility of a proposed project.

Left to their own resources, some courts have, when faced with these problems, seemingly succumbed to pressures markedly inconsistent with both logic and public welfare. The following analysis of some recent relevant decisions in these areas highlights the judicial failure to achieve even, in the Cardozian phrase, “the least erroneous answer to insoluble problems.”

A. Highest and Best Use

The general principle is that proposed land uses which are higher and better than those presently existing are a legitimate basis for evaluation, provided the use is not too remote or speculative. However, the danger is obvious. Judicial recognition of anticipated use as a factor in determining damages opens the door to exorbitant valuations by the “expert” witnesses. It does not follow that valuation must, therefore, be restricted to a consideration of present use. In that instance, the

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cure would likely be more inequitable to the individual than the present system can ever be to the condemning authority. But it does emphasize the duty on our courts carefully to scrutinize proffered evidence on anticipatory uses. Unfortunately, many courts have rejected this responsibility.

In *Town of Slaughter v. Appleby*, suit was brought against certain landowners to expropriate from them a right-of-way in order to construct a road and to install gas and water lines across their land. The right-of-way traversed a 250-acre plot dividing it into two parcels, one of which contained thirteen acres and the other 237 acres. At the time of the taking, the land was used solely for grazing purposes. However, at the trial, the property owners were permitted to present expert testimony that the land in question could be utilized for home sites. Further, if it were so utilized, its value would be about eight times the value in its present use. Even though no evidence was presented showing a reasonable prospect that, absent condemnation, the land would have been used for this value-enhancing purpose, the Supreme Court of Louisiana upheld an award based on development for homes.

A similar result was reached in *Kentucky Department of Highways v. Wilson*—another instance in which a seemingly exorbitant award was upheld. The property sought was seven acres of a thirty-seven acre tract. The lower court approved an award valuing the acquired property at three times the value of the remaining thirty-acre tract. Furthermore, this disproportionate valuation did not include residential improvements on the smaller tract. On appeal, the Kentucky Court of Appeals upheld the award by reason of evidence that the land taken had a prospective commercial value, despite the fact that the prospects for its commercial utilization were entirely remote.

In *City of Wichita v. Fitch*, the Supreme Court of Kansas also upheld a valuation based upon a remote anticipated use. The property condemned was taken by the City’s Park Commission in order to provide a municipal beach and recreation area. Prior to the condemnation, the owner had unsuccessfully attempted to have his land rezoned in order to permit his own operation there of a park. Despite the prior denial of rezoning, evidence of the tract’s value as a recreation area was presented at the subsequent condemnation proceeding and an award was made on this basis. On appeal, the award was affirmed, the court noting that the inability of the prior owner to gain a commercial zoning classification prerequisite for a private park was not determinative since the municipality had itself condemned the land for use as a park. The import of this decision seems to be that the use which the condemning authority plans for the acquired property is properly to be considered in the condemnation proceeding, regardless of any actual prospect of private achievement of this use. These cases represent the most liberal approach in permitting evidence of remote anticipated uses to determine value. Other decisions range a broad spectrum in so far as liberality to the property owner is concerned.

*235 La. 324, 103 So.2d 461 (1958).*

*317 S.W.2d 490 (Ky. 1958).*

*184 Kan. 508, 337 P.2d 1034 (1959).*
An example is *United States v. Jones Beach State Parkway Authority*, decided by the United States Court of Appeals for the Second Circuit. State-owned land adjoined a United States Air Force facility. At the time of condemnation, the land was used as a landing approach by the adjacent air field pursuant to existing federal easements. However, ownership in fee was deemed necessary. The base value of the land, before any depreciation due to the easements, was higher in residential use than it was in its use by the state for park purposes. However, the easements virtually precluded residential use and made the land almost valueless for that purpose. But the easements did not interfere so greatly with park use, and for that use the land apparently retained considerable value. Thus, the condemning authority was in the unusual position of favoring the land's highest and best use as the basis for an award, since the cost of acquisition would be less by reason of the existing federal easements. The court held that value of the land could not be based on its present use for park purposes, because no evidence was introduced showing that this use was also the highest and best use. Indeed, the state's own evidence of value disputed its contention and supported the position of the condemning authority that the best use was residential. The court ruled that since the easements had so completely depreciated the land's value for this best use, the compensation now allowable to the state for its land would be limited to the remaining value of the land for residential purposes.

In *Re Omaha Public Power District* is another decision similar in impact to *Jones Beach*. The Omaha Public Power District sought to condemn an easement for a transmission line. Only a corner of the land was to be traversed by the line, and less than half an acre was to be taken for the Power District's right-of-way. The trial court instructed the jury to consider any use to which the land was adapted, and for which it might be used either then or later, having regard to what "may reasonably be expected in the future." On appeal, the Supreme Court of Nebraska held this instruction constituted prejudicial error, since it failed to limit the future uses which the jury could consider. According to the appellate court, "the time element is an important one and it must be limited to the immediate future."

In *Southern Amusement Company v. United States*, the federal government instituted condemnation proceedings against a tract of land contiguous to another tract of land on which a drive-in theater was located. At the time of condemnation, the two parcels—although under the same ownership—were not complementary to each other either in existing or contemplated use. Nevertheless, at the trial, the corporation which owned the property attempted to introduce evidence that as a result of the condemnation, it would be unable in the future to enlarge the existing drive-in theater so as to make it comparable in size to the norm in the trade. On appeal, the trial court's refusal to admit the proffered evidence was challenged. The court of appeals, in affirming, held that the proffered evidence was merely a specula-

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1. 255 F.2d 329 (2d Cir. 1958).
2. 168 Neb. 120, 95 N.W.2d 209 (1959).
3. Id. at 124, 95 N.W.2d at 213.
4. 265 F.2d 34 (5th Cir. 1959).
tive estimate of what the theater would bring on the open market if offered for sale with the extra acreage—that acreage being the tract which was being condemned—in contrast to its value without the same acreage.

This case calls to mind the following hypothetical situation. Assume that condemnation is proposed of an urban tract of land zoned for single-family dwellings on one-acre plots. The condemning authority proposes to utilize the tract, presently lying fallow and undeveloped, for a public housing project in which high-rise structures and attached housing will be built. The private owners had not, previous to the condemnation proceeding, evidenced any intent to develop the land pursuant to existing zoning, let alone develop it for attached dwellings or apartments after appropriate action to obtain rezoning. Assume further that the tract is contiguous to a fully-developed attached housing urban area, and that the purpose of zoning this area for single-family residences, which includes the condemned tract, evidently was to insure a high-quality future residential development. Then, should the owner be permitted to present evidence that the highest and best use of the land would be other than that presently permitted by the applicable zoning regulations?\(^\text{1}\)

No meaningful contention can be made that the private owner should be restricted to compensation commensurate with the instant land use—namely, undeveloped and fallow property without housing and without agricultural value because of its size and location. Evidence of prospective use is clearly a proper matter to consider in determining value; and condemning authorities, in cases like the hypothetical one, have considered prospective use in determining the value of the tract with regard to the financial feasibility of the proposed project. But the question remains—where is the proper line of demarcation for future uses?

Because the condemned tract is contiguous to a fully-developed urban area, its potential residential use is properly considered. However, effective zoning restricts its residential use to single-family dwellings on one-acre plots. It would be most unlikely that the owner could obtain a requisite zoning variance enabling his potential development of attached housing. The condemning authority, on the other hand, proposes construction of this very type of housing; and its program will render it more difficult for landowners to develop any nearby property consistent with the existing single-family zoning classification. Consequently, in the future, it is more probable that owners adjacent to the condemned property will succeed in obtaining the requisite variances for construction of attached housing—and this, in turn, will tend to increase the values of the adjacent lands.

Both the government and the individual are placed in anomalous positions. If this is the only tract taken, other owners in the area will benefit by the resulting increase in property values. However, if the tract is not taken and no other is substituted, neither this owner nor any other would reap such a benefit. In other words, if the government should not construct this public housing at all, the owner has, at

\(^{1}\) At first blush, this hypothetical case is similar to *City of Wichita v. Fitch*. However, it differs in that in the hypothetical case, no zoning had been requested or denied.
best, a slight chance to gain approval of attached housing that will increase his land values—so slight, in fact, that its remoteness is clear. Thus, solely by reason of government action, the cost of condemnation would be increased if valuation were based on this prospective, more valuable use.

It would not seem proper to impose a penalty upon the condemning authority for government action laudable in purpose and beneficial to all. In such circumstances, attached residences should not be a proper anticipatory use. The private owner, nevertheless, obtains the full value to which he is entitled. The fact that other property owners ultimately may benefit is immaterial, for they do not benefit at his expense. Indeed, only if this owner can persuade the condemning authority to choose another tract in this area instead of his, could he in any way expect to be the recipient of this benefit. Therefore, the anticipatory use should be held too remote as a matter of law.

Using this analysis as a springboard, we may profitably return to the decisions previously cited. In City of Wichita v. Fitch, the situation is much the same as that in the hypothetical case. It seems clear that holding the future use not to be remote is unjustifiable. Moreover, in Fitch, the private owner’s application for a requisite zoning variance had been denied. In Kentucky Department of Highways v. Wilson, while the award was exorbitant and based on an erroneous determination that the prospective use was not remote, there was some evidence which justified this use as a proper basis for valuation. Conversely, in Southern Amusement Company v. United States, the court may have unduly restricted the landowner. At least from a mere reading of the court’s opinion, it does seem that some of the evidence which was offered but excluded was relevant to prove requisite intent to make the highest and best use of the land condemned.

Very few opinions display that depth of analysis necessary for an orderly determination of whether a particular future use is remote. This is a fault which cannot be cured by legislatures; it is for the judiciary to respond to the demand for thinking in depth in order to solve this admittedly difficult problem. And once this judicial responsibility is discharged, not only will the individual be assured that he will receive his just due, but government will be more able to project with reasonable certainty outlays needed in prospective projects.

13 If a decision is to be made that a future use is too remote for proper consideration, the only effective agency to assume this responsibility is the court itself. Remoteness must be decided by the judge as a matter of law. To admit all evidence subject to a limiting jury restriction is futile.

14 The only justification for the decision in Fitch that could be presented does not appear in the reports. If the zoning request by the private owner had been denied because of the announced intention of the condemning authority to take over the land, Fitch would stand on a better footing than the hypothetical. This is so because the application for the variance would be some proof that the owner had reasonable prospects for this anticipated use.

15 See note 5 supra.

16 See note 10 supra.
B. Interest on the Award

Commonly, appreciable delays occur between the time of the taking and the payment of compensation. Most frequently delay is occasioned because the private owner contests the amount of compensation due. But the right to question *ex parte* property valuation by government is basic in our society. No penalty, therefore, should be or is levied on the individual. Additional compensation is proper for the resulting delay in receipt of compensation. Of course, further expense is levied upon the condemning authority by reason of these interest charges. Indeed, protracted litigation frequently results in substantial land cost increases, on which huge interest payments must be made.

Legislative reaction to high condemnation costs, in part due to interest charges, has occasioned widespread action. Some jurisdictions enacted comprehensive quick-taking procedures with depository provisions and thereby averted much of the interest payments theretofore extracted from government. Other jurisdictions have more recently and more restrictively enacted depository provisions. Nevertheless, many problems remain, although, perhaps, they are not quite so crucial.

In *State v. Fisher*, the New Jersey Highway Department had acquired a tract of land in 1940 pursuant to an immediate-taking procedure. However, not until 1956 did the state institute condemnation proceedings. The initial award fixed compensation at a figure which "included therein use by the State." An appeal was taken by the landowners to compel the payment of interest on the award from the date of the actual taking until commencement of condemnation proceedings. The court, in denying relief, held that since the award included an amount for use by the state, an award of interest would be improper because it would grant a double allowance for the owners' deprivation.

Obviously, an award including both the value of the use of the property by the condemning authority during the interim period and interest for the deprivation to the private owner of the basic compensation award is, at least, double compensation. However, that conclusion in no way serves as a justification for the result reached in *Fisher*, for the court permitted an award seemingly commensurate with the value of the governmental use of the property. Yet, the loss occurs to the owner. And the loss is not in regard to the deprivation of his use of the property pending payment of compensation, but rather is in regard to the delay in his receipt of the proper compensation. It, therefore, is a pure monetary investment loss. Indeed, consideration of the value of the land use after the taking and pending payment to the owner—whether use by the condemning authority or hypothesized use by the owner—is totally irrelevant.

Most courts recognize the obvious propriety of considering solely the loss of

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20 Id. at 279, 148 A.2d at 739.
interest. In *De Bruhl v. State Highway & Pub. Works Commission*, the Supreme Court of North Carolina declared that property owners are entitled to an award including interest at the legal rate of six per cent from the date of the taking. However, the impact of this rigid ruling leaves much to be desired. The legal rate, being static, more often than not fails adequately to reflect the amount the individual lost by not having available for investment an amount of money equivalent to the basic value of the property taken. On the other hand, the commercial rate of interest which prevailed at the time of the taking does seem truly reflective of the loss. Of course, if it is utilized, an additional burden, that of computation, is placed upon the court, but that factor should not be determinative.

A recent decision by the Supreme Court of Pennsylvania may present a solution of striking practicality. The state had condemned land for highway purposes; and at the trial, it had requested a jury instruction that an award might be made on any rate of interest and not necessarily the legal rate. The trial court denied this instruction, and an award was made containing interest at the legal rate of six per cent. On appeal, it was contended that the refusal of the lower court so to instruct the jury was prejudicial error. The Supreme Court held that the legal rate of interest was not the unalterable rule in condemnation awards and, further, that an award was proper if based on the commercial rate of interest. However, there exists what amounts to a presumption that the legal rate is proper, although any party can present evidence that an interest award should be made at another rate. Nevertheless, the burden is on the proponent to prove that the legal rate is not reflective of true loss. As a result, unless an evidentiary contest arises, the court is unencumbered in its determination of the proper interest on the basic award.

C. Severance Damages: Single Ownership of Two or More Parcels of Land

In principle, the measure of damages when only a portion of a single tract is condemned is the difference in its value before and after acquisition. However, often the right to severance damages arises in the context of a question whether an owner of two or more distinct tracts of land is entitled to compensation for damages to the remaining property. Theoretically, if a unity of use exists between the two or more parcels, the owner should be entitled to severance damages to the same extent that he would if a portion of a single tract had been taken. Nevertheless, several recent decisions on this issue reveal a lack of uniformity in judicial analysis. Moreover,

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32 The Supreme Court of North Carolina, in Winston-Salem v. C. H. Wells, 249 N.C. 148, 105 S.E.2d 435 (1958), further clarified the right of a landowner to six per cent on the award from the date of the taking.
33 Waugh v. Commonwealth, 394 Pa. 166, 346 A.2d 297 (1958). In this decision, the court held that the state did not present sufficient evidence to justify the jury’s considering other than the legal rate.
34 A further criticism common to *Fisher* and *Waugh* is that the award did not specifically determine the amount of interest. Rather, there was a general award which included in *Waugh* a legal rate of interest and in *Fisher* no interest, but rather an amount commensurate with the state’s use of the property. No hardship will be caused by specific findings of the amount of the basic award and the interest thereon.
they portray oftentimes muddled thinking regarding what constitutes a unity of use and who should make that determination.

In *Ives v. Kansas Turnpike Authority*, it was presented with the issue of whether severance damages were allowable to an owner of two rural tracts of land lying one mile apart. The owners had used the two tracts as a unit for more than seventeen years prior to the condemnation. But as a result of the taking by the turnpike authority, unified use could no longer be continued. The court, while acknowledging that the distance between the two tracts was an important factor, held that even where two or more tracts of land under single ownership are not contiguous or physically connected, they can, nevertheless, be considered as a unit for the purpose of assessing damages, provided the uses to which the tracts have been applied are so inseparably connected that the taking of a portion of one, in fact, injures the other.

The Kansas Supreme Court, in *Ives v. Kansas Turnpike Authority*, held that noncontiguous tracts of land in single ownership constituted one distinct parcel of land for the purpose of assessing damages if both parcels were subject to a coordinated and uniform use.

However, the Court of Appeals for the Ninth Circuit seems to have imposed an additional test to determine a unity of use. *Cole Investment Co. v. United States* concerned two tracts of land, one of twenty acres and the other of one hundred acres, the latter being the one condemned. On the smaller tract, the owners had dug a well, laid some pipe, and installed a pump for the purpose of irrigating the other land. The court, affirming the denial of severance damages with respect to the smaller tract, held that there must have been, in fact, a unity of use of the land taken and the land remaining and that the market value of the remaining land must have diminished as a result of the condemnation. Here, since the well had not been completed at the time of condemnation—although extensive construction had commenced and costs therefor had been experienced—there was only a planned unity of use. Further, since the owner had not presented evidence of a decrease in market value, but only loss of business opportunity, he had not sustained his burden.

This decision is, of course, distinguishable from both the *Kansas Turnpike Authority* and the *State Highway Commission* cases. In *Cole Investment Co.*, the court was concerned with a use which at the time of condemnation was not in sustained operation, whereas the other cases dealt with long-standing coordinated operations of both tracts. In *State Highway Commission v. Bloom* and in *Ives v. Kansas Turnpike Authority*, the language used by the courts varied greatly in describing “unity of use.” However, the difference does not seem to be material or to represent a real divergence of opinion. Neither is harsh to the claimant or to the condemning authority. And each within its factual context seems correct.
Furthermore, the pronouncement of the court in *Cole Investment Co.* that a mere planned unity of use should not be considered does not seem erroneous. However, the court seems to have erred in stating there was a second, purportedly independent test—whether the market value of the remaining land has been diminished by the taking. And the application by the court of its criteria to the facts of the case was unduly harsh to the private owner. The Cole Investment Company not only had planned a well, but also it had commenced construction and experienced substantial expenses in pursuit thereof prior to the time of the condemnation. On this basis, the pronouncement by this Court of Appeals leaves much to be desired, since the owner had suffered a recognizable loss.

All of these "severance" cases concerned rural tracts of land. The same problem, however, does arise in an urban context. An interesting situation was presented to the Supreme Court of Pennsylvania in *In re Elgart's Appeal* with regard to distinctly urban tracts of land. Two tracts of land in Philadelphia were contiguous and fronted on a commercial street. One of them contained a multiple-family dwelling, while the other was unimproved. The undeveloped tract was condemned, and the owner appealed from a decision of the trial court which denied him severance damages for the remaining tract because there was no unity of use between the two tracts. The court rejected the unity-of-use test for contiguous properties and emphasized that "there is a recognized economical advantage in larger real estate holdings. Substantial sums are paid by developers for the acquisition of larger plots of land because the advantage of contiguous lots is always reflected by a larger square foot value." The contiguous plots involved in *Elgart* were in a commercially zoned area. Further, there was evidence offered at the trial that an increase in size of such a tract increased value more than proportionately. Thus, it seems that the Pennsylvania Supreme Court merely reflected obvious economic facts of life when it permitted severance damages to the owner. Since urban property was involved, it is not entirely clear that the rejection of the unity-of-use test would be extended to contiguous rural tracts. The court made no explicit distinction along these lines.

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**395 Pa. 343, 149 A.2d 641 (1959).**

**39 Id. at 347, 149 A.2d at 643.**

**It must be remembered that the unity-of-use doctrine is a "two-way street." Many times its invocation can only benefit the private owner. However, a recent Delaware case shows the converse, and its utilization was to the condemnee's marked disadvantage. In *0.089 of an Acre of Land v. State*, 145 A.2d 76 (Del. 1958), a portion of a single tract of land fronting on a highway was condemned. On that portion of the property not condemned, the owners operated a motel. The portion condemned was undeveloped. At the trial, the private owners testified that they had not built on the condemned portion because of a desire to utilize it in the future for commercial purposes such as a gasoline station. However, witnesses for the condemning authority testified that the condemned portion was not desirable for commercial purposes because such use would have an adverse effect on the value of the uncondemned portion as it was then being used. The private owners appealed from an award, their basis being a refusal of the trial court to instruct the jury to consider the property as two distinct parcels. The Supreme Court of Delaware, in affirming the lower court, held that compensation could not be allowed the landowner on any unimaginable, unnatural, or theoretical division of the property when it was not so divided.**
D. Impairment of Access

Again, there is a distinct absence of decisional uniformity as to whether severance damages are permissible for an impairment of access. The problem usually arises in this context: A commercial property fronts on a highway which either is changed to a limited access highway or is left untouched, while parallel to it a new super-highway is constructed which diverts much of the traffic theretofore using the older road. In both instances, the abutting land owner suffers through a reduction of traffic. In recent years, the courts have tended to hold that an abutting land owner does not have a property right or interest whereby the state is compelled to maintain either a road or its traffic under a threat of damages. Nevertheless, the marked divergence in judicial view is sharply demonstrated by two recent decisions, one in Florida and the other in Kansas.

In *Riddle v. State Highway Commission,* the Supreme Court of Kansas was faced with a claim for damages by a motel owner who abutted on a highway, the traffic of which had been diverted to a new limited access highway. The court held that, although an impairment of access is not an independent basis for assessing damages, it is correct for a jury, in determining the value of property taken, to consider this element because it would affect the market value which the owner could realize in a private sale. Since a portion of the motel owner's property was being condemned, he was entitled to impairment of access damages.

In contrast, a Florida District Court of Appeal has recently emphasized, when considering whether a land owner, part of whose property has been condemned, is entitled to compensation for traffic diversion, that the state has no duty to any person to send public traffic past his door. Whether or not the abutting owner has any of his land condemned for the new highway is immaterial. In no event should he be entitled to impairment of access damages.

It is difficult to justify the distinction drawn by the Supreme Court of Kansas between private owners whose land has been condemned and those whose land has not been taken. A further question to be considered in this context is whether a property owner, a portion of whose land is condemned, should be compensated because the value of the remaining tract will be further reduced, since the project to be constructed represents a “hazard.”

Many recent court decisions have dealt with claims for severance damages based on the fear or anxiety induced by the nature of the public use for which a portion of the land has been condemned. Such hazardous uses include gas transmission lines, high tension lines, guided missile sites, and others.

The decided trend of the courts when dealing with this problem has been to permit an award of severance damages. The reasoning of the Supreme Court of

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2. *Jahoda v. State Road Dept.*, 106 So.2d 870 (Fla. 1958).
Indiana in *Northern Indiana Public Service Company v. Darling* best summarizes the judicial thinking on this point. The issue in that case concerned the fear engendered by the laying of a gas transmission line. Evidence was adduced at trial that during the winter when the ground was frozen, if a leak in the gas line developed, it could travel through the ground and endanger the improvements on the remaining tract. The court considered this fear judicially cognizable and compensable.

However, there is a pronounced judicial reluctance to permit severance damages for an unproved or remote fear. The fact that the condemned property may at some future time be used for a purpose causing anxiety is not relevant. Further, the courts have usually hesitated to classify a project as a "hazard" without a clear showing of immediate danger.

The policy behind the decisions dealing with fear and anxiety should apply with equal force to the impairment of access cases. Government should not be specially burdened because of what it does in the public interest. Owners of property adjoining that taken and used by the government must normally accept the consequences which are general to all. And if a general economic loss is suffered because of the nature of the government improvement, no compensation should be awarded on that account specially. When the nature of the project imposes a peculiar burden upon the individual, compensation may be proper. But without a clear showing of specific danger or harm—not merely a general economic disadvantage—compensation should not be allowed.

E. Reimbursement of Attorney Fees

Without express legislative grants, attorney fees are made no part of an award in condemnation proceedings. And only a few states have enacted statutory provisions permitting the reimbursement of attorney fees by the condemnor. Within the states permitting such awards, several problems have arisen. Should the determination of the amount of the award for attorney fees be a matter of law or of fact? Are expert witness fees to be included in the determination of the proper amount of legal costs expended? Since these problems are not of broad scope, extensive discussion here seems unwarranted.

However, the fact that some jurisdictions have enacted legislation providing for the reimbursement of attorney fees brings to the fore once again the basic propriety of the inclusion of this cost as a part of the award in condemnation proceedings. Since we are here dealing with the issue of the propriety of an award intended

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18 *154 N.E.2d 881* (Ind. 1958).
20 In United States v. Chase, *supra* note 37, the court, while permitting damages because of a guided missile site, restricted the damages so as not to include severance damages by reason of barracks to be constructed on the land.
21 See note 3 *supra*.
22 *Seban v. Dade County*, 102 So.2d 706 (Fla. 1958).
meaningfully to reimburse legal costs expended by private owners, it is necessary to recognize that the granting thereof may materially increase the total cost of acquisition.

To place our analysis in a better perspective, it seems best to utilize the hypothetical case. As will hereafter be discussed, condemning authorities rarely if ever attempt to acquire property by court action without first directly negotiating with its owner for amicable purchase. Assume that the X Redevelopment Authority desires to acquire ten square municipal blocks in X City for a project. The area sought is residential and, for the most part, in a blighted condition. The Authority's appraisers value the individual parcels, and then the owners are contacted. Some individuals—foreseeing a losing and costly battle if they should protest—come to terms quickly. However, the fire is in the air once the proposed project is made public. Local real estate agents hastily contact many property owners and become their representatives. To a lesser extent, some individuals retain attorneys to represent them in the negotiations.

Normally, whether the representative is an attorney or real estate agent, the fee arrangement is one of two kinds. First, it may be a percentage, say ten per cent, of the final acquisition price, regardless of whether counsel is successful in obtaining a more advantageous valuation. Secondly, it may be a percentage, normally as high as fifty per cent, of the difference between the initial offering price and the final acquisition price.

Because, however, X Redevelopment Authority is cognizant not only that amicable purchase is a matter of bargaining, but also that many of the individuals will be represented by persons earning a fee, it has considerable incentive to make its first offer at less than the true valuation of the property. As a result, those condemnees who are unrepresented are placed at a marked disadvantage. They are offered less than just compensation for their property by the Authority, and they are without the tools to represent themselves meaningfully. In this event, to obtain just compensation, they must retain counsel. Even then, because of the counsel fee involved, either the condemnee will receive a net award constituting less than just compensation or the Authority will pay more than just compensation in its gross award.

The probable effect of permitting the recovery of legal costs is to foster litigation in condemnation. However, one must recognize that even without reimbursement of legal costs, substantial litigation does occur in the first instance. For example, in Philadelphia, Boards of View determine value in the great majority of governmental takings. The only new litigation that will be fostered is that which may occur with those who would not have formally contested at the outset the condemnor's amicable offer. However, continuation of litigation by the appeal of Boards of View determinations is less likely when legal costs are unreimbursed. Absent such reimbursement, condemnee's counsel normally charge on a percentage basis. And they are instrumental in terminating the judicial conflict, for litigation soon reaches—to their pocketbooks, at least—the point of diminishing return.
Therefore, upon analysis, it seems that a determination of the propriety of reimbursing legal fees depends upon the relative balance between two contrasting and yet crucial factors. The first is the importance to society of assuring that those few individuals who normally would not obtain counsel will receive a net award commensurate with just compensation. In contrast to this, is the importance of coercive factors preventing unduly continued litigation. No attempt will be made here to choose between these considerations.

II

INDIRECT OUTLAYS

In connection with a taking by eminent domain, the individual, both as the representative for the general public and in his own right, can effectively question not only the quantum of a basic condemnation award, but also the propriety and suitability of a particular project. However, judicial condemnation procedures, as they exist today, are best suited—and, indeed, designed—to provide a forum in which a determination of the amount of compensation can be made. At best, they are imperfect for other problems. There exist other forums, initially administrative but with judicial review, in which the individual can challenge the propriety of the taking or otherwise attack it.

However, condemning authorities are faced with a major problem. The traditional condemnation procedures can increase the cost of a project appreciably through delay and increased legal costs. Remedial legislation, in some instances, is the only solution. But in others, those where the responsibility rests with the judiciary, what is needed is a reappraisal by the courts of their role. Our task in this article is not to review the entire field. Rather, it is to analyze a few special problems with which many recent decisions have been concerned.

A. Prior Negotiations

It is only natural that condemning authorities should normally attempt to acquire the property involved through direct negotiations. Obviation of lengthy and costly judicial condemnation proceedings is obviously beneficial to all concerned. Nevertheless, it sometimes occurs that a condemning authority can work most efficiently if it utilizes the judicial process without negotiating for amicable purchase. Some states, however, have enacted legislation requiring the condemning authority to negotiate a purchase before instituting condemnation proceedings. In these jurisdictions, a problem arises—whether negotiations for purchase are an inflexible prerequisite to condemnation.

In Lookholder v. Zeigler, the Supreme Court of Michigan was confronted with legislation requiring negotiations not only with property owners, but also with lessees. The State Highway Commission, after determining the advisability of new construction, had negotiated with an owner offering him a price which included the

value of the leasehold. However, no negotiations were attempted with his lessees, the justification of this omission being the need for summary acquisitive action and the belief that the lessees could then negotiate with the owner for an amicable settlement. On appeal, the Michigan Supreme Court held that the condemnation proceedings were invalid.

Most leases contain a provision that, in the event of condemnation, no liability in favor of the lessee shall exist against the lessor. Further, what benefits one will not always benefit the other. Indeed, upon the assumption that each has a distinct property interest, the lessor would be in the fortuitous position of being able to sacrifice the lessee for his own (lessor’s) advantage. Therefore, for the lessee to be dependent on the lessor in regard to negotiating is most inadequate. The tenant should be allowed to negotiate with, and to proceed directly against, the condemning authority. For this reason, the interpretation by the Supreme Court of Michigan that the state’s prior negotiations requirement includes negotiations with a lessee seems justified.

B. Right to Appeal Condemnation Awards

Several recent decisions concern themselves with the basic, and as yet unsettled, question of the effect that payment of a preliminary condemnation award should have on the right of either the condemning authority or the condemnee to appeal. This problem has, to some degree, been magnified by the utilization of quick-taking procedures, where the condemning authority has the right to take immediate possession of land upon deposit in court of estimated damages. Under this procedure, the condemnee has a fund deposited in court by the condemnor which may be readily available to him.

The Supreme Court of Missouri in a recent case determined the proper scope of appeal by a condemnee who had accepted the initial condemnation award. The State Highway Commission had condemned an entire parcel of land in connection with road construction. The lower court awarded damages, which were paid into court and subsequently withdrawn by the condemnee. Thereafter, on appeal, the owner challenged the validity of the condemnation proceedings as a whole. The court held that since the land owner had accepted the award, he was estopped from questioning any matters except those relating to the amount of damages.

On the other hand, Woodside v. City of Atlanta was concerned with what, if any, prerequisites existed to the condemning authority’s right to prosecute an appeal from an allegedly excessive condemnation award by its assessors. The Georgia Supreme Court held that a tender of payment to the condemnees or a deposit in court was a mandatory prerequisite to the condemnor’s right to appeal. The condemning authority could not refuse to pay the amount awarded by the assessors and at the same time insist upon its right to take the property.

One step removed from the Woodside decision are recent rulings by the Supreme

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43 State v. Howald, 315 S.W.2d 786 (Mo. 1958).
Courts of Arizona and Nevada, both of which concern the question of whether the condemning authority can appeal a jury determination of damages in a condemnation suit, even though it took possession and paid the amount of the judgment.

In *State v. Jay Six Cattle Company*, the condemning authority had taken possession of land pursuant to a quick-taking statute under which it could apply for immediate possession after a hearing on necessity and probable damages. Upon a court deposit of double the probable damages, possession was awarded. Subsequently, a jury trial was conducted on the issue of damages and a judgment entered, which the state paid into court. Contending that the award was excessive, the condemnor filed its notice of appeal. Despite this appeal, the trial court permitted the condemnees to withdraw the deposit in full satisfaction of the judgment. On appeal, the Supreme Court of Arizona refused to sanction the condemnees' contention that the state, by tendering the judgment into court and taking possession of the land, waived its rights to appeal. The court reasoned that to hold that payment constituted a waiver would mean, in effect, that, whenever a condemning authority sought use of property before the conclusion of an appeal, the condemnee would gain a fixed right to a possibly unjust and excessive award.

In *State v. Second Judicial District Court*, unlike *Jay Six Cattle Company*, the condemning authority, being bound by a similar statute, contended at trial that it should not be required to deposit the amount of compensation adjudged if it took an appeal. The condemning authority took the position that to do so would waive its right of appeal if the condemnee withdrew the deposit in satisfaction of the judgment. The Supreme Court of Nevada, citing *Jay Six Cattle Company*, ruled, however, that its quick-taking statute had a similar purport to the Arizona statute with regard to preservation of the condemning authority's right to appeal. Therefore, the condemnor would not be prejudiced by tender of the amount of the judgment awarded by the trial court. The court held that such a tender is a prerequisite to the condemning authority's right to appeal on the question of damages. Of course, as the opinion acknowledges, the victory on appeal may be less meaningful if the property owner has squandered the award in the interval.

Our concern is not with the situation where a condemning authority has initially determined property valuation for the purpose of amicable negotiations with the condemnee. Instead, it is with the situation where, negotiated purchase failing, the initial determination of proper compensation is accomplished by independent bodies distinct in function and control from condemnors. At this point, both parties should be afforded the right to question the award further.

However, mere recognition that government, as well as the individual, has the right to appeal does not resolve the complicated question whether the condemning authority should lose this right by taking possession or by provisionally paying the

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45 *85 Ariz. 220, 335 P.2d 799 (1959).*
46 *337 P.2d 274 (Nev. 1959).*
47 *E.g., Boards of View appointed by a court of competent jurisdiction in Pennsylvania. See note 18 supra.*
amount of the award, or whether the condemnee forsakes all by accepting the initial award. The condemnee may have lost possession of his property. Without at least receipt of provisional compensation, his burden is extreme. Similarly, to the condemning authority, immediate possession oftmes is crucial. Delay may not only drastically increase costs, but may prove an insurmountable obstacle to the success of many governmental projects.

Quick-taking statutes normally require a deposit with the court. Similarly, in their absence, the condemnor may be required to pay the amount of the initial award to the condemnee in order to take immediate possession. It is difficult to justify withdrawing the condemnor's right to appeal the compensation award because of its practical necessity for immediate possession. The condemnee suffers no harm, for he has access to the funds so deposited under quick-taking statutes, or to the judgment in traditional condemnation proceedings. Even if, under the applicable procedure, the condemnee cannot obtain payment of the initial award prior to disposition of an appeal, no basis exists to place the condemnor in the dilemma of either paying an excessive award or foregoing its right to immediate possession. Of course, in the latter instance, the condemnee is deprived of both his property and immediate compensation, but the fault lies not with the condemning authority.

The Woodside case, which ruled that a tender of payment to the condemnees or a deposit in court was a mandatory prerequisite to the condemnor's right of appeal, creates special problems. There the initial award was made by three assessors, rather than by a jury.

To require deposit of an award by the condemnor at this early a stage in the proceedings—with the concomitant possibility that the money may be drawn down and squandered—may give too much weight to a relatively uninformed, and sometimes ill-considered, determination made without a judge's direct supervision. Perhaps, too, the funds of the condemnor might thereby be unduly tied up. Contrariwise, a ruling that a condemnor need never deposit money in court until final determination of appropriate compensation, while extremely favorable to public progress, unduly imposes upon the individual. A proper line of demarcation, therefore, seems to be at the point where the initial jury determination of compensation is made, for it is at this point that we first have a determining body which most representatively reflects individual interests and is operating fully within a framework of procedural safeguards.

In State v. Howald, the Supreme Court of Missouri determined that receipt of compensation by the condemnee forecloses his right to contest other than the quantum of the award. No matter if the issue is the broad constitutionality of the taking, its propriety, or the amount of compensation. The condemnee is in the same position, for he has been deprived of possession of his property. Of course, it might have been possible for the condemnee to contest other than the amount of condemna-

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48 See note 44 supra.
49 See note 43 supra.
tion during prior proceedings. However, the failure of the condemnee to raise such a question at that point should not now foreclose him, for as noted hereafter in this article, individuals have but a tenuous right to question at the administrative level either the constitutionality of a particular project or its propriety. Receipt of compensation should not be determinative of the issues that the condemnee can raise in protest, certainly if he demonstrates his willingness and ability to repay the money in the event of a favorable decision.

C. Finality of Agency Determinations

Most legislatures have not specified either the scope or the manner in which a court may review agency determinations. In some jurisdictions, administrative procedure acts govern the manner in which the agency makes its determinations and the manner of individual protests. Of course, where there is specific legislation or an applicable procedure act, many problems are resolved. However, typical of the situation in a majority of states is that which arose in Connecticut. In Bahr Corporation v. O'Brien, a redevelopment agency had decided after public hearings to condemn land including that which was owned by the plaintiff, who sought to enjoin action by the agency to take his land. The land owner protested the agency's decision as being unreasonable, an abuse of power, and a taking of property for a private use rather than a public one. The Connecticut Redevelopment Act did not specifically provide the scope of review for agency actions. Further, neither the state administrative procedure act nor its rules of court specified the applicable procedure and scope of review. On appeal, it was held that the plaintiff was entitled to a judicial review whether the agency determination was unreasonable, in bad faith, or an abuse of its power. He was not required to allege or prove any fraud by members of the agency.

On the surface, it might appear that no justification can be advanced for this ruling. Its obvious result is a wasteful delay of agency action. Yet, too often existing administrative procedures do not adequately heed individual interests; and property owners are not afforded a fair opportunity to challenge the propriety of a proposed project. The right to appear at a public hearing conducted by the agency is often futile, for the property owner does not have adequate time to prepare his case. What is really needed is an adequate administrative procedure. For instance, the local agency should be required to make specific findings to be incorporated in the record; all information presented at the public hearings and all other factors which the agency has considered in making its decision that an area is blighted and requires renewal should be presented to the public. Furthermore, adequate time should be afforded property owners so that they may prepare their cases. Thus, the Bahr de-

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50 See note and text at note 51 infra.
51 146 Conn. 237, 149 A.2d 691 (1959).
cision must be read against a background of legislative failure in Connecticut to provide sufficient administrative safeguards.

CONCLUSION

No attempt has here been made to set forth all the problems that exist in the field of eminent domain. Such a task is, indeed, impossible of accomplishment in other than a complete text—adequate today but, nevertheless, obsolete tomorrow. However, the problems touched upon typify some of the areas in which corrective action by courts and legislatures is necessary. Continued delay in taking such corrective action will threaten many individual governmental projects with failure. Conversely, intelligent and timely remedial action will further the cause of dynamic—and good—government.