LEGISLATION

EMINENT DOMAIN—USE OF THE PENNSYLVANIA EMINENT DOMAIN CODE OF 1964 TO PROVIDE INITIAL COMMON PLEAS JURISDICTION IN A LIMITED NUMBER OF ZONING CASES

Landowner bought thirteen acres of land in Hickory Township in order to build a supermarket. For three years he has used the land as a golf driving range. The land, suitable only for business purposes, was zoned for business until July 1, 1964, when the township rezoned it as R-2 (residential) in order to keep the business district confined to its present area. Landowner is trapped: to make his land suitable for residential use would involve prohibitive cost, and, since the housing built after such improvement would have to be low-cost, it would not bring enough profit to cover the expense of necessary improvements. Landowner not only has lost his investment, but also must continue to pay taxes on the land. Landowner faces the prospect of protracted litigation to try to salvage his property rights.

This hypothetical situation presents an example of a zoning ordinance which has resulted in a constitutionally-prohibited taking of property without just compensation.[1] Both the police power, under which the zoning ordinance was passed, and the power of eminent domain are adjuncts of the sovereignty of the state.[2] The use of both is limited by the due process clause to actions which are for the health, safety, or general welfare of the community.[3] They are differentiated, however, by the constitutional[4]

[1] This hypothetical fact situation is substantially that found in Garbev Zoning Case, 385 Pa. 328, 122 A.2d 682 (1956). The court in this instance held the ordinance invalid because it violated the Pennsylvania constitution by taking land without just compensation. PA. CONST. art. I, § 10.

[2] The citizen whose use of his property is curtailed by an exercise of the police power can be said to be compensated by his share in the public good that such restrictions bring about; the restrictions are thus self-compensating. According to this view, the constitutional compensation requirement represents a determination by the framers that the individual's share of the public good justifies only a limited amount of restriction on his rights. In other words, if property ownership is pictured as a bundle of sticks (rights), the framers decided that the retention of a certain number of those sticks is a basic right upon which the government might not encroach without paying compensation over and above the mutual benefit which the restrictions themselves provide.

[3] See Berman v. Parker, 348 U.S. 26 (1954) (eminent domain); Andress v. Zoning Bd. of Adjustment, 410 Pa. 77, 188 A.2d 709 (1963) (zoning).

[4] PA. CONST. art. I, § 10 ("nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured"); PA. CONST. art. XVI, § 8:

> Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.

The United States Supreme Court in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897), stated that the right to just compensation for property taken by state authority was one of the fundamental liberties included in the due process clause of the fourteenth amendment of the United States Constitution.

requirement that just compensation be paid whenever the state "takes" property,[5] *i.e.*, exercises the power of eminent domain. When the state exercises the police power with the unintended result of "taking" property, courts have generally voided the offending ordinance.[6] Rarely have courts reached the equally logical result of simply treating the ordinance as an exercise of the power of eminent domain and ordering just compensation, although this result would seem more desirable in many situations such as the present hypothetical.[7]

When government authority has been involved in a physical taking of land for which no compensation has been paid, the Pennsylvania courts have sometimes permitted the landowner to bring an inverse condemnation suit to recover compensation.[8] Pennsylvania courts have even allowed inverse condemnation suits involving only regulatory takings.[9] In *Sansom Street (Caplan's Appeal)*,[10] the City of Philadelphia had mapped a widening of Sansom Street and by ordinance had precluded the owners from developing the land to be used for this project until the project was actually undertaken. Caplan had property bordering on Sansom Street which became unusable because of the restriction. He brought an inverse condemnation suit for the appointment of viewers to assess damages. The trial court held that there had been no taking as defined by the Pennsylvania constitution because the ordinance did not provide for the actual widening of the street.[11] The supreme court reversed, stating that Caplan's land had been taken within the meaning of the Pennsylvania constitution. The court said that, in spite of the fact that there had been no physical invasion, there was no valid reason for distinguishing this case from one of outright seizure.

The regulatory-taking, inverse condemnation suits differ from the present situation, however, because the legislature has drawn a statutory

[5] See White's Appeal, 287 Pa. 259, 134 Atl. 409 (1926) (dictum). While the views stated in this case are not good law today, see Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958), the statement concerning the division between the power of eminent domain and the police power is still valid. See generally McCrady Case, 399 Pa. 586, 160 A.2d 715 (1960); Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).

[6] See, *e.g.*, Garbev Zoning Case, 385 Pa. 328, 122 A.2d 682 (1956); Baronoff v. Zoning Bd. of Adjustment, 385 Pa. 110, 122 A.2d 65 (1956); Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).

[7] If this result were reached, the taking authority need not be required to maintain and pay for the restriction. It might be permitted to revoke the condemnation and pay damages for the intervening time. See Reinbold v. Commonwealth, 319 Pa. 33, 179 Atl. 571 (1935).

[8] See Griggs v. Allegheny County, 402 Pa. 411, 168 A.2d 123, *rev'd on other grounds*, 369 U.S. 84 (1961). An inverse condemnation suit is one in which a property owner petitions the court to assess the compensation to which he is entitled because an entity with the power of eminent domain has taken his land. See generally Note, 1962 WASH. U.L.Q. 210, 232-36.

[9] In Griggs v. Allegheny County, *supra* note 8, at 414, 168 A.2d at 124, the court indicated that it made no distinction between physical and regulatory takings by citing a zoning case, Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), which involved only a regulatory taking.

[10] 293 Pa. 483, 143 Atl. 134 (1928).

[11] *In re* Widening of Sansom Street, 10 Pa. D. & C. 247 (C.P. Philadelphia County 1928).

line which separates zoning from other exercises of the police power. A landowner aggrieved by a zoning regulation must pursue a statutory appeal process before the common pleas courts can take jurisdiction.[12] Thus, to gain relief from what he believes is an unconstitutional taking of his property, Landowner must follow the procedure provided in the zoning code for second class townships by drawing up building plans or a subdivision plat and applying for a permit, then, on failure to get such a permit, appealing to the board of adjustment.[13] Various reasons are assigned for requiring exhaustion of these statutory remedies. First, the zoning board might grant relief, thus relieving Landowner from any taking, so the court should not have to hear the case until this relief is precluded. Second, trial of the usual zoning appeal in a court would be facilitated by the record of the proceedings before the board.[14] Finally, the tradition is that, since zoning is statutory, the remedy is exclusively one at law, and the law requires that the statutory procedures be followed.[15]

The board cannot decide whether or not a zoning ordinance constituted a taking and cannot void the ordinance;[16] it is restricted to granting variances. Therefore, landowners in a zoning-taking situation must have a reasonable possibility of obtaining a variance for the statutory appeal process to serve them any purpose. In the present hypothetical, the zoning board would be loath to grant Landowner a variance because of likely political opposition[17] and because such a large-scale variance might emasculate the zoning plan. Moreover, in some cases the emasculation might be so serious as effectively to void the ordinance, a remedy beyond the board's power.[18]

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[12] PA. STAT. ANN. tit. 53, § 67007 (Supp. 1963).

[13] Home Life Ins. Co. of America v. Board of Adjustment, 393 Pa. 447, 143 A.2d 21 (1958) (requiring application for permit); Jacobs v. Fetzer, 381 Pa. 262, 112 A.2d 356 (1955) (requiring appeal to board of adjustment). For an example of the delays which may be caused by this process, see the Easttown Township Zoning Cases: *In re* Appeal of Nat'l Land & Inv. Co., Appeal No. 78, Bd. of Adjustment of Easttown Township, Chester County, Pa., 1963; Nat'l Land & Inv. Co. Appeal, 32 Pa. D. & C.2d 426 (C.P. Chester County 1963); *In re* Appeal of Nat'l Land & Inv. Co., No. 21, C.P. Chester County, Pa., Jan. 1963; *In re* Appeal of Nat'l Land & Inv. Co., Appeal No. 78, Bd. of Adjustment of Easttown Township, Chester County, Pa., Jan. 24, 1964; Appeal of Nat'l Land & Inv. Co., 13 Chester 4 (C.P. Chester County, Pa., 1964).

[14] Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273-78 (1962); see Andress v. Zoning Bd. of Adjustment, 410 Pa. 77, 188 A.2d 709 (1963).

[15] See Barth v. Gorson, 383 Pa. 611, 119 A.2d 309 (1956).

[16] See Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958). The powers of the board of adjustment are listed in PA. STAT. ANN. tit. 53, § 67007 (Supp. 1963).

[17] *Cf.* Corsino v. Grover, 148 Conn. 299, 308, 170 A.2d 267, 271 (1961). Those who own homes in Hickory Township and who sponsored the zoning ordinance in question will fight to prevent Landowner from using his property for business purposes; the citizenry regards such use as tending to cause the disintegration of its community.

[18] See Catholic Cemeteries Ass'n Zoning Case, 379 Pa. 516, 109 A.2d 537 (1954). In Corsino v. Grover, *supra* note 17, the Connecticut Supreme Court recognized the futility of pursuing statutory remedies when the board did not have the power to grant the landowner any relief. Initial trial court jurisdiction was provided. *Accord*, Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 373, 167 N.E.2d 406, 408 (1960).

Lack of an adequate board remedy would not work such a severe hardship on Landowner if his statutory appeal could be perfected economically and in a short period, so he could quickly obtain a decision by the common pleas court.[19] However, the board, responding to an understandable desire to avoid a politically embarassing issue, may tend to delay Landowner to kill his enthusiasm for further appeal, using procedural pitfalls for this purpose.[20] What appears a relatively simple process can result in a seemingly endless period of stall and harassing tactics which result in loss of money and time.[21] The costs of statutory appeal fall on Landowner no matter what the court of common pleas decides.[22] In addition public funds which the board spends to support its position during the statutory appeal process are wasted if common pleas grants relief. The problem of inadequate means for protecting the interests of all parties in such a "taking" situation is clear.

The new Pennsylvania Eminent Domain Code[23] should remedy this situation by permitting initial common pleas jurisdiction in the zoning-taking cases. The code was intended to cover all condemnations,[24] and it provides: "If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers . . . ."[25] Thus the code follows

[19] PA. STAT. ANN. tit. 53, § 67007(i) (Supp. 1963); *cf.* Barth v. Gorson, 383 Pa. 611, 119 A.2d 309 (1956).

[20] See note 13 *supra*. See generally Dukeminier & Stapleton, *supra* note 14, at 273-78; McCarty, *Zoning and the Property Rights of Others*, 48 MASS. L.Q. 473 (1963); Van Dusen & Ryan, *Reduction of Zoning Litigation: Proposals*, 35 PA. B.A.Q. 25 (1964); Note, 103 U. PA. L. REV. 516, 523-29 (1955).

[21] *Compare* PA. STAT. ANN. tit. 53, § 67007 (Supp. 1963), *with* Eastman Township Zoning Cases, *supra* note 13. The board eventually will hear all of Landowner's claims, and board experts will present painstakingly prepared reports to rebut Landowner's evidence and to demonstrate that the claims are without merit because the ordinance is well within the meaning of the health, safety, and general welfare requirements. See *In re* Appeal of Nat'l Land & Inv. Co., No. 21, C.P. Chester County, Pa., Jan. 1963. In the first of this series of cases, in which the land company applied for a variance, the board held that the township's motion to quash was granted because the land company had failed to comply with a subdivision ordinance and therefore had no standing. This decision was appealed to the common pleas court where the board's decision was reversed, reargument at the insistence of the township failing to change the result. The board then heard the case on the merits and refused to grant a variance or to amend the ordinance because it was needed for the health, safety, and general welfare of the community. This decision was subsequently reversed by the court of common pleas which held that the zoning ordinance constituted a taking. Appeal of Nat'l Land & Inv. Co., 13 Chester 4 (C.P. Chester County, Pa., 1964).

[22] There is no provision for payment of costs in the zoning process unless gross negligence, bad faith, or malice can be demonstrated. See PA. STAT. ANN. tit. 53, § 67007 (1957).

[23] PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1964).

[24] See EMINENT DOMAIN LAW OF PENNSYLVANIA § 401, comment (Proposed Code 1963). When the code is taken as a whole, it is clear that the legislative intention was to include all condemnation cases. Section 1-201(1) states that "'condemn' means to take, injure or destroy private property by authority of law for a public purpose." A "condemnee" is defined by §1-201(2) as the "owner of a property interest taken, injured or destroyed . . . ." PA. STAT. ANN. tit. 26, § 1-201 (Supp. 1964). These definitions are paraphrased from the constitutional provisions dealing with eminent domain which have been applied to the zoning-taking situation. PA. CONST. art. XVI, § 8.

[25] PA. STAT. ANN. tit. 26, § 1-502(e) (Supp. 1964).

previous case law in permitting inverse condemnation actions in regulatory-taking cases.[26]

In addition to the fact that exhaustion of statutory remedies would be futile, another code provision's requirement that a condemnor pay damages, including costs and reasonable attorney's fees, when it revokes a condemnation,[27] should permit recognition of this action as an inverse condemnation suit. This section would apply if the restricted land is considered as having been taken when the ordinance is passed. It may be argued that the ordinance should not be viewed as applied to the land until the landowner has failed to gain relief through the statutory appeal process, or that invalidation of the ordinance by the court of common pleas makes the ordinance invalid from the date of passage, and, therefore, the land was never taken. This argument, however, misses the very real facts that neither invalidation nor exhaustion of statutory remedies can prevent or eradicate the injury the landowner has already suffered.[28] Since it is undeniable that the landowner has suffered injury, the situation comes within the policy decision made by the legislature when it adopted the damages provision of the revocation section of the new code. Therefore, the court of common pleas should treat the ordinance as applied from the time it went into effect. Granting such damages would not only do justice to the property owner, but also provide an incentive for the township to proceed expeditiously in its consideration of objections to zoning ordinances and requests for variances. Moreover, it would place the risk of unconstitutionality of an ordinance where it belongs—upon the adopting body—rather than upon the innocent landowner, and thus promote more careful consideration of such ordinances. Because the zoning board is powerless to grant relief, and because the court of common pleas would have to take jurisdiction eventually in order to decide whether there was a taking at least for purposes of damages pending "revocation," [29] the court should accept jurisdiction, for the purpose of deciding whether a taking has occurred, without requiring exhaustion of statutory remedies. Such a result

[26] See PA. STAT. ANN. tit. 26, § 1-612 (Supp. 1964), which provides for damages for injury to property rights such as that of access even though no property has been physically taken.

[27] The condemnor, by filing a declaration of relinquishment in court within one year from the filing of the declaration of taking, and before having made the payment provided for in section 407 (a) or (b), or as to which the condemnee has not tendered possession of the condemned property as provided in section 407, may relinquish all or any part of the property condemned that it has not taken actual possession of for use in the improvement, whereupon title shall revest in the condemnee as of the date of the filing of the declaration of taking . . . . Where condemned property is relinquished, the condemnee shall be entitled to the damages sustained by him including costs, expenses and reasonable attorney's fees . . . .

PA. STAT. ANN. tit. 26, § 1-408 (Supp. 1964). (Footnote omitted.)

[28] The revocation section of the new code provides that the land whose condemnation is being revoked be treated as though it had never been taken. However, such treatment does not preclude recovery of damages. The code refuses to ignore the fact that a landowner has suffered damages even though it holds that the title never left the condemnee. *Ibid.*

[29] PA. STAT. ANN. tit. 26, § 1-401 (Supp. 1964).

would be in harmony with the result of the Connecticut Supreme Court in *Corsino v. Grover*,[30] which apparently recognized that the zoning ordinance should be considered as applying since passage when relief cannot be obtained by traditional methods.

The inverse condemnation action would permit the parties to arrive at a satisfactory settlement concerning the property in question.[31] If they did not reach a settlement, the court could grant compensation as in the *Sansom Street* case,[32] or void the ordinance as a violation of the Pennsylvania constitution as it did in the case of *Miller v. Beaver Falls*.[33] The court should give the township the option either to maintain the restrictive ordinance and pay compensation or to revoke the condemnation and pay damages. The additional burden placed on the court would be at least partially offset by the increased opportunity for informal settlement which follows from recognition of the appropriateness of money damages in this situation.

EMINENT DOMAIN—PROBLEMS OF "JUST COMPENSATION" UNDER THE PENNSYLVANIA EMINENT DOMAIN CODE OF 1964

Pennsylvania's newly enacted Eminent Domain Code of 1964 provides compensation for an expanded range of property interests affected by condemnation.[1] Moreover, most of the code seems to implement a policy of compensation in proportion to the condemnee's actual loss. However, the framers apparently failed to recognize some problems which arise when more than one person owns interests in a particular tract. As a result the code's procedure appears inadequate in such situations, and courts may fail to take advantage of the means provided to assure truly just compensation. This comment will treat certain problems in determining the scope of interests entitled to compensation and in computing damages.

Section 1-601 of the code guarantees "just compensation" to all condemnees.[2] A condemnee is defined in section 1-201 as "the owner of a property interest taken, injured, or destroyed" by the condemnation.[3] This definition of persons who are entitled to compensation is somewhat clarified by section 1-507,[4] the procedural section, which requires that all tenants

[30] 148 Conn. 299, 307-08, 170 A.2d 267, 271 (1961); *accord*, Sinclair Pipe Line Co. v. Village of Richton Park, 9 Ill. 2d 370, 373, 167 N.E.2d 406, 408 (1960).

[31] PA. STAT. ANN. tit. 26, § 1-501 (Supp. 1964).

[32] 293 Pa. 483, 143 Atl. 134 (1928).

[33] 368 Pa. 189, 82 A.2d 34 (1951). It should be noted that in a recent law review article, Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 73 (1964), the *Miller* case was referred to as one in which compensation should have been required.

[1] PA. STAT. ANN. tit. 26, §§ 1-608 to -610 (Supp. 1964). See generally EMINENT DOMAIN LAW OF PENNSYLVANIA §§ 609-11 & comments (Proposed Code 1963).

[2] PA. STAT. ANN. tit. 26, § 1-601 (Supp. 1964).

[3] PA. STAT. ANN. tit. 26, § 1-201(2) (Supp. 1964).

[4] PA. STAT. ANN. tit. 26, § 1-507 (Supp. 1964).

and owners of interests in the condemned land have their claims tried together. It specifically refers to joint tenants, tenants in common, life tenants, remaindermen, and owners of easements. Since these interests are specially enumerated, it can be assumed that all holders of such interests are condemnees. Section 1-507 also refers to "all others having an interest in the property," a broad class whose membership seems to be left to judicial interpretation. However, since the statute purports to be the exclusive law, procedure, and remedy for losses resulting from condemnation,[5] the class of "all others having an interest in the property" must include owners at least of all other interests protected from loss without compensation under state or federal constitutions.[6]

A problem of growing importance in defining membership in the class of interests compensable under the code is whether condemnation of a property bound by a restrictive covenant entitles co-covenantors to "just compensation."[7] A majority of American jurisdictions that have passed on this point have held that such restrictions are part of the aggregate of rights inhering in property and therefore compensable.[8] A substantial minority has criticized this approach and has refused to compensate co-covenantors on the theory that the covenants are mere contracts between private parties and not applicable to the sovereign.[9] Pennsylvania courts have not decided the point, but a recent supreme court case adopted a broad view of what constitutes a property interest.[10] In affirming an award to the grantee of a right to mine coal for impairment of his surface facilities and access, the court endorsed the statement that "property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have, in any and every thing that is the subject of ownership by man . . . and extending to every species of valuable right or interest in either real or personal property, or in ease-

[5] PA. STAT. ANN. tit. 26, § 1-303 (Supp. 1964).

[6] For some interests so protected under the federal constitution, see United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (agricultural value of land); United States v. General Motors Corp., 323 U.S. 373 (1945) (fixtures and permanent equipment); United States v. 11.48 Acres of Land, 212 F.2d 853 (5th Cir. 1954) (riparian rights); Creasy v. Stevens, 160 F. Supp. 404 (W.D. Pa. 1958), *rev'd on other grounds*, 360 U.S. 219 (1959) (access rights); United States v. Gossler, 60 F. Supp. 971 (D. Ore. 1945) (easement).

Article XVI, § 8 of the Pennsylvania constitution calls for "just compensation for property taken, injured or destroyed." This language has commonly been construed to provide a greater range of compensation than do mere "taking" provisions. See 29A C.J.S. *Eminent Domain* § 111, at 456 (1965). As the court points out in Moyer v. Commonwealth, 183 Pa. Super. 333, 337, 132 A.2d 902, 904 (1957), municipal and other corporations have been held liable even for consequential damages under the Pennsylvania constitution, although the Commonwealth was not liable except for "takings." The new code treats the Commonwealth the same as municipalities. PA. STAT. ANN. tit. 26, § 1-612 (Supp. 1964).

[7] For a thorough discussion see 2 NICHOLS, EMINENT DOMAIN § 5.73 (rev. 3d ed. 1963).

[8] *E.g.*, Johnstone v. Detroit G., H. & M. Ry., 245 Mich. 65, 222 N.W. 325 (1928); City of Shelbyville v. Kilpatrick, 204 Tenn. 484, 322 S.W.2d 203 (1959).

[9] *E.g.*, State *ex rel.* Wells v. City of Dunbar, 142 W. Va. 332, 95 S.E.2d 457 (1956).

[10] Schuster v. Pennsylvania Turnpike Comm'n, 395 Pa. 441, 149 A.2d 447 (1959).

ments, franchises and incorporeal hereditaments . . . ." [11] Therefore, Pennsylvania seems likely to recognize co-covenantors' interests as compensable.

Once it is determined which interests come within the compensation provisions of the code, it must then be decided how much each of these interests is worth. Whenever more than one compensable interest exists in a condemned property, the valuation problem becomes complex, for section 1-507 adopts the "unit valuation" approach to compensation. Under this theory the total amount of damages for the condemned property is first determined, this amount being computed as if the land were held in an undivided fee simple.[12] Thereafter, it is apportioned among the various condemnees, all of whom are required to bring suit together. This procedure saves the commonwealth and the parties time and expense [13] and tends to protect the commonwealth from having to pay unwarranted overlapping recoveries. In some instances, however, the unit approach may lead to an unjust result discordant with other provisions in the code. Thus, under unit valuation, the total damages cannot exceed the value of the condemned land; interests taken whose value is not fully reflected in the condemned land are not fully compensated for.

An example of the problems arising under this procedure is the situation of the owner of an easement across the land taken. The easement's effect on the value of the servient tenement may be only a small fraction of its value to the dominant tenement.[14] If the easement owner is compensated only for his proportion of the fee value of the servient tenement, he will receive only the smaller amount, which does not really reimburse him for his loss. Co-covenantors in a restrictive covenant including the condemned property are in a like predicament.[15] Such a result can perhaps be justified on the basis of an argument that the condemnor should not be required to pay for more than it is gaining: since it is acquiring only a fee simple in the land, it should have to pay only the value of a fee simple, without having to worry about the ornate structure of interests which individuals have erected upon it. Yet this solution not only seems unjust to persons like the easement owner, but also contravenes the explicit command of another section of the code, which provides that each condemnee is entitled to "just compensation," an amount defined as "the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation . . . and

[11] *Id.* at 453, 149 A.2d at 453 (quoting 73 C.J.S. *Property* §1(b), at 138-40 (1955)).

[12] See generally 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §109 (2d ed. 1953).

[13] Orgel suggests that administrative convenience is an important factor in the continued vitality of the "unit" rule. *Ibid.*

[14] The United States Supreme Court stated expressly in United States v. Welch, 217 U.S. 333, 339 (1909), that "the valuation of an easement cannot be ascertained without reference to the dominant estate to which it was attached."

[15] See text accompanying notes 7-11 *supra* for a description of the situation regarding restrictive covenants.

the fair market value of his property interest remaining immediately after such condemnation . . . and such other damages as are provided in this article." [16] This section seems to contemplate the condemnee receiving payment for the entire loss in value of his own property interest, regardless of the position of other condemnees who may have interests in the same piece of land. This interpretation of the code as contemplating full reimbursement to each condemnee for all his pecuniary loss [17] is supported by the inclusion within the definition of "just compensation" of traditionally excluded special damages such as removal expenses,[18] business dislocation damages,[19] and moving expenses.[20]

This conflict between provisions of the code indicates that the framers and the legislature failed to discern these problems. Nevertheless, they have included a section which can be used to resolve the conflict and provide a just recovery. Section 1-605 provides that "where all or a part of several contiguous tracts owned by one owner is condemned or a part of several non-contiguous tracts owned by one owner which are used together for a unified purpose is condemned, damages shall be assessed as if such tracts were one parcel." [21] Unfortunately, the code carries no direct definition of the word "owner." But the meaning can be derived, perhaps, from the language of section 1-507, which describes "owners of easements, and all others having an interest in the property" as "owners" thereof. Thus, it would seem that damage to properties connected with the condemned tract through a restrictive covenant or easement should be included in the "total amount of damages." Section 1-606 ensures that these damages will be enough to provide adequate compensation. It states that:

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[16] PA. STAT. ANN. tit. 26, § 1-602 (Supp. 1964). The former Pennsylvania rule measured compensation by "the difference between the market value of the land before . . . and its market value immediately after the appropriation . . . ." Brown v. Commonwealth, 399 Pa. 156, 158, 159 A.2d 881, 882 (1960); *accord*, Peterson v. Pittsburgh Public Parking Authority, 383 Pa. 383, 119 A.2d 79 (1955); Spiwak v. Allegheny County, 366 Pa. 145, 77 A.2d 97 (1950). The change from "market value of the land" to "market value of the *condemnee's* entire property *interest*" may signal an important philosophical change in the law.

[17] Recovery for such damages as removal expenses, loss of business good will, and general moving expenses has been cited as a recent trend toward compensating the owner for what he has lost. Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 615-20 (1954). As far back as 1910, in Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910), the Supreme Court, speaking through Mr. Justice Holmes, had announced that in condemnation cases "the question is what the owner lost, not what the taker gained." *Id.* at 195. But it is only recently that this concept has begun to have any real vitality. See, *e.g.*, Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957). Paying for the property interest taken may be beneficial to the condemnor in certain cases. In Boston Chamber of Commerce v. City of Boston, *supra*, dual interests actually depressed one another in value, and the condemnor had to pay only for the loss occasioned to each interest holder, thus saving $55,000.

[18] PA. STAT. ANN. tit. 26, § 1-608 (Supp. 1964).

[19] PA. STAT. ANN. tit. 26, § 1-609 (Supp. 1964).

[20] PA. STAT. ANN. tit. 26, § 1-610 (Supp. 1964).

[21] PA. STAT. ANN. tit. 26, § 1-605 (Supp. 1964).

> In determining the fair market value of the remaining property after a partial taking, consideration shall be given to the use to which the property condemned is to be put and the damages or benefits specially affecting the remaining property due to its proximity to the improvement for which the property was taken.[22]

While "owner" probably need not be read to carry the same meaning in sections 1-507 and 1-605 and thereby lead to this result, this reading is desirable in order to carry out the spirit of the code: to give property owners compensation equal to their actual losses. If this reading is rejected, the objectives of the code can and should be carried out by considering the dominant tenement as a separate property which has been partially condemned and holding separate hearings to assess the damage to it.

Neither this approach nor section 1-605, however, completely eliminates the inequities resulting from the "unit" procedure. In the landlord and tenant area the competitive nature of the struggle over apportionment is acute, particularly because it has been recognized that leases are not normally bought and sold, and, consequently, that market value is an unsatisfactory test in determining the value of a leasehold.[23] The tenant whose rent is less than the rent for similar leaseholds on the open market receives the difference between the two figures. This value—which may not be reflected in the value of the land—is then deducted from the total award, the residue going to the landlord.[24] Landlords, fearful of this struggle, have tended to insert condemnation clauses in modern leases, requiring that the lease terminate as of the date of the condemnation with all rights vesting in the landlord.[25] The tenant thus suffers hardship because of the uncompensated loss of his true right in the property, *i.e.*, an uninterrupted use of the leasehold.[26]

It is possible, however, that the injustice of unit valuation may be more theoretical than actual, for article VII of the code seems to authorize admission of a wide range of evidence in condemnation proceedings. If the condemnee can present to a jury or board of viewers evidence of the

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[22] PA. STAT. ANN. tit. 26, § 1-606 (Supp. 1964).

[23] See James McMillin Printing Co. v. Pittsburgh, C. & W.R.R., 216 Pa. 504, 511, 65 Atl. 1091, 1094 (1907).

[24] The leasehold problem is discussed in Snitzer, *Slicing the Condemnation Pie: Compensable Interest Under Eminent Domain in Pennsylvania*, 9 VILL. L. REV. 250, 254-59 (1964). See generally 1 ORGEL, *op. cit. supra* note 12, §§ 120-27.

[25] See Snitzer, *supra* note 24, at 258.

[26] This right was clearly recognized in James McMillin Printing Co. v. Pittsburgh, C. & W.R.R., 216 Pa. 504, 511, 65 Atl. 1091, 1094 (1907), where the court said: "The right of which he [the tenant] is deprived and for which he is entitled to full compensation is the right to remain in undisturbed possession to the end of the term."

For a general criticism of the "unit" approach in the landlord and tenant situation, see Hitchings, *The Valuation of Leasehold Interests and Some Elements of Damage Thereto*, 1960 INSTITUTE OF EMINENT DOMAIN PROCEEDINGS 61. Mayor of Baltimore v. Latrobe, 101 Md. 621, 61 Atl. 203 (1905), is an oft-cited case in which the court refused to use the "unit" approach, suggesting it might be unconstitutional as applied to a tenant who held a ninty-nine year ground rent. *Id.* at 631-32, 61 Atl. at 206.

value of his discrete interest "prior to the determination of the undivided fee value, not infrequently [he can lead] . . . the tribunal to estimate compensation with an eye to the subsequent apportionment." [27] Unfortunately, the code fails to make clear whether the owner of each discrete interest has this protection, which can only be described as a loophole if unit valuation is otherwise strictly enforced. Nevertheless, the breadth and liberality of the provisions of article VII would appear to preclude limiting evidence to that which relates to the property as a whole.[28] Section 1-701 permits the board of viewers to receive all data "without being bound by the formal rules of evidence." [29] Both before and at trial the condemnee, "without further qualification, may testify as to just compensation." [30] Finally, experts are clearly not limited in the data they may use in reaching their valuation conclusions, so it would seem quite proper for them, at least, to allude to the individual property interest.

Although the evil effects of the unit valuation procedure may thus be circumvented in various ways in order to award "just compensation" to condemnees, other states contemplating the adoption of new eminent domain codes should refuse to adopt this outmoded approach [31] and should seek instead to secure for each individual his right to receive compensation in proportion to his individual loss.

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[27] 1 ORGEL, *op. cit. supra* note 12, § 112.

[28] The Pennsylvania Bar Association Committee on Continuing Legal Education published a pamphlet to help guide practitioners through the important parts of the new code. In its introductory statements concerning article VII, it was stated that:

> The purpose of this article of the law is to significantly change the present case-made rules of evidence in eminent domain cases, which have tended to be so restrictive as to prevent adequate consideration of those evidential matters which fairly bear on an appraisal of the fair market value of a condemnee's interest in a condemned property.

OLDS, THE PENNSYLVANIA EMINENT DOMAIN CODE OF 1964, at 27 (1964).

[29] PA. STAT. ANN. tit. 26, § 1-701 (Supp. 1964).

[30] PA. STAT. ANN. tit. 26, § 1-704 (Supp. 1964).

[31] See Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 70 (1957), for a thorough discussion of this idea in its broad context.