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REPORT
OF
EMINENT DOMAIN REVISION COMMISSION,

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Eminent Domain Revision Commission Letter of Transmittal

To: His Excellency, the Governor of the State of New Jersey

To: The Honorable Members of the Senate and General Assembly of the State of New Jersey:

Pursuant to the directions of P.L. 1962, Chap. 50 (R.S. 1:16-9 et seq.), creating an Eminent Domain Revision Commission, prescribing its powers and duties, and repealing "An Act creating an Eminent Domain Revision Commission and prescribing its powers and duties," the Commission herewith submits its report.

As may be expected in a report as exhaustive as this, affecting a highly controversial and widely discussed subject, complete unanimity cannot be expected. There are many suggestions contained in the report which receive the hearty endorsement of all members of the Commission. Chief among these is the requirement that no condemning agency, including the state, shall be permitted to take possession of property unless reasonable compensation is made available to the property owner, simultaneously with the taking of such possession. There are other recommendations concerning which there is divided opinion. These relate to the proposed enlargement of the scale of compensation so as to include payment for business losses consequential damages and other items. There are other matters which it is thought require further study; for instance, the matter of fixing compensation by specially appointed Commissioners.

In order, therefore, that prompt legislative consideration be given to the problem, the results of our research are herewith presented, with the hope that the report will aid

in effecting a long past due reform of our eminent domain practice.

Respectfully submitted,

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Dated: April 15, 1965.

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Report of Eminent Domain Revision Commission

Introduction

The Eminent Domain Revision Commission was created by P.L. 1962, Chap. 50 (R.S. 1:16-9 *et seq.*). Its duties were stated in the following language:

“It shall be the duty of said commission to study and prepare a proposed revision or revisions of the statute governing eminent domain as set forth in R.S. 20:1-1 *et seq.* and other statutes relating to the taking of property for public use, for enactment by the Legislature, if it shall so determine, in such manner that conflicting and overlapping provisions shall be reconciled; vague, uncertain, confusing and redundant expressions may be clarified or excised; amendments and supplements suggested and considered by court decisions or otherwise relating to the basis of just compensation and the procedure for fixing and determining the same devised; and that said statute shall be made as uniform as possible with respect to matters of basic policy and statutory provisions.”

The committee formally organized on June 5, 1963, and elected Herbert J. Hannoeh, Esq., as its chairman, and Samuel A. Alito, Research Director of the Division of Legislative Information and Research, Law Revision and Legislative Services, as its secretary. The committee employed John M. Kaufman, Esq., of Newark, as its counsel.

In the exercise of its duties and responsibilities, it held public hearings, to which were invited the Attorney General, various State and interstate agencies vested with the power of eminent domain, e.g. the State Highway Department, New Jersey State Highway Authority (Garden

State Parkway), New Jersey Turnpike Authority, Department of Conservation and Economic Development (Green Acres), Port of New York Authority, Public Utility Commission, and others. Also invited were representatives of the New Jersey State and County Bar Associations, the New Jersey State League of Municipalities, the New Jersey State and County Real Estate Boards and Appraisal Industries, New Jersey Farm Bureau, New Jersey State Grange, New Jersey Title Association, various Utility Companies, and attorneys specializing in eminent domain practice.

Most of these invitees responded either through attendance at hearings or submission of memoranda.

The meetings were also attended by persons whose properties had been acquired by some of the agencies, and who expressed views of dissatisfaction with procedures currently adopted by the taking agencies. In addition, the chairman and other members of the Commission attended and participated in meetings of various organizations throughout the State, at which problems of the Commission were discussed.

The laws of New Jersey and other states, particularly with respect to recent adjudications and statutes relating to eminent domain problems were intensively researched.

The Commission had the benefit of the efficient assistance of its secretary, Samuel A. Alito, and Arthur S. Applebaum of his staff. During the period that Senator Donal C. Fox was a member of the Commission, his aid and assistance were of great value.

Summary of Conclusions and Recommendations

After due consideration, the Commission recommends:

1. *Necessity for uniform statute.* The adoption of a statute, effective upon passage, creating a uniform practice and procedure for the exercise of the power of eminent domain, equally applicable to all bodies vested with such

power, including the State of New Jersey and Interstate-Pact authorities, where possible. This statute shall provide for the manner of fixing just compensation, distributing the same among the parties entitled thereto and the method of adjudicating all matters incidental thereto and arising therefrom. The rules of practice shall be established by the court.

2. *Negotiations for acquisition.* To foster amicable adjustments and thereby reduce litigation, the statute shall require that before proceedings are instituted, the condemning body shall conduct bona fide negotiations with the owners, through fair offers of compensation, including a reasonable disclosure of the manner of arriving at the offer. Should negotiations fail and the eventual award of compensation exceed by 25% the amount of the offer, the condemning agency shall pay the attorney and expert fees of the owners, the amount thereof to be fixed by the court, but not to exceed 10% of the eventual award. Some members of the Commission recommend that to meet the problem of excessive demands by owners, a similar penalty be imposed on them if the eventual award be less than the amount requested.

3. *Taking possession before final determination of compensation.* Such statute shall permit condemning bodies to take possession of property immediately following institution of proceedings, upon making available to the property owner at that time through a deposit of funds, all or a substantial amount of the compensation to which he may become entitled.

4. *Practice for determining compensation.* Establishing a procedure to govern the determination of compensation has been the most difficult task of the Commission. The Commission after considering various ideas presented to it, has concluded that unless waived by the parties, hearings before Commissioners should be continued but in a modified form.

Some members of the Commission are of the opinion that such hearings should be abolished entirely, and the cases heard before the court as in other actions at law.

5. *Date as of which compensation shall be determined.* Because of the great delay which occurs between the date of the declaration of "blight" under the Public Housing and Re-development statutes, and the date of actual taking, during which the property is vandalized and its income reduced or frequently lost entirely, the Commission recommends that compensation be fixed as of the date of declaration of "blight" with adjustments as set forth in last paragraph of Article IX (Interest).

Property owners are similarly adversely affected by public announcements of agencies relating to proposed projects, which are not completed for considerable time thereafter. It is the opinion of the Commission that increases or decreases in valuation of such properties resulting from such announcements shall be disregarded in fixing compensation.

6. *Elements to be considered in determining compensation.* The elements of damage to be considered in determining the amount of just compensation shall include limited costs of removal and re-installation of machinery, fixtures, equipment, and limited damages resulting from loss of access, change of grade and the like. On the other hand, in cases of partial takings, severance damages shall reflect benefits immediately accruing as a result of the improvement. The Commission is divided on its views as to whether there should also be included limited damages resulting from interference with and loss of business, and limited consequential damages resulting from a project, notwithstanding that land is not actually taken.

In this connection, it is the opinion of the Commission that although the inclusion of such elements of compensation may increase the cost of acquisition in certain situations, that fact in and of itself, does not constitute a valid objection. Property is being taken from an owner, in-

voluntarily, for a public use and benefit or his property is being damaged to effectuate such public purpose and the public should bear the reasonable cost thereof.

7. *Vesting of title.* Existing statutes and adjudications create uncertainty as to when title to property taken passes from the owner into the taking agency. To eliminate this uncertainty, the Commissioner recommends that title shall pass to the condemning agency upon the happening of the *earliest* of the following events:

- a. Recording of a deed of conveyance, if any.
- b. Date of filing of declaration of taking.
- c. Satisfaction of record of award of Commissioners, or making deposit of Commissioners award pending appeal.
- d. Satisfaction of record of final judgment determining compensation.

8. *Apportionment of taxes.* When municipalities adopt their annual budget and establish their local tax rate, they anticipate the payment of taxes which they have assessed. The taking of ratables during the year by tax exempt agencies who do not assume liability for such taxes for the period *subsequent* to the taking, severely disturbs the local municipal finances. The lost revenue must be reflected in the tax rate of the succeeding year.

The Commission feels that this is an injustice and that payment of taxes for the *entire* tax year during which the taking occurs should be assured to the municipality.

9. *Interest.* The problem of whether interest on its award is payable to the person whose property has been taken, and if so, under what circumstances, at what rate and for what period, has plagued the court for many years.

The Commission recommends that interest at 6% per annum should be paid upon the amount of compensation awarded (exclusive of moneys deposited pursuant to Article III), from the date possession is taken or when title vests in the taking body, whichever date is the earlier,

with appropriate credit to the taking body for any net income actually collected by the owner during the period within which interest is payable, or for the fair rental value of any portion of the property occupied by the owner during said period.

10. *Recording data.* It is essential to the eminent domain procedure that clear and sufficient descriptions of the property being taken be available in the county recording offices, and that matters affecting the transfer of title to the condemning body be equally available. The Commission recommends that these requirements be met.

11. *Court clerk's fees and charges.* When funds are deposited with the clerk of the court, *pendente lite*, statutory charges are made. In eminent domain proceedings, two occasions arise when funds are so deposited: (1) when the taking body desires to acquire possession in advance of determination of compensation; and (2) when, because of uncertainty of ownership or disputes between parties, the taking body cannot safely pay the award.

The Commission recommends that such charges be eliminated with respect to deposits made in eminent domain proceedings.

We proceed to more detailed discussion of the matters above referred to in general terms.

ARTICLE I

Necessity for Uniform Statute

The right of eminent domain vests power in the sovereign to take private property for public use. It is a power inherent in government, requiring no constitutional provision to give it force and effect. It is not created by the Constitution, but is merely limited thereby. By the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, section 20, of the 1947 New Jer-

sey Constitution, the exercise of this power is limited by the requirement that "just compensation" must be made for property taken.

Some historical adjudications on the subject are:

- Scudder v. Trenton Delaware Falls Co.* (1)*;
- Sennickson v. Johnson* (2);
- State Highway Commission v. Elizabeth* (3);
- Abbott v. Beth Israel Cemetery Association of Woodbridge* (4);
- Valentine v. Lamont* (5);
- State v. Burnett* (6);
- State v. Lanza* (7);
- Chicago, Burlington & Quincy R.R. v. Chicago* (1a).

In considering statutes of sister states, consideration must be given to applicable constitutional limitations. The Pennsylvania Constitution, for instance, requires compensation for "property taken, injured or destroyed" (Art. 16, par. 8), a measure broader than our Constitution.

It is not generally recognized that until the adoption of our 1844 Constitution, no *constitutional* requirement existed respecting payment of such compensation. The Constitution of 1776 contained no express restriction on the taking of private property for public use. The 1844 Constitution (Art. I, par. 16) provided:

"Private property shall not be taken for public use without just compensation; but land may be taken for public highways, as heretofore, *until the legislature shall direct compensation to be paid.*" (Italics supplied)

That qualifying clause is frequently overlooked in considering adjudications respecting compensable damage for tak-

* Number in parenthesis following name of case indicates that the citation thereof appears in the same numerical order in the Appendix at 1a to 2a, *infra*.

ing of *roads* for the period prior to 1947, when the reservation was eliminated in the Constitution of that year. *Newark v. Cook* (8), a case frequently cited in current condemnation litigation, bases a large portion of its conclusions upon the absence of legislation on the subject of compensability of damages there sustained as a result of a taking for street purposes. (See p. 537 of the opinion).

Following the adoption of the 1844 Constitution, statutes were enacted creating obligations to pay compensation for various takings. The basic law on the subject as of the present date is, "An Act to Regulate the Ascertainment and Payment of Compensation for Property Condemned or Taken for Public Use" (Revision of 1900), now R.S. 20:1-1 *et seq.*, as amended in 1953 (P.L. 1953, Chap. 20), to reflect the new court system. This is generally referred to as the "Title 20 Act".

A very large number of existing statutes authorize the acquisition of property merely by referring to the Title 20 Act.

As public and quasi-public activities expanded in recent years, the necessity for the acquisition of large quantities of private properties required additional and enlarged powers of eminent domain. These takings affected not only vacant lands in rural and suburban areas, but residences, business properties, factories and the like in the urban municipalities. Financing of these acquisitions and improvements, particularly those relating to highways and methods of transporting persons, merchandise, power, etc., required legislative creation of Authorities, the sale of whose securities readily provided the necessary funds for the improvement. These statutes incorporated powers different from and in addition to those in the Title 20 Act, as well as new and different methods of acquisition and measures of compensation. They also varied in language to meet the current needs of each individual draftsman.

Consequently, there are now in effect in this state in excess of some 300 statutes authorizing the exercise of the

power of eminent domain. Most of those statutes (particularly those relating to most municipal, county and school board acquisitions) do *not* authorize the condemning body to take possession of land in advance of fixing and paying compensation. The statutes which do authorize "pre-payment takings" are not uniform in their provisions for *pro tanto* payment to property owners at the time of taking, and the protection of such owners with respect to the payment of any additional moneys which may be found due them.

Our Supreme Court, aware of the problem, appointed a committee of the New Jersey Bar Association to investigate and report. The recommendation of that committee have been considered by the Commission. Similarly, reports and recommendations from the New Jersey State Bar Association, New Jersey Farm Bureau, New Jersey State Grange, and others have been made to and considered by the Commission.

Statutes fixing the taking powers and procedures of the interstate-compact authorities, such as the Port of New York Authority, differ substantially from those of other agencies. Representatives of the latter Authority advise that their acquisitions have been completed with a minimum of litigation, having in mind the volume of takings. An explanation and discussion of this procedure and approval of its legality appears in *Port of New York Authority v. Heming* (14).

The cases of, *Goodavage v. State Highway Commission* (9) and *State Highway Commission v. Elizabeth* (3), authorize the State Highway Commissioner to take possession of lands in advance of paying partial compensation, and also authorize taking of possession *in advance of the institution of proceedings to acquire the land*. This authority liberally exercised by the State Highway Commissioner, has been the subject of complaint to this Commission.

The necessity for remedial legislation has been referred to by the Courts in various opinions. *State v. Jones* (10), with respect to measure of compensation where the taking precedes the filing of complaint; *State v. Fisher* (11), on the subject of allowance of interest without necessity of appeal; *Milmar Estate v. Borough of Fort Lee* (12), on subject of interest; *State v. Pellini* (13), on payment of clerk's fees on funds on deposit. The off-the-record comments of the bench and bar confirm the necessity of a revision.

The problem is not unique in New Jersey. Revisions of the law on the subject have been adopted in Wisconsin (P.L. 1959, Chap. 639); Maryland (P.L. 1963, Chap. 52), and Pennsylvania (P.L. 1964, Act 6).

Commissions or Committees are undertaking similar revisions in the states of New York, Massachusetts and elsewhere. In Massachusetts, recent opinions of the Attorney General construing existing laws, resulted in a radical change in administration and procedure for the acquisition of property.

A Select Subcommittee of Real Property Acquisition of the Committee on Public Works of the House of Representatives, 88th Congress, has considered the problem with respect to acquisition of lands for federal purposes. Members of the Commission have been in consultation with the legal staff of that Committee. The Committee's report has been made public recently and is available to those interested upon application to the United States Government Printing Office, Washington, D. C. (Request should be made for "Real Property Acquisition in Federal Programs, Committee Print #31, 88th Congress, Second Session.) Many of the recommendations contained in this report (with the exception of matters of procedure), find support in the Congressional report.

The Commission is advised that at the present time upwards of a least 500 proceedings are pending involving

takings by State agencies and that at least an equal number are contemplated in the near future. Added to the foregoing are the usual current takings by the various counties, municipalities, school boards, local sewer and water authorities. All of this indicates the large volume of proceedings either now before or shortly to reach the courts.

It is currently necessary to carry on varied proceedings to adjudicate miscellaneous questions arising in connection with takings, other than compensation.

The 1953 amendment to Title 20 (P.L. 1953, Chap. 20) provided:

“In any such action, the court shall have and shall exercise its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain * * *.”

Notwithstanding the foregoing, it is still necessary to institute proceedings in lieu of prerogative writ to *compel* the exercise of the power in cases where the agency carrying on the project denies a taking or denies ownership of lands in the condemnee. The limitations of the amendment are pointed out in *State v. Fisher* (11).

Similarly, by Revised Rules 4:92-13, the rules relating to discovery are not applicable to eminent domain proceedings “except by leave of court.” This rule is not construed uniformly. Some courts are of the opinion that the restrictive clause implies that discovery should be permitted in exceptional cases only, thereby restricting the advantages of discovery and pretrial. (See exhaustive discussion of the subject of pretrial discovery in “Discovery Process in Highway Land Acquisition”, by Messrs. Goldstein, Rice and Lavelle of the Federal Bureau of Roads, presented at the 1964 meeting of Highway Research Board.) This phase of our problem is now being considered by a Rules Revision Committee of our Supreme Court.

The need for revision of the eminent domain law is unquestioned in New Jersey and such revision is required immediately.

The Commission, therefore, proposes that there shall be vested in the Superior Court full and complete jurisdiction of all actions in eminent domain and all matters incidental thereto and arising therefrom; including, without limitation, jurisdiction to determine the right to exercise and to compel the exercise of the power of eminent domain; to fix and determine the amount of just compensation to be paid and to whom paid, and to determine any question of title to properties affected by the action. All such matters shall be determined in the same proceeding.

The procedure for carrying the foregoing into effect shall be in accordance with rules of court to be promulgated from time to time.

ARTICLE II

Negotiation for Acquisition

Complaints have been made to the Commission that negotiations for acquisition are frequently conducted in an arbitrary manner. The owner is advised merely of the dollar amount of the offer, but is given no information, even if he requests, as to the manner of ascertaining the amount so offered. It is believed that such treatment of a property owner is improper. The Commission is of the opinion that if fair offers are made based upon appropriate data disclosed to the owner, many acquisitions will be completed amicably, without subjecting the authority and the owner to the expense and delay of litigation.

The Commission, therefore, recommends that no proceedings for the taking of property shall be instituted until bona fide negotiations (including a reasonable disclosure of the basis of the offer) have failed. No offer so made shall be evidential in the cause. Should the final award exceed the amount of the offer by more than 25%, the condemnee shall be paid, in addition to his award, his

reasonable attorney and expert fees (to be fixed by the court), but not in excess of 10% of the award. Some members recommend that to meet the problem of excessive demands by property owners, a like penalty be imposed if the eventual award be similarly less than the amount requested.

Undoubtedly, situations will arise which make negotiations impossible or impractical, such as when an owner lacks capacity to convey, is unknown, or resides out of the state. Upon a disclosure of those facts to the court, negotiations may be omitted.

ARTICLE III

Taking Possession of Property Before Final Determination of Amount of Compensation

Except in the rather rare cases in which the right to condemn is questioned, it is essential that the condemning body be permitted to take possession of property promptly following the filing of the complaint and service of process. (In special cases, the court may authorize the taking of possession prior to completion of service.) As has been stated, many agencies do not currently possess such power. Other agencies may take possession upon depositing in court the amount of its estimated compensation and segregating, in trust, additional funds to assure payment of any insufficiency. These funds are available to the parties in interest without prejudice to a claim for additional compensation. The State Highway Commission may take such possession, without depositing funds and without instituting proceedings (p. 13, *supra*).

It is believed that the right to take possession should be granted on a uniform basis to *all* bodies possessing the power of eminent domain, except individuals or private corporations who are constitutionally prohibited from taking possession until compensation has been paid (Art. I, Sec. 20 New Jersey Constitution 1947).

Hence, the following recommendations are made:

A condemning body, including the State of New Jersey, shall be permitted to enter into possession of the land to be acquired before the amount of compensation to be paid therefor is finally determined, subject, however, to the following conditions:

A. Proceedings to acquire the property shall have been instituted and process therein served and a declaration of proposed taking of possession shall have been filed and notice thereof given. The declaration is an additional step giving the owner a description of the property being taken and the estimated compensation therefor. The Commission is of the opinion that the owner should have reasonable notice that actual proceedings have been instituted, and that possession of his property is about to be taken. This will also enable a corporate condemnee to avail itself of relief under I.R.S. Section 377, against duplicate capital gain taxation. For good cause, the court may permit such taking of possession prior to notice of the proceeding of service, but not prior to institution of suit.

B. There shall be deposited with the clerk of the court (or in a special interest bearing bank account of the condemnor for the benefit of the property owner and lien holder), an amount which the condemnor estimates to be just compensation. Should the taking of possession occur after the filing of the award of Commissioners, or the entry of a judgment, the amount to be deposited shall be amount of the last formal offer of the condemnor, or the award or judgment, as the case may be.

C. Upon application to the court and due notice, parties in interest may withdraw the funds so deposited. Should the amount withdrawn exceed the final award, the excess shall be repaid with interest. Should the award be found insufficient, the condemnor shall pay the deficiency with interest.

D. The deposit and withdrawal of funds shall be without prejudice to the question of total compensation and shall not be evidential in the cause.

E. Provisions in existing statutes requiring the condemning body to establish trust funds for the payment of deficiencies should be eliminated as to those bodies whose financial responsibility is unquestioned. This will avoid the presently existing "freezing" of substantial sums for long periods of time. Should the court determine that the financial responsibility of the condemnor is uncertain, it may direct that such trust fund be established.

F. From time to time, agencies may institute proceedings, but not take possession of the property until after an award has been made. In the meantime, the owner is without funds to acquire substitute property and is unable to efficiently manage his property because of loss of tenants and inability to re-rent *pendente lite*. This is a great hardship to property owners, particularly to owners of small properties. It is recommended that if the condemning body does not take possession within three months after institution of the proceedings, any party in interest, upon application to the court, may require the condemning body to take such possession and make the deposit herein required unless for good cause, the court shall direct otherwise.

ARTICLE IV

Procedure for Determining Just Compensation

This phase of the research of the Commission has been its most difficult and controversial problem.

The existing procedure is as follows:

1. Upon the filing of a complaint, the court appoints three commissioners, who hold hearings and make an award.

2. Any party may appeal from the award, and a trial *de novo*, is held in the Superior Court with a jury, unless waived.

3. A further appeal may be taken from the judgment on appeal, as in other actions at law.

The Committee on Eminent Domain of the New Jersey State Bar Association has strongly recommended the abolition of hearings before Commissioners and favors a trial before a judge as in other civil litigation.

Similar representations have been made to the Commission by counsel for various State agencies, for the New Jersey League of Municipalities, and by specially appointed committees of the New Jersey Farm Bureau, New Jersey State Grange and others.

Frequently, the hearings before the Commissioners have taken the form of a "dress rehearsal" or a "trial-run" of the case to be tried on appeal. This result may have been reached because counsel were dissatisfied with the personnel of the Commission, or its lack of adequate authority or experience to pass upon involved questions of law and fact. Furthermore, counsel feel that they should not disclose the merits of their case before the Commissioners when an appeal is in the offing. This practice should be eliminated.

Present statutes do not permit a waiver of commission hearings and some title authorities contend that in the absence of a confirmatory deed, a failure to hold a commission hearing constitutes a defect in the statutory proceedings.

It having been adjudicated, *Port of New York Authority v. Heming* (14), that there exists no constitutional right of trial by jury in condemnation cases, the abolition of such trials has been urged. In support of this argument, it is said that the complexities of valuation are far too great for the comprehension of a group of persons, totally uninformed and ill-equipped to adjudicate such issue. It

is well recognized that upon the *voir dire*, all persons having any semblance of expertise on the subject are excused from jury service. When it is recalled that our appellate courts frequently vacate adjudications of value made by state agencies, highly knowledgeable in the field, how can we expect adequate findings by a jury whose excursion into the area is an isolated experience.

Nevertheless, proponents of the jury system prefer the "verdict" of the jury to the decision of a single judge.

Various suggestions have been made to and considered by the Commissioners, as follows:

1. Compensation shall be fixed by the court, without a jury. This would eliminate entirely all hearings before Commissioners. On the other hand, it would increase substantially the already existing court calendar congestion. To meet this problem, suggestions were made that in the counties having large condemnation calendars, one week of each month should be devoted to such trials. In fact, there have been some suggestions of much broader reforms, such as the creation of a special calendar or branch of the court to adjudicate not only condemnation hearings, but also all prerogative writ proceedings involving zoning and other problems (already entitled to preferential hearing date) and other proceedings in which the valuation of property is the main issue.

2. Continue the existing practice, but authorize the parties to waive hearings before Commissioners and proceed directly to trial before the court and jury.

3. Continue the present practice, but create in each county a permanent board of several Commissioners with fixed terms, from whom appointments would be made in each case or group of cases affecting similar lands. The accumulated experience of such persons would create highly qualified personnel. They would be appointed and paid upon a per case basis as at present. Objections were made to this creation of these positions and the manner of appointment thereof.

4. Continue the present practice, but require the maintenance of a complete stenographic record and submission of written findings in accordance with forms to be prescribed by court rules. These findings would be reviewable on appeal in the Superior Court, without a jury, upon such record and findings without additional proofs, unless the court, for good cause, so permits or so requests. No presumption of correctness should attach to such findings and the substantial evidence rule should not apply.

5. Reduce the number of Commissioners from three to one, an attorney of at least ten years' experience, who would try the cause, fix compensation and render a *judgment*. Such trial could be held without a jury, unless a jury was requested by any party. Appeals would lie from this judgment, directly to the Appellate Division, as in other civil actions. The present trial *de novo* on appeal thus would be abolished. The Commissioner's compensation would be fixed by the court, paid by the condemning agency and probably would not exceed the present fees paid to three Commissioners. This suggestion would relieve the congested court calendar without any additional cost to the state. Objectors suggest that the combined judgment of three persons is preferable to that of a single individual.

6. Adopt of the procedure of the Port of New York Authority, explained and approved in *Port of New York Authority v. Heming* (14). Under this procedure, compensation is fixed by the court, without a jury. The Court is vested with power to appoint commissioners to take testimony and "advise" him, but the final conclusion is made by the court.

7. Various combinations of the foregoing suggestions have also been made and considered.

Many forceful and impressive presentations have been made to the Commission that the current practice is a waste of time, effort and money, and therefore, should be abolished. Should our court adopt the practice recently inaugurated by the United States Supreme Court (*U. S. v.*

Merz, 376 U. S. 192, 1964) requiring the court to "charge" Commissioners appointed pursuant to Federal Rule 71A-(h), additional time will be expended. Nevertheless, the Commission was confronted with the very practical fact that the abolition of Commissioners hearings would increase the already congested trial calendar, particularly in the larger counties. It was also indicated to the Commission that a large number of cases are adjusted at the Commissioner's hearings, or shortly thereafter and before the trial on appeal. Consequently, it has been concluded that the hearings should be continued in a modified form, as follows:

1. Compensation shall be fixed, in the first instance, by a commission of three persons, residing in the county in which any portion of the property, shall be situated. The chairman shall be an attorney, admitted to practice for at least ten years, and the remaining two members shall be persons having a reasonable knowledge of the value of property of the character being taken.

2. The Commissioners shall hold hearings, of which a stenographic record shall be maintained. Attendance of witnesses and production of records may be enforced by subpoena. The Commissioners shall make an award accompanied, when requested, by written findings, in form to be established by the rules. Unless an appeal be taken, a judgment may be entered upon the award.

3. The award shall be reviewable on appeal in the court, without a jury, unless requested by any party. If without a jury the review shall be upon the record and findings without additional proofs, unless the court for good cause, so permits or requests. There shall be no presumption of correctness of the award and the substantial evidence rule shall not apply. If a jury is demanded, the appeal shall be a trial *de novo*. If at the trial *de novo*, testimony as to value is to be offered by witnesses who did not testify before the Commissioners, the identity of such witnesses and his opinion of the dollar amount of compensation to

which the condemnee is entitled shall be submitted to the adverse party in the manner and within the time limit fixed by the rules.

4. The parties may waive a hearing before Commissioners and in such event, compensation shall be fixed by the court without a jury, unless demanded by any party.

The foregoing does not represent the unanimous conclusion of the Commission. Some members are of the opinion that compensation should be fixed by the court, without a jury, thus entirely eliminating hearings before commissioners.

ARTICLE V

Date as of Which Compensation Shall be Determined

The present statute (R.S. 20:1-9) provides for the assessment of compensation "as of the date of the filing of the petition and order thereon."

The effect of this rule has been the subject of criticism.

In recent years, a practice has arisen under which condemning agencies advise owners that their properties lie within the lines of contemplated takings and warn them that their action with respect to the property should give consideration to the possibility of future takings. Statements with accompanying maps are issued to the press. Municipalities are so advised and as a result, a building improvement *quasi-caveat* is created. Tenants become aware of the proposed project and an uncertainty of continued possession arises resulting in their vacation of the property. For all practical purposes, the full enjoyment of the property is thus diminished.

The problem is accentuated in the administration of the Public Housing and Redevelopment statutes (P.L. 1949, Chap. 187, R.S. 40:55-21.1 *et seq.*, and P.L. 1938, Chap. 19, R.S. 55:14A-1 *et seq.*). Those statutes and the applicable federal statutes and regulations concerning government aid, require a determination of "blight" of the proposed af-

fectured area by the governing body, as a prerequisite to federal assistance. The period between the declaration of "blight" and the eventual acquisition of title encompasses an extended period. There is no statutory limitation of time within which the acquisition shall occur, and there is no requirement that "blighted" property must be acquired in all event. In fact, there is uncertainty as to how the declaration of "blight" can be vacated, if the project is abandoned.* Five or more years between the date of declaration of "blight" and acquisition is not unusual. During this period, the tenants, advised of the proposed taking, vacate. Vandalism occurs. Only speculators will purchase. In business areas, re-rentals are limited to temporary tenants at greatly reduced rents. No one will equip or establish a new business in the area. A glaring example exists in Newark, where valuable downtown business property in the Bamberger area has been blighted for over five years and the authorities do not think that an acquisition will occur for three to five years hence, if at all. Tenants have vacated a large percentage of the property, and the income collected from the occupied portion is rarely sufficient to pay carrying charges. Similar conditions exist elsewhere in the state.

Fixing the award to such owners as of the date of filing of the complaint does not constitute adequate compensation.

Commissioner Robert A. Roe, of the Department of Conservation and Economic Development, in a letter to the Commission, states and recognizes the problem in the following language:

"Provision should be made under the Eminent Domain statutes to protect the owner of property against declining value as a result of procedural delays in acqui-

* Suggestions have been made that the Commission should recommend appropriate legislation to meet this uncertainty, but it is of the opinion that such action would not be within the scope of its duties.

sition caused by protracted negotiations on prices, delaying litigation, public hearings, changes of administration, crowded court calendars or other reasons. This has been especially true in slum clearance and urban renewal programs involving heavily built up areas and many vital interests. When an area is declared to be blighted by a municipality, there is in effect a cloud on the title to property and a consequential decline in its value resulting from natural reluctance of persons to buy property which they know is soon to be condemned. Redevelopment agencies have no time limitation in which to acquire lands in blighted areas. If, as under present law, property valuation is conducted at the time of taking, possibly years after declaration of blight, the property owner may suffer severe financial loss through no fault of his own. To remedy this obvious injustice, proposed State legislation has been introduced in the Legislature to provide that if land or other property is acquired in connection with the development or redevelopment of a blighted area, its valuation shall be determined as of the date of the declaration of blight. Assembly Bill No. 240 of 1963 (similar to Assembly Bill No. 519 of 1962) would amend the Eminent Domain law to this effect. Assembly Bill No. 225 of 1963 (similar to Assembly Bill No. 518 of 1962) would amend the Blighted Areas Law (Chapter 187 of 1949) to this effect. The department has endorsed the enactment of these measures."

Some of these problems are without authoritative adjudication in this state. *North Hudson RR Co. v. Booraem* (15), cited in *State v. Jones* (10) at 261 suggests some answers, but the *Jones* case, at 264, points out the need for legislation. See also, 13 Rutgers L.R. 284 (1958).

The question was recently considered by the Court of Appeals of Ohio in the case of *City of Cleveland v. Carcione* (16). In that case, five years elapsed between the original municipal ordinance and the institution of proceed-

ings and trial, during which period the rental income dropped from \$8,100 to \$565. Under applicable Ohio statutes, compensation was to be fixed as of the date of trial. The court pointed out that under Ohio (and other) state law, a property owner was *not* entitled to *enhancement* in value caused by the improvement, therefore the reverse of such a situation, a *depreciation* in value caused by the improvement, required a parallel rule. The court held:

“Hence the standard for measuring the compensation to be awarded her should have been the fair market value of it [her property] as it was immediately before the City of Cleveland took steps to carry out the work of the project which to any extent depreciated the value of the property.” (190 N. E. 2 at 57)

Property owners are similarly affected by public announcements by agencies of proposed projects, highway routes and the like. Years may elapse between the date of the announcement and the consummation, and the final plan may and probably will differ substantially from the original scheme. The Commission realizes that a public body must be afforded a wide range of time within which to reach its final conclusion, and to this end, will publicize various thoughts to test public opinion. But some consideration should be given to the persons whose property is thus placed in the test tube, and boiled in the caldron of public and political bickerings. It is said that this is the price which is paid for the benefit of living in a democracy. But why should these property owners pay the entire cost? Should not the benefited public also share?

Conversely, such public announcement may *increase* the value of the value of the property. Some adjudications hold that such increase in value may not be considered in fixing compensation.

After a taking has actually occurred, neither an increase nor decrease in value can affect the compensation to be paid. *State v. Jones* (10) at p. 261. But neither the declara-

tion of "blight" nor the declaration of intention to make an improvement, constitute a "taking" in the legal sense. *Wilson v. Long Branch* (31), *Bauman v. Ross* (22) and *Danforth v. U. S.* (33). Hence, the rule of the *Jones* case may not meet the problem.

The Commission therefore suggests that any increase or decrease in the value of property caused by administrative actions, or public announcements of proposed public improvements, (other than that due to physical depreciation within the reasonable control of the owner) shall be disregarded in determining the compensation for the taking, and that compensation shall be fixed as of the date the action of the taking body shall substantially affect the use and enjoyment of the property.

ARTICLE VI

Elements Which Should be Considered in Fixing Compensation

In the absence of any *constitutional* definition of "just compensation" (and there is none), the determination thereof is a judicial function which is said to be sufficiently elastic to adjust itself to the social needs of the times as they may change from generation to generation. *City of Trenton v. Lenzner* (17).

The mere fact that principles of law respecting such compensation have been recognized over a long space of time, is no reason for continued adherence thereto, if the reasons for their adoption no longer exist. This thought has been well expressed in the opinion of our Supreme Court, in *State v. Pennsylvania Railroad Co.* (18), as follows:

"The principle espoused by these cases has stood for over 100 years. Mere antiquity, however, will not save it from the onslaughts being made if it is otherwise barren of reason or logic, equity or justice. Time alone will not suffice to cause its re-embracement. On the

other hand, a firmly fixed and well settled rule should not be changed unless it is proved erroneous or, under present-day conditions, no longer sustains the basic principle of law and justice which originally evoked it."

The cases of *State v. Gorga* (21), *City of Trenton v. Lenzner* (17), *State v. Gallant* (22), and *State v. Burnett* (6), are indicative of the awareness of our courts that the basis of just compensation is subject to change and modification whenever the facts and circumstances warrant. Such modifications are not rapid however and are achieved only after long and expensive litigation. These results could and should be effected more promptly through legislative enactment.

In the case of *U. S. v. Miller* (23), it is stated:

"The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money for the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

This is a restatement of the rule enunciated in *Monongahela Navigation Co. v. U. S.* (24).

This principle is again stated in *State v. Burnett* (6) at 288, where our court points out that although such phraseology is "a term which speaks more of total indemnity",

"* * * the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place. *Olson v. United States*, 292 U. S. 246, 255 * * * *Kimball Laundry Co. v. United States*, 338 U. S. 1 * * *. We deal, then, in most valuation problems, in an evidential construction of a hypothetical sale between a willing and uncoerced seller and a like-minded buyer."

As was pointed out in *City of Trenton v. Lenzner* (17) at 476:

“While it has been pointed out that these concepts are somewhat indefinite, it may well be that their flexibility is the very thing which will best serve to attain the goal in eminent domain proceedings of ‘justice and indemnity in each particular case.’ ”

Notwithstanding the foregoing equitable, fair and idealist principles, the cold hard facts are that the practical application thereof in many cases does *not* afford the full and perfect equivalent for the property taken and the owner is *not* placed in as good position pecuniarily as he would have occupied if his property had not been taken.

The items of non-compensable losses with respect to which most frequent complaints are made are discussed below:

Moving Expenses

The taking of property requires the vacation thereof by its occupants, both owners and tenants. This involves the cost of removal of furniture, fixtures, machinery and equipment, and the re-installation thereof in a new location. Incidental thereto is the damage done to such equipment as a result of dismantling and reconstruction.

Until recently, these items were held to be non-compensable items. However, Federal Aid Highway Act (Title 23, Sec. 133, U. S. C.) has now authorized relocation assistance when such payments were authorized and made by state agencies under state statutes. The maximum allowed is \$200 for expenses of an individual and his family and \$3,000 for a business. By P.L. 1962, Chap. 221, the State Highway Commissioner was authorized to pay such sums. Other agencies are not authorized to make any payments whatsoever for such costs, and hence do not do so. *Newark v. Cook* (8) and *City of Trenton v. Lenzner* (17).

The Federal Housing and Redevelopment Agencies are also authorized to make such payments in connection with their projects. (Title 42, U. S. C. A. 1450, *et seq.* as amended, and regulations issued thereunder). These statutes and regulations permit payment of money expenses of \$200 to a family and up to \$25,000 for businesses moving within an area of 100 miles.

There appears to be no logical reason why owners whose lands are taken by agencies subsidized by federal funds should receive compensation for relocation expenses while owners whose lands are taken by other agencies, financed by sale of securities to the public, are not similarly paid. In both instances, the owner suffers the same loss, and the Commission feels that uniform compensation should be paid therefor.

Our cases have held that such relocation items are not compensable as such. *Newark v. Cook, supra* (8), *City of Trenton v. Lenzner* (17) *supra*, *State v. Gallant* (22) *supra*. In *State v. Gallant* (22) decided July 7, 1964, the looms used in the owner's fabric weaving business could be moved only at great physical risk and at an expense of about 80% of its cost. Recognizing that such losses were not compensable as independent items, the court adopted a rule which may grant the owner relief in another manner. It permitted proof of the value of the real property, both with and without the equipment, and directed that the compensation paid should reflect any enhanced value of the property caused by the fact that the equipment was located and ready for use therein.

This, however, does not meet the problem of the merchant whose *land* is not affected by the installation therein of his store fixtures, but who nevertheless suffers a genuine loss caused by the necessity of removal. Nor does it satisfy the merchant or manufacturer who is a *tenant* in the property.

The Commission therefore, recommends that there be included in the amount of just compensation, the actual

cost of moving and the re-installing machinery equipment, furniture and fixtures within a radius of 25 miles, with a limit of \$250 per family in cases of residential moving and \$15000 in cases of displaced businesses or non-profit organizations (churches and the like). The attention of the legislature and public is called to the fact that in some instances, these limitations could be unfair. A manufacturer receiving \$15000 to compensate him for a \$75000 moving cost would be paid only 20% of its cost, but another concern incurring a cost of \$15000 would be paid in full. The legislature might consider some other standard of compensation.

These payments (in addition to compensation for property taken) should be made to the occupants of the property who incur the expenditure, whose right to occupancy expire more than 3 years after the taking date. The fact that a lease may bar a tenant from participating in an award to his landlord, should not bar him from this compensation, payable by the condemnor directly to him.

Business Losses

Objection to the inclusion of this item has been made by some members.

The owner of a thriving business, developed after years of toil and effort, located on property taken for public use, may have his business totally destroyed, but will receive no independent compensation for his loss of good will, income, or profits, resulting from the taking; nor will he be compensated for the loss of and interference with his business while the public improvements are being made. The authorities on this subject are collected in the *Lenzner* case (17).

Various reasons are assigned for this omission:—his *land*, and not his *business* has been taken; he can move his business elsewhere; his profits and good will result from his personal acumen and skill rather than the location of his property; no statutory authority exists authorizing

compensation; damages are speculative and subject to exaggeration; improvement costs would increase substantially the cost of acquisition, and other reasons. *State v. Galant* (22) supra.

What is generally overlooked, however, is that if the owner of the business dies, the state finds no difficulty in valuing and taxing his business good will, and many of the reasons for not compensating him for his loss in eminent domain proceedings, vanish into thin air.

This injustice in eminent domain cases, and the necessity for remedy thereof, has found expression in our courts and the legislatures of sister states. *City of Trenton v. Lenzner* (17) at 477, our Supreme Court has recognized:

“* * * the foregoing principles [lack of compensability for business losses] may operate harshly in denying to landowners reasonable compensation for their actual loss resulting from the taking of their property; and although varying justifying theories may be found in the judicial opinions, they seem far from compelling. * * * More significant is the increasing tendency displayed in recent cases of giving fair and weighty consideration to the consequential loss of business as an element of the compensation rightly due to the owner.”

Some measure of relief, though slight indeed, has been afforded by permitting proof of business profits to establish that the property being taken is being put to its highest and best use, (*Housing Authority of City of Bridgeport v. Lustig* (25)); to support the market value of land occupied by a gasoline station (*State v. Hudson Circle Service Center, Inc.* (26)); and *State v. Williams* (27); and to support value of land used for parking purposes, *City of Trenton v. Lenzner, supra* (17).

On this subject, see enlightening editorial in the 87 N. J. L. J. 68 (January 30, 1964), and an article in 67 Yale Law Journal, p. 61 (1957).

Some members of the Commission feel that the interference with and destruction of a business as a result of a condemnation taking is a loss which entitles the owner to compensation and that the enactment of a statute to that effect is necessary and proper. Others regard the matter debatable.

If this loss is to be compensable, the compensation should be limited to a loss of profits for one year (based upon mathematical average of profits for the three years preceding). Federal tax returns shall be evidential in support and defense of the claim, and failure to exhibit the return shall bar the claim. In Pennsylvania (under a broader constitutional requirement of just compensation) the compensation is arbitrarily measured by the equivalent of the rental value of the business premises for a period not to exceed 24 months (Pennsylvania Statute, P.L. 1964, Act 6, par. 609.)

However, the views of the respective Commissioners are highly divergent on this phase of the Report and therefore no specific recommendation is made.

Consequential Damages

Consequential damages is the term applied to damages sustained by an owner of property as a result of a taking, notwithstanding that no part of his land is actually taken. Such damages are for the most part not compensable in New Jersey, or elsewhere. A glaring example is, *H. F. Sommer v. State Highway Comm.* (28), in which light and air was shut off from a factory by a high embankment, no part of which was located on the owner's property. No compensation was awarded. Another example is the shutting off or interference with an existing access. *Mueller v. State Highway Authority* (29), recognizes that compensation for such interference should be made. Change of grades of existing roads, injury to surface support and the like, are other examples of consequential damages.

If these items are to be compensable, there it is our opinion that an owner should be paid compensation for damages resulting to his property within a limited area (200 feet) of an improvement, resulting from change of grade, permanent interference with access, injury to surface support, or vacation of streets whether or not any property of the owner is actually taken. The views of the Commissioners being divergent, no specific recommendation is made on the general subject.

Benefits Resulting from Taking

In cases of partial takings, the remaining land frequently benefits from the improvement. Our present Eminent Domain Act contains no provision for reflecting this benefit in the calculation of compensation, except in the limited situation where an assessment is to be levied, in which case, it may be set off against any award rendered (R.S. 20:1-33). Our cases have uniformly held that *general* benefits may not be considered to reduce damages which an individual owner will sustain from the taking of a portion of his property. *Ridgewood v. Sreel Investment Corp.* (30) and cases collected therein. The law is reviewed in an article by Walter Goldberg, Esq., 82 N. J. L. J. 273 (May 28, 1959).

It is our recommendation that in cases of partial taking, special benefits (the *immediate peculiar benefits* accruing to the remaining property as a result of the improvement), shall be considered in determining the value of or damage to the remaining land. Such special benefits shall not however affect the compensation for the land actually taken. *General* benefits accruing to the *general* area shall not be considered.

Imminence of Taking

The extent to which the value of property may be affected both favorably and adversely, by public announcements of a proposed taking thereof has been discussed under Article V and is therefore, not repeated in detail. It is mentioned here because it is an element which should be considered in fixing compensation.

General

The foregoing suggestions are not to be regarded as a limitation upon the amount of just compensation to which a condemnee is entitled according to law, but rather as an enlargement of those elements of compensation presently available and as a clarification of those elements in respect to which the right to compensation is debatable.

ARTICLE VII

Vesting of Title

The date at which title to condemned property vests has been the subject of much litigation. The statutes shed little light on this important subject. Some statutes provide for passing of title when the declaration of taking of possession is filed. Others are silent on the subject. The adjudications indicate the need for clarification. See:

- *In re Essex County Park Commission* (34);
- Delancey & Stockton Corp. v. Reliable &c. Co.*
(35);
- Taylor v. N. J. Highway Authority* (36);
- State v. New Jersey Zinc Co.* (37).

Accordingly, it is recommended that title shall vest in the condemning body upon the happening of the earliest of the following contingencies:

1. Recording in the appropriate recording office, a conveyance by the owner to the condemning agency;
2. Filing in the action and recording in the recording office, an agreement between the agency and owner fixing the date as of which title shall so vest;
3. Filing the declaration of taking and making the deposit pursuant to Article III hereof;
4. Satisfying the award of Commissioners or depositing the amount thereof pending appeal;
5. Satisfying a final judgment determining compensation;

The pendency of an appeal shall not prevent the vesting of title, unless the appeal relates to the power of the agency to acquire lands through condemnation.

Title examiners desire that satisfaction of awards and judgments be made matters of public record. This and similar requests concerning public records will be considered in preparation of statute.

The nature of the title to be acquired shall be in fee simple, unless a lesser estate is taken.

Reasonable notice of proposed divesting of title should be afforded, so that corporate condemnees may avail themselves of the benefit of Section 377 of the Internal Revenue Code (avoidance of duplication of capital gains tax).

ARTICLE VIII

Apportionment of Real Estate Taxes

This problem arises when a taking body, enjoying a tax exempt status, acquires title to property during a tax year. The municipalities assert that having anticipated the total tax revenue from the property in their current budget, such taxes, as assessed, should be paid for the entire year. The property owner should, of course, pay the taxes for the period during which he holds title and has full control of his property. The condemning bodies presently vary in their treatment of this problem. Some require the owner to pay the taxes for the entire year, without any allowance for the period subsequent to the taking; others, provide for the payment of taxes to the municipality for the balance of the year (by reimbursing the owner so that he can pay taxes for the entire year); and others refuse to make any allowances for taxes for the balance of the year following the acquisition of title.

A portion of the problem is covered by R.S. 54:4-56, in which it is provided that where title is acquired through eminent domain or similar proceedings, unless otherwise agreed, the owner of the property shall pay the taxes up

to the date that title is acquired by the taking body. The statute leaves open the matter of payment of taxes for the balance of the year.

Much litigation has arisen construing this statute and kindred problems. Clarifying legislation has been recommended in the *Milmar Estate v. Borough of Fort Lee, supra* (12). Some of the applicable adjudications are:

- Rutsen Estates, Inc. v. County of Hudson* (38);
- Empress Manufacturing Co. v. Newark* (39);
- Edgewater v. Corn Products Refining Co.* (40);
- Milmar Estate v. Borough of Fort Lee, supra* (12);
- N. J. Highway Authority v. Henry A. Raemsch Coal Co.* (41);
- Shelton College v. Ringwood* (42).

The matter is now on appeal in *East Orange v. Palmer* (43) in which the Chancery Division adopted a rule applicable when title was acquired by the condemning agency as a result of a *voluntary* settlement agreement, but reserved its ruling with respect to situations where title was acquired through prosecution of eminent domain proceedings.

It is our recommendation that when title is acquired by a condemning agency, whether through settlement, or as a result of prosecution of proceedings, the owner shall be chargeable for the pro rata share of taxes during the period of his ownership or possession and that as additional compensation to the owner, the condemning agency shall pay to the municipality for the account of the owner, the taxes for the balance of the year. The municipality thereby receives payment of the taxes for the entire year.

These recommendations respecting apportionment of taxes, shall not apply to acquisitions of right of way easements by corporations under the jurisdiction of the Public Utilities Commission. The tax liability of such corporations is controlled by special statutes.

ARTICLE IX

Interest

The matter of payment of interest is also a subject of uncertainty and lack of uniformity. Disputes exist both with respect to the period during which interest shall be paid, and the rate at which it should be calculated.

Some of the cases on the subject are:

- Metter v. Easton and Amboy Railroad Co.* (44);
Acquackanonk Water Co. v. Weidman &c., Co.
 (45);
Yara Engineering Co. v. Newark (46);
Milmar v. Borough of Fort Lee, supra (12);
N. J. Highway Authority v. Ellis (49);
State v. Fisher, supra (11);
State, by State Highway Commissioner v. Hankins
 (47).

The *Fisher* case states the rule to be that interest shall be awarded "according to consideration of equity and fair dealing." This is a rather elastic definition, subject to varying constructions.

The courts have awarded interest at 4% (*Bergen County Sewer Authority v. Little Ferry Bor.* (48); *Yara Engineering Co. v. Newark, supra*, at 4½%; and *State, by State Highway Commissioner v. Hankins, supra*, at 5%. Some agencies pay at the rate of 6%.

Both *Milmar v. Borough of Fort Lee, supra* (12), and *State v. Fisher, supra* (11), suggest remedial legislation.

Accordingly, it is recommended that interest at 6% per annum on the amount of the compensation (exclusive of any amount deposited in court) be paid by the condemning agency from the date possession is taken, or the date title vests in the taking body, whichever date is earlier.

The condemning agency shall be entitled to credit on such interest for the amount of any net income received by the owner from the property during such period, and the fair rental value of any portion of said property occupied by the owner during such period.

ARTICLE X

Recording Data

Representatives of title companies, title examiners and surveyors have indicated the necessity for additional recordation of condemnation data. Where such matters are terminated through a recorded conveyance, existing statutes are sufficient. On the other hand, title vests in the taking body frequently merely as the result of a judgment in the proceedings and payment thereof, but without any conveyance by the owner. This requires a title examiner to make a detailed examination of the proceedings, with respect particularly to any modification of the original taking lines fixed during the hearings, and with respect to which no formal transcript is made or amendment filed.

The Commission is of the opinion that the description contained in the complaint and *lis pendens* should be sufficiently definite and accurate to enable an owner, from a reading thereof and a comparison with monuments or other land marks upon the ground and therein referred to, to ascertain accurately the location of the land and interest therein which is proposed to be taken. A metes and bounds description, with reference to the latest tax map designation should be a minimum requirement.

This is especially vital in cases of partial takings, which generally include slope or other access rights to and over the remaining lands. The owner is entitled to know exactly what lands are still held by him and what easements thereover exist, and this data should be a matter of public record.

It is also recommended that the provisions respecting amendments to pleadings, the entry of judgment and the like, be made matters of public record in the office of the recording register or clerk, as the case may be, and indexed as in the case of recording of conveyances to real estate.

Details of these suggestions are in the process of preparation by the title companies and cannot be submitted at this time.

ARTICLE XI

Clerk's Fees on Funds Deposited

Clerk's fees are charged pursuant to R.S. 22A:2-20 *et seq.* on funds deposited in connection with condemnation cases. The rates are \$15.50 on the first \$1,000, and 1% on the balance.

Such funds are deposited as a condition precedent to entering into possession before fixing of compensation, or where ownership is in dispute or uncertain. Substantial sums become involved and disputes have arisen as to whether payment thereof is chargeable to the taking agency or to the fund. The question was discussed in *State v. Ellis* (49) and there it was held that in the absence of a statute, no costs may be assessed against the State. The problem was also discussed in *State v. Pellini* (13), *supra*, at 171, and there it was held to be chargeable against the fund, since it was deposited because of uncertainty of ownership, a state of facts not created by the state. In an unreported opinion by Superior Court Judge Conklin, in *City of Newark v. S. N. Holding Co.* (Docket Nos. L-828-61; L-10887-61), it was held that the deduction of clerk's fees from an award, deprived the owner of just compensation, when the deposit was made to enable the City to take possession.

It is recommended that all such charges be eliminated with respect to funds deposited in eminent domain matters. This action was recently adopted in the Pennsylvania Eminent Domain Code (P.L. 1964, Act. No. 6, par. 522).

If this recommendation cannot be adopted, then consideration should be given to an equitable apportionment of the costs between the parties.

CONCLUSION

A statute carrying the foregoing recommendations into effect is now in the process of preparation for consideration by the Legislature.

It is the hope of the Commission that the factual and legal data herein contained, and recommendations made may be of aid and assistance in solving the very intricate and important problems arising in this State as a result of the ever increasing taking of private property for public use.

Respectfully submitted,

HERBERT J. HANNOCH,
Chairman.

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- (1) N. J. Eq. 694 (Ch. 1832).
- (1a) 166 U. S. 226 (1897).
- (2) 17 N. J. L. 129 (Sup. Ct. 1839).
- (3) 102 N. J. Eq. 221 *aff'd* 103 N. J. Eq. 376 (E. & A. (1928)).
- (4) 13 N. J. 528, 543 (1953).
- (5) 13 N. J. 569; *cert. denied* 347 U. S. 966.
- (6) 24 N. J. 280, 287 (1957).
- (7) 27 N. J. 516, 529, 530 (1958).
- (8) 99 N. J. Eq. 527 *aff'd* 100 N. J. E. 581-4 (1926) *cert. denied* 274 U. S. 757.
- (9) 96 N. J. Eq. 425 (Ch. 1924).
- (10) 27 N. J. 257 (1958—*concurring opinion*)
- (11) 54 N. J. Super. 274, 283 (1959).
- (12) 36 N. J. Super. 241, 246 (1955).
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- (16) 190 N. E. 2d 52 (1963).
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- (19) 323 U. S. 375 (1945).
- (20) 338 U. S. 1 (1949).
- (21) 26 N. J. 113 (1958).
- (22) 42 N. J. 583 (1964).
- (23) 317 U. S. 309, 373 (1942).

- (24) 148 U. S. 312, 326 (1892).
- (25) 90 Atl. 2d 169 (Conn. 1952).
- (26) 46 N. J. Super. 125 (1957).
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- (28) 106 N. J. L. 26 (1929).
- (29) 57 N. J. Super. 583, 589 (1960).
- (30) 28 N. J. 121, 131 (1958).
- (31) 27 N. J. 361, 374 (1958).
- (32) 167 U. S. 548 (1897).
- (33) 308 U. S. 271 (1939).
- (34) 80 N. J. Eq. 1, aff'd 81 N. J. Eq. 163 (1912).
- (35) 134 N. J. Eq. 71, 75 (1943).
- (36) 22 N. J. 454 (1956).
- (37) 40 N. J. 560, 572 (1963).
- (38) 102 N. J. L. 265 (1925).
- (39) 109 N. J. L. 131 (1932).
- (40) 136 N. J. L. 664 (1947).
- (41) 40 N. J. Super. 355 (1956).
- (42) 48 N. J. Super. 10 (1957).
- (43) 82 N. J. Super. 258 (1964).
- (44) 37 N. J. L. 222 (1874).
- (45) 99 N. J. L. 175.
- (46) 136 N. J. Eq. 453 (1945).
- (47) 63 N. J. Super. 326 (1960).
- (48) 15 N. J. Super. 43, 52 (1951).
- (49) 24 N. J. 1 (1957).
- (50) 21 N. J. 189, 195.