

## CHALLENGING THE CONDEMNOR'S RIGHT TO CONDEMN: AVOIDANCE OF PERIPHERAL DAMAGES

One of the most difficult political and moral problems regarding large-scale public improvement projects is providing full compensation to the landowner for losses which occur in the long period between public announcement and property acquisition. In broad outline, the process of planning and condemnation consists of advance project planning, public announcements of, and hearings on the project, filing of condemnation petition, valuation of the property, and determination of compensation at trial. While the landowner is compensated for the loss of possession of his property, earlier losses (in the form of depreciation, loss of tenants, and non-marketability of the property) following the designation of the project are not compensated. This is true because the earliest time at which the value of the property can legally be determined is the date of the filing of the condemnation petition.<sup>1</sup>

This problem is particularly acute when the landowner challenges the right of the condemnor to condemn his land. The owner who feels his challenge will be successful may continue to repair and improve his property even after the petition to condemn is filed. If it is found that the condemnor is acting properly, the owner will not be compensated for improvements made after the filing. The problem is exacerbated in the case of a successful challenge,<sup>2</sup> whether the owner is optimistic or pessimistic.

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1. *Housing Auth. of the City of Decatur v. Schroeder*, 113 Ga. App. 432, 148 S.E.2d 188, *rev'd on other grounds*, 222 Ga. 417, 151 S.E.2d 226 (1966); *Chicago Housing Auth. v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); *Eckhoff v. Forest Preserve Dist.*, 377 Ill. 208, 36 N.E.2d 245 (1941); *Glaves, Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 329 (1963); *Comment, Modernizing Illinois Eminent Domain Procedures*, 48 Nw. U.L. REV. 484, 487 (1953) and cases there cited; *see St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964).

2. It must be questioned, however, whether it is realistic to assume that the owner can successfully challenge the public action. *See Costello, Challenging the Right to Condemn*, 1966 U. ILL. L.F. 52, 53.

There seems to be a general reluctance on the part of the courts to intervene if there is a proper exercise of the eminent domain power, even to prevent financial losses resulting from project execution. Many courts have indicated that such problems are for the legislature. Note, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 125. Even in the case of an improper taking, the reluctance of the courts to inhibit the eminent domain power is apparent. In *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944), a public utility

If the owner has maintained and improved his property, it will have declined in value due to the deterioration of the neighborhood. And if he has been pessimistic, he is left in possession of property sorely in need of repairs and improvement.<sup>3</sup>

It is important to determine at what point in the proceedings the condemnee can challenge the condemnor's right to condemn, because the earlier he can successfully challenge, the smaller will be the losses of the successful owner or of the unsuccessful owner who has maintained his property while challenging. The owner is in an almost impossible position. He cannot practically challenge the right early enough to preclude damages, yet courts have defined the term "taking" such that he cannot be compensated for damages resulting from delay. An early challenge serves both to settle the rights of the parties and to avoid uncompensable damages. This note will examine the nature of the damages involved, the rules governing the time at which the challenge can be raised, and the alternatives for providing an early yet practical challenge.

### I. PERIPHERAL DAMAGES: NATURE AND OCCURRENCE

The damages that can be avoided through an early challenge to the condemnor's right will be referred to throughout this note as peripheral damages.<sup>4</sup> This term indicates the depreciation the property suffers<sup>5</sup> and the freeze upon the owner's right to sell<sup>6</sup> during the period before the taking,

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took plaintiff's land without using the eminent domain power which it possessed. The court remonstrated against such action, firmly stated that the utility company was liable for damages in trespass and ejection, and said the owner was entitled to a mandatory injunction. The court held, however, that the injunction should be delayed to give the utility a reasonable time to establish its right to take.

3. An analogy can be drawn to the situation in which the proceedings are discontinued by the public agency. A subsequent finding of a lack of right would be similar to a discontinuance, because in both cases there would be a cessation of proceedings without compensation, after damages have been suffered. *See Hamer v. State Highway Comm'n*, 304 S.W.2d 869 (Mo. 1957); *Sorbino v. New Brunswick*, 43 N.J. Super. 554, 129 A.2d 473 (1957) (dictum); *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965); 6 P. NICHOLS, *EMINENT DOMAIN* §§ 26.4, 26.45 (Rev. 3d ed. 1950). *See generally* Annot., 92 A.L.R.2d 355 (1961).

4. The English call these damages "planning blight" and provide a procedure to compel compensation. Town & Country Planning Act 1959, 7 & 8 Eliz. 2, c. 53, Part IV; *Glaves*, *supra* note 1, at 344-45.

5. *See St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964); *City of Cleveland v. Kacmarik*, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (C.P. Cuyahoga County 1961); *Glaves*, *supra* note 1, at 344-45.

6. *See City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965); Limerick, *Procedures Under the Illinois Eminent Domain Act*, 1966 U. ILL. L.F. 1, 4.

as distinguished from the direct damage which the owner sustains by being physically deprived of his property. Peripheral damages may occur when surrounding landowners move out and allow their properties to fall into disrepair.<sup>7</sup> Not even owner occupancy can prevent decline: it is pointless to expend large amounts for maintenance and repair since the property is under threat of condemnation.<sup>8</sup> The owner, resident or not, who has space to rent, will lose income when he is unable, because of neighborhood decay, to replace tenants who move out.<sup>9</sup> Loss of income further discourages maintenance, which further discourages prospective tenants. Buildings are soon abandoned to vermin and vandals.<sup>10</sup> Peripheral damages thus have a reinforcing effect: once begun, the decline feeds upon itself.

There are a number of delays in the planning and condemnation process during which peripheral damages can accumulate. While a delay of five years between project planning and the commencement of condemnation proceedings is common, there are instances of delay of as much as thirteen years.<sup>11</sup> After the condemnation petition has been filed, the property may not be viewed for valuation purposes<sup>12</sup> for many more months, and there

7. *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966); *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964); *City of Cleveland v. Kacmarik*, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (C.P. Cuyahoga County 1961); *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965); STAFF OF HOUSE COMM. ON PUBLIC WORKS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 88TH CONG., 2D SESS., 64-65 (Comm. Print 1964); *see Olson & French, Inc. v. Commonwealth*, 399 Pa. 266, 160 A.2d 401 (1960).

8. Mandelker, *Planning the Freeway: Interim Controls in Highway Programs*, 1964 DUKE L.J. 439, 460; *see City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965).

9. *See Mosher v. City of Phoenix*, 39 Ariz. 470, 7 P.2d 622 (1932), *overruled on other grounds*, *In re Forstrom*, 44 Ariz. 472, 38 P.2d 878 (1934); *Housing Auth. of the City of Decatur v. Schroeder*, 113 Ga. App. 432, 148 S.E.2d 188, *rev'd on other grounds*, 222 Ga. 417, 151 S.E.2d 226 (1966); *City of Cincinnati v. Mandel*, 38 Ohio Op. 2d 157, 224 N.E.2d 179 (C.P. Hamilton County 1966); *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965); *State v. Vaughan*, 319 S.W.2d 349 (Tex. Civ. App. 1958).

10. *See Housing Auth. of the City of Decatur v. Schroeder*, 113 Ga. App. 432, 148 S.E.2d 188, *rev'd on other grounds*, 222 Ga. 417, 151 S.E.2d 226 (1966); *Chicago Housing Auth. v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964); *City of Cleveland v. Kacmarik*, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (C.P. Cuyahoga County 1961).

11. Glaves, *supra* note 1, at 327 & n.49. *See also* Mandelker, *supra* note 8.

12. "View" is the term used to describe the examination of condemned property by a board of appraisers (sometimes called viewers or commissioners) for valuation purposes. Pennsylvania procedure is typical. In each county there is a three to nine member board, appointed by the judges of the court of common pleas for a term of three to six years. The appraisers are attorneys, tax assessors, or other appraisal experts. Three board mem-

is another time lag between the view and the trial at which the compensation is actually determined. The stage at which the peripheral damages begin to accumulate will depend on when the community realizes the project will actually be performed. Since this may be different in each city, the holdings vary as to when peripheral damages occur. Courts have been called upon to recognize the occurrence of these damages at three points in the process: announcement, designation, and filing of petition.<sup>13</sup> Most courts have refused even to recognize the existence of any damages prior to taking of possession by the public agency. Those that do recognize the existence of peripheral damages have held such injury non-compensable because it doesn't constitute a taking. This refusal to define a taking as occurring earlier than physical dispossession has created the problem of uncompensated damages.<sup>14</sup>

The bare announcement of intent to undertake a project may be sufficient, even before its exact boundaries are defined, to affect market values (in which event it is possible that property will be depreciated though it is ultimately decided not to include it in the project). The announcement of a renewal or highway plan will mean an end to improvement and maintenance in the community and will depreciate property values at least until the scope of the plan is clarified.<sup>15</sup> These effects can be particularly harmful in an area designated in part for conservation and rehabilitation, because deterioration will render the program more costly and difficult.<sup>16</sup> Despite these problems, courts have either denied the existence of any

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bers, appointed by the trial court, constitute the panel assigned to value the property in any particular case. The view consists of an actual visit to the site, although the panel may also hear evidence and examine witnesses. After the view has been completed, a report as to the value of the property and the amount of the owner's damages is filed with the court. A majority of the panel must concur in the report. Some statutes designate the time of the view and the return date of the report, although the Pennsylvania code leaves these matters to the appraisers' discretion, merely cautioning them to act promptly. At the trial, the appraisers' report is admitted as evidence of the owner's damages, but the owner is permitted to contest the report and submit his own evidence. The jury may make its own view of the property. E. SNITZER, PENNSYLVANIA EMINENT DOMAIN §§ 503, 504, 504-2, 510-2, 511-2, 701-1, 801 (1965).

13. Cf. *Glaves*, *supra* note 1, at 327.

14. See *State v. 0.62033 Acres of Land*, 49 Del. 174, 180-81, 112 A.2d 857, 861 (1955); *Housing Auth. of the City of Decatur v. Schroeder*, 222 Ga. 417, 151 S.E.2d 226, *rev'g* 113 Ga. App. 432, 148 S.E.2d 188 (1966).

15. HOUSE COMM. ON PUBLIC WORKS, *supra* note 7, at 64; *Glaves*, *supra* note 1, at 327-28; Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 525 (1959).

16. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 525 & n.189 (1959).

damages,<sup>17</sup> or have recognized their existence but held that since they do not amount to a taking they are non-compensable.<sup>18</sup> A recent Kansas case<sup>19</sup> seems an exception. Two resolutions were passed by a municipal board of commissioners: one found an area to be blighted; the other approved the urban renewal agency's plan for the area. The landowners apparently sued before the declaration of taking (petition of condemnation) was filed. The Supreme Court of Kansas, affirming the grant of an injunction, held that passage of the resolutions was arbitrary, and indicated, when it referred to "the action of the Commission in passing the two resolutions taking [the] property,"<sup>20</sup> that their passage may have constituted a taking.

17. A clear statement of this position is found in *Thompson v. Fayette County*, 302 S.W.2d 550 (Ky. 1957). This case involved a resolution of the Fayette County Fiscal Court to open a street:

We are confronted with the effect of the resolution of the Fiscal Court. Appellees assert the action taken was simply a first step in the opening of this street prior to condemnation, and the resolution itself did not effect a "taking" of property rights. This position is sound.

Surely no street came into being upon the passage of the resolution. It seems clear . . . that the "establishment" of the street constitutes a designation of it. . . . The resolution of the Fiscal Court must be construed as identifying the new roadway ultimately to be established when necessary further procedural steps have been taken. Therefore the resolution, standing alone, took nothing from appellants.

*Id.* at 551. The following authorities also support this position: *United States v. Sponenbarger*, 308 U.S. 256 (1939); *Danforth v. United States*, 308 U.S. 271 (1939); *City of Chicago v. Lederer*, 274 Ill. 584, 113 N.E. 883 (1916); *Hamer v. State Highway Comm'n*, 304 S.W.2d 869 (Mo. 1957); *Glaves, supra* note 1, at 329; *Annot.*, 64 A.L.R. 546 (1929); *see City of Chicago v. R. Zwick Co.*, 27 Ill. 2d 128, 188 N.E.2d 489, *appeal dismissed sub nom.*, *Gonzalez v. City of Chicago*, 373 U.S. 542 (1963); *Grisanti v. City of Cleveland*, 18 Ohio Op. 2d 143, 179 N.E.2d 798 (C.P. Cuyahoga County 1961), *appeal dismissed per curiam*, 173 Ohio St. 386, 182 N.E.2d 568, *appeal dismissed per curiam*, 371 U.S. 68 (1962). In its decision in *State Road Dep't v. Chicone*, 158 So. 2d 753, 758 (Fla. 1963), the court said that depression or depreciation in the value due to the "prospect" of condemnation is generally not compensable. *Contra*, *Housing & Redev. Auth. v. Minneapolis Metropolitan Co.*, 273 Minn. 256, 141 N.W.2d 130 (1966); *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963); *City of Cincinnati v. Mandel*, 38 Ohio Op. 2d 157, 224 N.E.2d 179 (C.P. Hamilton County 1966). In the *Minneapolis Metropolitan Co.* case, *supra*, MINN. STAT. ANN. § 462.445(3) (1964) required discounting any increase due to the value of the project. The court held that the statute operated to bar the consideration of a decrease as well.

18. *Eckhoff v. Forest Preserve Dist.*, 377 Ill. 208, 36 N.E.2d 245 (1941); *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964); *Bakken v. State*, 142 Mont. 166, 382 P.2d 550 (1963); *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958); *Sorbino v. New Brunswick*, 43 N.J. Super. 554, 129 A.2d 473 (1957) (depreciation due to legislation is just an incident of ownership); *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964) (an "incidental" damage), *cert. denied*, 380 U.S. 962 (1965). *Contra*, *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966).

19. *Offen v. City of Topeka*, 186 Kan. 389, 350 P.2d 33 (1960).

20. *Id.* at 390, 350 P.2d at 35. The court went on to state that "where a private citizen is likely to be injured in some special manner or whose situation is peculiarly affected

Peripheral damages also occur when the property is designated on an urban renewal project map or at the site of a public improvement.<sup>21</sup> It has generally been held, however, that the mere act of locating, mapping, or plotting a proposed project does not amount to a taking of land in the constitutional sense of the term<sup>22</sup>. Only an "unreasonable" exercise of the mapping power will be compensable. In *Miller v. Beaver Falls*,<sup>23</sup> a statute gave the public agency a period of three years to acquire land after its reservation for park and playground purposes. The Pennsylvania Supreme Court held this delay to be an unconstitutional freeze on value in that it constituted a cloud on the title.<sup>24</sup> The length of delay which a court will find unreasonable is open to question, however. For instance, one court upheld a zoning ordinance which allowed a three year reservation of property which advance planning had designated for acquisition for reservoir purposes.<sup>25</sup>

The third point at which it has been urged, unsuccessfully, that damage begins and taking occurs, is the filing of the condemnation petition.<sup>26</sup> While

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by the exercise of usurped authority, he may maintain an action for injunctive relief." Thus, even without a finding that the resolutions constituted a taking, the same result might be reached on the basis that they damaged the property. See also *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963); *City of Cincinnati v. Mandel*, 38 Ohio Op. 2d 157, 224 N.E.2d 179 (C.P. Hamilton County 1966).

21. Other pre-filing activities can also cause peripheral damages. These include the determination that a study should be made of the feasibility of undertaking the project, preparation of surveys and planning reports, gathering of preliminary ownership and title information, preparation of formal urban renewal documents, agreement between the various agencies involved, holding of public hearings, approval of the plan, and certification by local, state, and federal authorities. HOUSE COMM. ON PUBLIC WORKS, *supra* note 7, at 65.

22. Note, *Eminent Domain and the Planning of Public Streets in Pennsylvania*, 13 U. PITT. L. REV. 553, 554 (1952) and cases there cited. See also 2 P. NICHOLS, *supra* note 3, § 6.12. See generally *Glaves*, *supra* note 1, at 331-36.

23. 368 Pa. 189, 82 A.2d 34 (1951).

24. *Accord*, *State ex rel. Willey v. Griggs*, 89 Ariz. 70, 358 P.2d 174 (1960); see *Mandelker*, *supra* note 8, at 455, 467 & n.91.

25. *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963); *Mandelker*, *supra* note 8, at 456 & n.49. Even in Pennsylvania it has been said that a delay of five years is permissible when a street is being plotted. *In re Philadelphia Parkway*, 295 Pa. 538, 145 A. 600 (1929); see *Miller v. Beaver Falls*, 368 Pa. 189, 192-96, 82 A.2d 34, 36-37 (1951) (dictum on the difference between reserving property for street purposes and reserving property for park purposes).

26. See *Limerick*, *supra* note 6, at 4. *Limerick* points out that the filing encumbers the land, impedes its transfer, and, although it vests no interest in the condemnor, destroys the fee simple estate of the owner.

The same result can follow negotiations for voluntary purchase. *Chicago Housing Auth. v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); see *Hamer v. State Highway Comm'n*, 304 S.W.2d 869 (Mo. 1957). Again, the peripheral damages are non-compensable. *Eckhoff v. Forest Preserve Dist.*, 377 Ill. 208, 36 N.E.2d 245 (1941).

damages sustained before the filing are not compensable, the landowner supposedly receives just compensation for the value of his property at the time of filing.<sup>27</sup> However, there can be long delays, during which depreciation continues, in the process between filing and the adjudication of value.<sup>28</sup> Because of the time lags before view and trial, it is often difficult to determine the value of the property as of the time of filing.<sup>29</sup> While courts have recognized that depreciation can result from condemnation proceedings, this damage, too, has been held non-compensable.<sup>30</sup>

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27. Note 1 *supra* and accompanying text.

28. Note 11, *supra* and accompanying text.

29. See *City of Cleveland v. Kacmarik*, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (C.P. Cuyahoga County 1961); *Glaves, supra* note 1, at 328.

The problem here is similar to the problem created by the lapse of time between the filing of the petition (the usual date of valuation) and the date upon which actual valuation is made in the courtroom. If actual valuation is long after the date of filing, it may be impossible because of subsequent depreciation to determine value accurately. See generally *Glaves, supra* note 1. "A particular valuation date will effectively determine where the burdens and benefits of the market effects will fall." *Id.* at 321.

30. The court has not overlooked an additional objection made by certain defendants that under the statutory scheme for condemnation there has already been an uncompensated "taking" of property in this case. The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. *But such interference is inherent in all condemnation proceedings.* No case has been cited or found which supports the view that the condemnation action itself constitutes a taking. The court finds no merit in it. *Virgin Islands v. 50.05 Acres of Land*, 185 F. Supp. 495, 498 (D.C.V.I. 1960) (emphasis added); *accord, Mosher v. City of Phoenix*, 39 Ariz. 470, 7 P.2d 622 (1932), *overruled on other grounds, In re Forsstrom*, 44 Ariz. 472, 38 P.2d 878 (1934); *Housing Auth. v. Lamar*, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 63 S.W.2d 814 (1933) (decrease in rental value and inability to sell property during pendency of proceedings are "personal" damages); *Sorbino v. City of New Brunswick*, 43 N.J. Super. 554, 129 A.2d 473 (1957) (dictum); *see State Road Dep't v. Chicone*, 158 So. 2d 753 (Fla. 1963); *A. Gettelman Brewing Co. v. City of Milwaukee*, 245 Wis. 9, 13 N.W.2d 541 (1944); 2 P. NICHOLS, *supra* note 3, § 6.13[3].

Aside from announcement, mapping, and institution of proceedings, there are other municipal actions which can result in peripheral damages. The holdings are unclear as to whether peripheral damages caused by such acts will entitle the owner to compensation.

It is generally held that the condemnor may not by deliberate acts reduce the value of the property. *Old Colony & Fall River R. R. v. County of Plymouth*, 80 Mass. (14 Gray) 155 (1859); *In re Elmwood Park Project*, 376 Mich. 311, 136 N.W.2d 896 (1965); *City of Cleveland v. Kacmarik*, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (C.P. Cuyahoga County 1961); 2 P. NICHOLS, *supra* note 3, §§ 6.1[1], 6.21; *cf.*, in the zoning context, *City of Plainfield v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (1961). There is no agreement, however, as to what constitutes "deliberate acts," beyond those undertaken by the city in bad faith or to encourage depreciation. *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966); *In re Elmwood Park Project, supra*; *Application of Port Auth. Trans-Hudson Corp.*, 48 Misc. 2d 485, 265 N.Y.S.2d 925 (Sup. Ct. 1965); *see Foster v. Herley*, 207 F. Supp. 71 (E.D. Mich. 1962); *Eckhoff v. Forest*

Since the courts, with very few exceptions, have refused to redefine the concept of "taking," the time at which the owner can challenge the condemnor's right to condemn becomes a very important issue. The earlier he can challenge, the less serious will be his non-compensable peripheral damages.

## II. METHODS OF CHALLENGING THE CONDEMNOR'S RIGHT TO CONDEMN

The condemnee now has the right in all jurisdictions to challenge, on a variety of grounds, the condemnor's right to condemn.<sup>31</sup> The issue of right is different from that of public use, which in most public programs has been settled in favor of the condemnor.<sup>32</sup> Challenging right often involves an attack on the legislative authority to condemn blighted areas, or on the condemnor's compliance in fact with such authority.<sup>33</sup>

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Preserve Dist., 377 Ill. 208, 36 N.E.2d 245 (1941). In some cases, however, acts which appeared to be deliberate and which resulted in damages, were held to be non-compensable. For instance, one court held that letters sent to tenants notifying them of intent to condemn and causing them to move did not constitute a taking. *State v. Vaughan*, 319 S.W.2d 349 (Tex. Civ. App. 1958). Nor will abandonment of the proceedings and refile of the petition always entitle the landowner to compensation, unless he can establish the bad faith of the condemnor in seeking to avoid the high award granted in the first proceeding. *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App. 1964), *cert. denied*, 380 U.S. 962 (1965).

On the other hand, there are decisions holding that the award cannot be decreased as a result of depreciation caused by actions which are merely the normal procedures involved in project execution. *City of Cincinnati v. Mandel*, 38 Ohio Op. 2d 157, 224 N.E.2d 179 (C.P. Hamilton County 1966); *see City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963). The court in *Carcione* emphasized that valuation should be made at a date "immediately before the City . . . took active steps to carry out the work of the project which to any extent depreciated the value of the property." *Id.* at 533, 190 N.E.2d at 57 (emphasis added).

31. A. JAHR, *EMINENT DOMAIN: VALUATION AND PROCEDURE* §§ 201, 236 (1957). One purpose of the condemnation petition in many states is to establish the condemnor's right to take. Wasserman, *Procedure in Eminent Domain*, 11 *MERCER L. REV.* 245, 268 (1960).

32. It has long been held that condemnation for highways and urban renewal is for a public use. 2 P. NICHOLS, *supra* note 3, §§ 7.512, 7.51561.

33. Although the question of what constitutes a challenge to right is beyond the scope of this note, an example will be found in note 115 *infra*. In deciding what issues go to the question of right, subtle distinctions must often be made. *Compare In re Certain Parcels of Land*, 420 Pa. 295, 216 A.2d 769 (1966), with *State v. Land Clearance for Redev. Auth.*, 364 Mo. 974, 270 S.W.2d 44 (1954); *cf. Rothwell v. Coffin*, 122 Colo. 140, 220 P.2d 1063 (1950); *City of Chicago v. Riley*, 16 Ill. 2d 257, 157 N.E.2d 46 (1959); *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N.E. 132 (1924) (interpreting OHIO GEN. CODE § 3680, presently OHIO REV. CODE § 719.05 (1953)); *Costello*, *supra* note 2, at 53. In *In re Certain Parcels of Land*, *supra*, a challenge on the basis that the condemnee's property was not blighted was considered by the court to be a challenge to the authority's right to condemn. In *State v. Land Clearance for Redev.*

There are four points in the process at which the condemnee can raise the issue of right to condemn, all of which, unfortunately, are likely to occur long after damage has begun. Nonetheless, even a few months difference can be significant to an owner responsible for taxes and utilities of a building producing little or no income.

#### A. *Challenge After Compensation is Awarded*

A procedure of some antiquity, followed in only a few modern jurisdictions, permits the challenge to the condemnor's right only after the amount of the award has been determined.<sup>34</sup> This method delays adjudication of right to the latest possible time, and hence maximizes peripheral damage.

The few jurisdictions following this practice implement it in different ways. North Carolina allows the challenge only on appeal,<sup>35</sup> while California leaves it to the trial judge to consider the challenge at trial or to reserve the question until the jury has reached its verdict on compensation.<sup>36</sup> In Kansas, until recently, a challenge as part of the condemnation proceedings could be had only on appeal, although the issue could be raised earlier in a separate suit in equity.<sup>37</sup> In 1963, the Kansas legislature amended the eminent domain statute to eliminate the need for recourse to equity, and to allow the challenge to be made as soon as the petition of condemnation is filed.<sup>38</sup> A recent Minnesota case<sup>39</sup> involved the City of Austin, whose charter authorized the Common Council to carry out the entire condemnation itself, including the appointment of appraisers and the awarding of the compensation. The landowner was given the right to appeal to the state district court within ten days after the Council's resolution confirming the award. The Supreme Court of Minnesota upheld this procedure, holding

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*Auth., supra*, the condemnee challenged solely on the basis that the entire area was not blighted. The court refused to adjudicate this issue on the basis that "the decision of what property is to be taken is a legislative and not a judicial function." *Id.* at 994, 270 S.W.2d at 56. The condemnee's petition in the *Riley* case, *supra*, alleged that the condemnee had accepted the authority's offer for the purchase of the property and prayed for dismissal of the condemnation suit, or, in the alternative, that judgment be entered in the amount of the offer. The court held that this was in the nature of traverse and questioned the condemnor's right to condemn.

34. *See* *Town of Selma v. Noble*, 183 N.C. 322, 111 S.E. 543 (1922).

35. *Id.*

36. *Laguna Salada Union Elem. School Dist. v. Pacific Dev. Co.*, 119 Cal. App. 2d 470, 259 P.2d 498 (1953).

37. *State v. Boicourt Hunting Ass'n*, 177 Kan. 637, 282 P.2d 395 (1955).

38. KAN. GEN. STAT. ANN. §§ 26-501, -504 (1963).

39. *City of Austin v. Wright*, 262 Minn. 301, 114 N.W.2d 584 (1962).

that the owner was not constitutionally entitled to a hearing on the question of right before the Council. A judicial appeal after the Council set the compensation was held to protect fully the owner's constitutional rights.<sup>40</sup>

### B. *Challenge at Valuation Trial*

A substantial minority of jurisdictions allows the challenge to be made at the valuation trial.<sup>41</sup> In a recent case<sup>42</sup> typifying this procedure, the property owners challenged a taking by answer to the condemnation petition. The applicable statute provided that "any issue raised in the answer or other pleading filed, putting in issue the right of the agency to condemn the property shall be promptly heard. . . ."<sup>43</sup> The agency argued that the statute required the court to hear the issue of right only after final judgment on valuation had been entered.<sup>44</sup> The court disagreed, holding that the procedure suggested by the agency would permit a taking without the hearing expressly required by the statute.<sup>45</sup> The court's solution was to require a hearing on the issue of right at the proceeding to determine the award, but before the entry of the judgment granting the agency possession. The court's solution is preferable to the agency's, but it still postpones the prompt hearing required by the statute to a time after the appraisers' report is submitted. In other states, either decisionally or by statute, the determination of right must be made by the judge prior to submitting the question of compensation to the jury.<sup>46</sup>

A decision that the trial is the proper place to raise the issue of right means that the exercise of eminent domain is treated as an ordinary law suit in which all defenses are raised at trial. In the ordinary law suit, however, damages are not likely to be irreparably aggravated with each delay

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40. *Id.* at 306, 114 N.W.2d at 587; *cf.* 6 P. NICHOLS, *supra* note 3, § 25.3[1]: "Certiorari takes the place of the hearing by the court upon the adjudication of the right to take which is a necessary step in condemnation by judicial proceedings." *See also* *Town of Selma v. Noble*, 183 N.C. 322, 111 S.E. 543 (1922) (based on a questionable interpretation of N.C. GEN. STAT. § 40-16 (1871-72), presently N.C. GEN. STAT. § 40-16 (1966)).

41. 2 J. LEWIS, *EMINENT DOMAIN* § 602 (3d ed. 1909).

42. *Idol v. Knuckles*, 383 S.W.2d 910 (Ky. 1964).

43. KY. REV. STAT. § 99.420(5) (1963).

44. In making this contention the agency relied upon another section of the statute which provided that the agency may file a demand for an interlocutory judgment at any time prior to the entry of final judgment and after the report and award of the appraisers is filed. KY. REV. STAT. § 99.420(9) (1963).

45. *Idol v. Knuckles*, 383 S.W.2d 910, 912 (Ky. 1964).

46. *Stein v. Darby*, 126 So. 2d 313 (Fla. Dist. Ct. App. 1961) (interpreting FLA. STAT. ANN. § 704.04 (Supp. 1966) (enacted in 1953)); *Brown v. Calumet River Ry.*, 125 Ill. 600, 18 N.E. 283 (1888) (decisionally).

in the proceedings. While the delay under this method is not quite as long as when the challenge is postponed until after compensation is awarded, both procedures allow peripheral damages to accumulate longer than is necessary.

### C. Challenge After Filing of Condemnation Petition

The majority of jurisdictions allows a hearing on the issue of right during the condemnation proceedings, but *in limine*,<sup>47</sup> *i.e.*, before the appointment of appraisers to determine the compensation.<sup>48</sup> The determination of the issue of right can be made by the court either as part of the general proceeding or in an entirely separate hearing.<sup>49</sup> In those jurisdictions which allow a challenge to the right to condemn after filing, the challenge may be raised by one of three methods: by answer, by motion to dismiss, or by a separate suit in equity.

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47. 6 P. NICHOLS, *supra* note 3, § 26.3:

It is the usual practice in the states in which condemnation is effected by judicial proceedings for a hearing to be held at which the petitioner is called upon to establish its right to condemn the land described in the petition, before any action is taken toward appointing commissioners, or sending the case to a jury to determine the compensation or damages to be awarded.

*Accord*, County Bd. of School Trustees v. Batchelder, 7 Ill. 2d 178, 130 N.E.2d 175 (1955); Potomac Elec. Power Co. v. Birkett, 217 Md. 476, 143 A.2d 485 (1958).

48. State v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955) (DEL. CODE ANN. tit. 10, § 6107 (1953)); Wilton v. St. Johns County, 98 Fla. 26, 123 So. 527 (1929); State v. New Jersey Zinc Co., 40 N.J. 560, 193 A.2d 244 (1963) (N.J. REV. STAT. § 20:1-2 (1953)); *In re* Parking Fields 11 & 11A, 217 N.Y.S.2d 827 (Sup. Ct. 1961); 2 J. LEWIS, *supra* note 41, §§ 589, 602. In Washington, it is the first part of a three part procedure. Mercer Island School Dist. No. 400 v. Victor Scalzo, Inc., 54 Wash. 2d 539, 342 P.2d 225 (1959).

The hearing can be conducted without waiting for further action by the public authority. State v. 0.62033 Acres of Land, *supra*, at 180, 112 A.2d at 860-61. On the other hand, it may not be impermissible to wait for a considerable length of time after the filing. In Frank Mashuda Co. v. County of Allegheny, 256 F.2d 241 (3d Cir. 1958), it was held that the fact that the landowner waited two and one half years after the filing did not bar the challenge because of laches. Rather, his case was stronger because the delay was for the purpose of seeing what use the county was planning to make of the land. This decision is superseded by the new Pennsylvania Eminent Domain Code, notes 78-80 *infra* and accompanying text.

49. Metropolitan Seattle v. Kenmore Properties, Inc., 67 Wash. 2d 923, 410 P.2d 790 (1966); 6 P. NICHOLS, *supra* note 3, § 26.3 and cases there cited. In any event, the issue of right has been tried by the court, rather than by the jury. Laguna Salada Union Elem. School Dist. v. Pacific Dev. Co., 119 Cal. App. 2d 470, 259 P.2d 498 (1953); City of Chicago v. Riley, 16 Ill. 2d 257, 157 N.E.2d 46 (1959); Idol v. Knuckles, 383 S.W.2d 910 (Ky. 1964) (based on KY. REV. STAT. § 99.420(5) (1963)); Potomac Elec. Power Co. v. Birkett, 217 Md. 476, 143 A.2d 485 (1958); State Highway Comm'n v. Yost Farm Co., 142 Mont. 239, 384 P.2d 277 (1963) (based on MONT. REV. CODES ANN. § 93-9911(4) (1964)); Metropolitan Seattle v. Kenmore Properties, Inc., *supra*; 2 J. LEWIS, *supra* note 41, § 602; Costello, *supra* note 2, at 54.

### 1. *By Answer*

The most common preliminary means of challenging the right to condemn is by answer to the condemnor's petition.<sup>50</sup> The owner is required to challenge the right by answer, if he is to do so at all, even if he is not permitted to file an answer on the issue of damages.<sup>51</sup> In a series of opinions involving challenges brought in equity, the Pennsylvania Supreme Court has held that the objection must be raised by answer.<sup>52</sup> The court felt that this procedure provided an adequate remedy at law, foreclosing the right to resort to equity.

Federal procedure likewise now provides for raising the objection by answer.<sup>53</sup> For many years, federal condemnation actions had been governed by the Conformity Act,<sup>54</sup> which required suits in the district courts to follow state procedure. Federal Rule 81(a)(7), in accordance with the Conformity Act, made the Federal Rules of Civil Procedure inapplicable to condemnation suits, except as to appeals.<sup>55</sup> The diversity of state practices resulted in confusion and conflicting decisions in federal condemnation proceedings.<sup>56</sup> The policy of conformance was reversed in 1951 with the

50. *State v. Fahey*, 146 Conn. 55, 147 A.2d 476 (1958); *State v. 0.62033 Acres of Land*, 49 Del. 174, 112 A.2d 857 (1955) (DEL. CODE ANN. tit. 10, § 6107 (1953)); *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (1929); A. JAHR, *supra* note 31, § 233. The rule in *Wilton*, *supra*, has been changed by FLA. STAT. § 74.04 (1964).

51. 6 P. NICHOLS, *supra* note 3, § 26.13:

In some jurisdictions, while the owner does not forfeit his right to be heard upon the question of damages by failure to file an answer, it is thought to be the better practice, if not absolutely necessary, for the respondent to set up by answer any objections to the validity of the attempted taking not appearing on the face of the petition.

Nichols cites cases in Iowa, Missouri, Oregon, and West Virginia. *See also*, with respect to federal procedure, note 58 *infra* and accompanying text.

52. *Pittsburgh Rys. v. Port of Allegheny County Auth.*, 415 Pa. 177, 202 A.2d 816 (1964); *Cunfer v. Carbon Airport Auth.*, 414 Pa. 408, 200 A.2d 768 (1964); *Balazick v. Dunkard-Bobtown Municipal Auth.*, 414 Pa. 182, 199 A.2d 430 (1964); *Schwab v. Burgess and Town Council of the Borough of Pottstown*, 407 Pa. 531, 180 A.2d 921 (1962); *Creasy v. Lawler*, 389 Pa. 635, 133 A.2d 178 (1957); *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491 (1955).

53. FED. R. CIV. P. 71A(e); Drafters' Comment to Rule 71A; *Maun v. United States*, 347 F.2d 970, 973 (9th Cir. 1965); *United States v. City of Tacoma*, 330 F.2d 153, 156 (9th Cir. 1964).

54. 25 Stat. 357 (1888); 40 U.S.C. § 258 (1952).

55. FED. R. CIV. P. 81(a)(7); Dolan, *New Federal Procedure in Condemnation Actions*, 39 VA. L. REV. 1071, 1072 (1953).

56. Dolan, *supra* note 55, at 1072. *See generally* Morton, *Basic Principles and Practices in Federal Condemnation*, PROCEEDINGS OF THE SECOND ANNUAL INSTITUTE ON EMINENT DOMAIN 1, 10-20 (1960); Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 357 (1946); Armstrong, *Proposed Amendments to Federal Rules for Civil Procedure*, 4 F.R.D. 124, 134 (1946).

repeal of Rule 81(a)(7) and its replacement by Rule 71A, which supercedes the Conformity Act.<sup>57</sup> Under Rule 71A(e), no answer is required or contemplated unless the owner seeks to contest the right of the petitioner to acquire the property.<sup>58</sup>

## 2. *By Motion to Dismiss*

In some jurisdictions a motion to dismiss is required to raise the objection to the condemnor's right to condemn. The Illinois Supreme Court, in *Department of Public Works & Buildings v. Lewis*,<sup>59</sup> held that although no answer or plea is required of the condemnee, he must challenge the condemnor's right by motion to dismiss.

## 3. *By Separate Suit in Equity*

Many states, while recognizing the condemnee's right to challenge the right to condemn in the period between filing and appointment of appraisers, deny him the opportunity to raise the objection during the condemnation proceedings in the trial court. Either the statute does not provide for an answer or motion to dismiss for raising the challenge,<sup>60</sup> or the courts have held that the only issue triable in the proceedings is the question of damages.<sup>61</sup> In either case, since the issue of right to condemn cannot be raised at the proceedings, there is no adequate remedy at law; the landowner's only recourse is a suit for an injunction.<sup>62</sup>

57. All new Federal Rules must be reported to Congress and take effect only if 90 days elapse without congressional action. Thereafter, all laws in conflict with a new rule are of no further force or effect. 28 U.S.C. § 2072 (1959); Historical Note to 40 U.S.C. § 258 (1952).

58. Dolan, *supra* note 55, at 1074; Note to FED. R. CIV. P. 71A.

59. 344 Ill. 253, 176 N.E. 345 (1931); *accord*, Board of Educ. v. City of Chicago, 402 Ill. 291, 83 N.E.2d 714 (1949); Village of Depue v. Banschback, 273 Ill. 574, 113 N.E. 156 (1916); Costello, *Challenging the Right to Condemn*, 1966 U. ILL. L.F. 52, 53.

60. A. JAHR, *supra* note 31, § 236.

61. Sargent v. City of Cincinnati, 110 Ohio St. 444, 144 N.E. 132 (1924); *accord*, Colgate v. Philadelphia Elec. Power Co., 20 F.2d 263, 264 (E.D. Pa.), *appeal dismissed mem.*, 276 U.S. 589 (1927); *In re* Appropriation of Easements for Highway Purposes, 17 Ohio Op. 2d 29, 31, 176 N.E.2d 607, 609 (C.P. Ashtabula County 1961).

62. Sargent v. City of Cincinnati, 110 Ohio St. 444, 449, 144 N.E. 132, 134 (1924); A. JAHR, *supra* note 31, § 236; *accord*, Emery v. City of Toledo, 121 Ohio St. 257, 167 N.E. 889 (1921) (based on OHIO GEN. CODE § 3677, now OHIO REV. CODE § 719.01 (Anderson 1953)); Grisanti v. City of Cleveland, 18 Ohio Op. 2d 143, 149, 179 N.E.2d 798, 805 (C.P. Cuyahoga County 1961), *appeal dismissed per curiam*, 173 Ohio St. 386, 182 N.E.2d 568, *appeal dismissed per curiam*, 371 U.S. 68 (1962); *see* Jones v. Brown, 82 So. 2d 899 (Fla. 1955); Hagans v. Excelsior Elec. Membership Corp., 207 Ga. 53, 60 S.E.2d 162 (1950); City of San Antonio v. Trease, 243 S.W.2d 187 (Tex. Civ. App. 1951) (interpreting Tex. R. Civ. P. 638). *But see* Ferguson v. City of Kenosha, 5 Wis. 2d 556, 93 N.W.2d 460 (1958).

In a decision which was contrary to earlier Pennsylvania court decisions,<sup>63</sup> the United States Third Circuit held that under Pennsylvania procedure it is proper, if not necessary, to test the validity of condemnation in a court independent of that in which compensation is awarded.<sup>64</sup> This conflict among the courts was finally resolved by the Pennsylvania legislature, as will be detailed below.<sup>65</sup>

An unusual provision in the Kansas statutes<sup>66</sup> required the condemnor to apply to the judge of the district court, rather than to the court itself. The state supreme court held, because of this, that condemnation proceedings were in the nature of an inquest, and that no challenge could be made by answer because no lawsuit was involved.<sup>67</sup> The court further held that common law equitable remedies were available to landowners seeking to protect their property interests. "[I]njunction, brought by the landowner in a separate and distinct action . . . is a proper remedy. . . ."<sup>68</sup> Kansas' new eminent domain code authorizes the filing of the petition in the state district court<sup>69</sup> and requires the judge to make a finding of right before appointing appraisers,<sup>70</sup> thus effectively nullifying the earlier holding.<sup>71</sup>

#### 4. *Trend Toward Early Adjudication*

The trend today is toward requiring determination of the right to condemn as quickly as possible after the petition is filed. Federal procedure

63. See note 52 *supra* and accompanying text.

64. *Frank Mashuda Co. v. County of Allegheny*, 256 F.2d 241 (3d Cir. 1958). In so deciding, the Court of Appeals ignored the pre-1958 Pennsylvania Supreme Court decisions holding that equity had no jurisdiction over condemnation issues (note 52 *supra*), and relied upon lower court decisions: *Colgate v. Philadelphia Elec. Power Co.*, 20 F.2d 263 (E.D. Pa. 1927); *Englehart v. Westmoreland Water Co.*, 165 Pa. Super 156, 67 A.2d 775 (1949). See also *Cheltenham Township v. Tookany Land Dev. Co.*, 83 Montg. 281, 33 Pa. D. & C.2d 661 (Pa. Quart. Sess. 1964) (dictum).

Although the *Mashuda* case, *supra*, was decided in the federal courts, a state rather than a federal condemnation proceeding was involved; jurisdiction was based on diversity of citizenship. For this reason, the Third Circuit had to decide the case under Pennsylvania law rather than Federal Rule 71A, discussed in notes 53-58 *supra* and accompanying text.

65. Notes 109-13 *infra* and accompanying text.

66. KAN. GEN. STAT. ANN. §§ 26-201, -202 (1949).

67. *State v. Boicourt Hunting Ass'n*, 177 Kan. 637, 282 P.2d 395 (1955).

68. *Id.* at 645, 282 P.2d at 401.

69. KAN. GEN. STAT. ANN. § 26-501 (1963).

70. KAN. GEN. STAT. ANN. § 26-504 (1963).

71. *Cf. Kansas Home Dev. Co. v. Kansas Turnpike Auth.*, 181 Kan. 925, 317 P.2d 794 (1957).

There are two cases involving separate suits in equity that suggest the possibility that equity could provide a method for challenging the right to condemn before the filing of the petition. See notes 85-87 *infra* and accompanying text.

is indicative. Under Rule 71A of the Federal Rules of Civil Procedure, a condemnee must object within twenty days of the filing.<sup>72</sup> If the challenge is not made within the prescribed time period, it is deemed waived.<sup>73</sup>

The trend is also illustrated by the increasing prevalence of quick-take statutes,<sup>74</sup> which are an alternative to the normal condemnation procedure. These provisions vest immediate possession in the condemnor upon payment into court of an estimated amount of compensation. If the owner wishes to challenge the right to condemn, he must do so immediately so that title can quickly vest in the condemnor.<sup>75</sup> The Illinois quick-take statute requires the court to fix a date for the hearing of all issues not more than five days after the filing of the petition.<sup>76</sup> After the hearing, assuming the challenge to the right to condemn is unsuccessful, the public authority is free to take immediate possession since the only remaining issue is that of compensation.<sup>77</sup> Under Pennsylvania's 1964 Eminent Domain Code, quick-take is the exclusive procedure. The condemnee is required

72. FED. R. CIV. P. 71A(e); notes 53-58 *supra* and accompanying text. A similar procedure is authorized under MONT. REV. CODES ANN. § 93-9909 (1964), but limits the period to 15 days. MONT. REV. CODES ANN. § 93-9911 (1964) authorizes a hearing on the issue of right after which the judge can issue an order that the condemnation may proceed.

73. Morton, *supra* note 56, at 15; Dolan, *supra* note 55, at 1074; *see* United States v. 1,108 Acres of Land, 25 F.R.D. 205 (E.D.N.Y. 1960). It has been held that a court is without jurisdiction to extend the 20 day period. United States v. Rands, 224 F. Supp. 305 (D. Ore. 1963), *rev'd on other grounds*, 367 F.2d 186 (9th Cir. 1966). Note, however, that if holding the objection to be waived would work substantial injustice on the condemnee, he may be permitted to raise the challenge even if he has exceeded the 20 day limit. United States v. 1,108 Acres of Land, *supra*, held that a landowner would be entitled to an extension under FED. R. CIV. P. 60(b). The Ninth Circuit has indicated that the 20 day provision of Rule 71A(e) is permissive rather than mandatory. Rands v. United States, 367 F.2d 186 (1966).

74. Quick-take statutes embody an administrative method of condemnation. Although half of the states have such provisions, only a few authorize the procedure for urban renewal projects. Note, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 136-37.

75. FLA. STAT. § 74.051 (Supp. 1965).

76. ILL. ANN. STAT. ch. 47, § 2.2(a) (Smith-Hurd Supp. 1966) (applies to highways only).

77. In interpreting the statute, the Illinois Supreme Court has stressed that the policy is to place possession and title in the state prior to final determination of just compensation while protecting the interest of the landowners by requiring an early hearing. Department of Public Works & Bldgs. v. Dust, 19 Ill. 2d 217, 166 N.E.2d 36 (1960). *See generally* Limerick, *Procedure Under the Illinois Eminent Domain Act*, 1966 U. ILL. L.F. 1, 19. Under the normal Illinois eminent domain procedure, right can be challenged by a traverse or motion to dismiss. *Id.* at 14-15; note 59 *supra* and accompanying text.

to file his preliminary objections, which may include a challenge to the right to condemn, within thirty days after service of notice of taking by the public authority.<sup>78</sup> The court must hold a prompt hearing on the objections.<sup>79</sup> The condemnor is entitled to immediate possession of the property upon written offer to pay the estimated compensation to the condemnee. If the condemnee refuses to deliver possession, he is given five days to show why a writ of possession should not immediately issue upon deposit in court of the estimated compensation.<sup>80</sup> The issue of right can be raised in this pleading also.

#### D. Challenge Before Filing of Condemnation Petition

Implications in recent opinions indicate the possibility of challenging the right to condemn before the petition is filed. Even in the few decisions which have discussed the procedure, however, judicial approval is unclear.<sup>81</sup>

The decision most clearly supporting this procedure is the Connecticut case of *Graham v. Houlihan*.<sup>82</sup> Connecticut law requires a hearing on the final project report at which opportunity is given for all affected persons to be heard.<sup>83</sup> This hearing occurs before the institution of condemnation

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78. PA. STAT. ANN. tit. 26, § 1-406 (Supp. 1966):

(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; . . . or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

79. PA. STAT. ANN. tit. 26, § 1-406 (Supp. 1966):

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title.

80. PA. STAT. ANN. tit. 26, § 1-407 (Supp. 1966), modeled after 40 U.S.C. § 258 (1964):

(a) The condemnor after filing the declaration of taking, shall be entitled to possession or right of entry upon payment of, or a written offer to pay to the condemnee, the amount of just compensation as estimated by the condemnor. If a condemnee thereafter refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule, returnable in five days after service upon the condemnee, to show cause why a writ of possession should not issue, upon which the court may issue a writ of possession conditioned upon payment to the condemnee or into court of such estimated just compensation and on such other terms as the court may direct.

81. Primary support for such a "rule" rests on three cases: *Graham v. Houlihan*, 147 Conn. 321, 160 A.2d 745, cert. denied, 364 U.S. 833 (1960); *Offen v. City of Topeka*, 186 Kan. 389, 350 P.2d 33 (1960); *Chapman v. Huntington Housing Auth.*, 121 W. Va. 319, 3 S.E.2d 502 (1939). See also *Bristol Redev. and Housing Auth. v. Denton*, 198 Va. 171, 93 S.E.2d 288 (1956).

82. 147 Conn. 321, 160 A.2d 745, cert. denied, 364 U.S. 833 (1960).

83. CONN. GEN. STAT. REV. § 8-127 (1958).

proceedings, but after public meetings on the preliminary report, municipal and voter approval and publication of the final report, and the designation of the affected properties. In the *Graham* case, a representative of the owner appeared at the final project report hearing and spoke in opposition to the plan, but offered no evidence and neither examined nor cross-examined any witnesses. The court dismissed the owner's injunction suit, upholding the preclusive effect of the statute. The court held that the hearing constituted a full and fair determination on the issue of right to condemn, because the owner had the right to appear, oppose, and present evidence. It is thus necessary in Connecticut to raise the issue of right before the condemnation. However, the advantage of this right to an early challenge may have been gained at too great an expense: the question is heard by an interested administrative body and cannot be appealed to the courts.<sup>84</sup>

*Chapman v. Huntington Housing Authority*<sup>85</sup> involved a suit, undertaken by owners before their property was condemned, to enjoin the city from proceeding further with certain realty developments and from acquiring land for that purpose. Although the West Virginia Supreme Court denied the injunction on other grounds, it did not say that the action itself was improper. This may indicate that such procedure is available to landowners in West Virginia. The Supreme Court of Kansas, in *Offen v. City of Topeka*,<sup>86</sup> held that injunction was the proper remedy to challenge the right, but the case is unclear as to whether or not the injunction was sought prior to the filing of the petition.<sup>87</sup> Although these last two decisions involve petitions for injunction, they are considered here rather than with the cases involving separate suits in equity because here the action was brought prior to filing of the condemnation petition.

While challenging prior to filing limits peripheral damages, it is not widely supported by case law and has serious drawbacks which will be discussed in the next section.<sup>88</sup> Use of this procedure is further limited be-

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84. The only issue which can be appealed is that of compensation. CONN. GEN. STAT. REV. § 8-132 (1958), discussed in *Graham v. Houlihan*, 147 Conn. 321, 331, 160 A.2d 745, 750, cert. denied, 364 U.S. 833 (1960).

85. 121 W. Va. 319, 3 S.E.2d 502 (1939).

86. 186 Kan. 389, 350 P.2d 33 (1960).

87. The court did say that the "plan became a project [that] the Agency was bound to execute, and . . . steps were being taken to acquire plaintiff's property by eminent domain." *Id.* at 390, 350 P.2d at 35. The only acts which clearly appear, however, are the passage of a resolution finding the area to be slum and blighted and a resolution approving the plan. See also *Johnson v. Preston*, 1 Ohio App. 2d 62, 203 N.E.2d 505 (1963).

88. Notes 101-05 *infra* and accompanying text.

cause it has been categorically rejected in some jurisdictions. Typical of these is an Illinois holding that courts are powerless to act in condemnation proceedings until the petition is filed, because until that time they have no jurisdiction over the subject matter.<sup>89</sup> Some courts have restricted this procedure by holding that it will only be available when property has been taken without an exercise of eminent domain and the owner seeks to halt the taking until just compensation can be determined.<sup>90</sup>

### III. ALTERNATIVE SOLUTIONS: THE EARLY YET PRACTICAL CHALLENGE

While in most cases the landowner is best protected from peripheral damages by the earliest adjudication of the right to condemn,<sup>91</sup> requiring a hearing on the issue too early may produce undesirable consequences from the condemnor's point of view.<sup>92</sup> In an attempt to balance these two conflicting interests, several proposals for an early challenge have been advanced.<sup>93</sup>

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89. *Department of Public Works and Bldgs. v. Lewis*, 344 Ill. 253, 255, 176 N.E. 345, 346 (1931) (based on what is now ILL. ANN. STAT. ch. 47, § 2 (Smith-Hurd 1950)); *Limerick*, *supra* note 77, at 4; *accord*, *Loebner v. City of New York*, 162 N.Y.S.2d 233 (Sup. Ct. 1957) (action premature since redevelopment plans were still in the initial stage); *see City of Milwaukee v. Utech*, 269 Wis. 132, 68 N.W.2d 719 (1955). *See generally* Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 513-17 (1959).

90. *Harrison v. City of East Point*, 208 Ga. 692, 69 S.E.2d 85 (1958); *Illinois Cities Water Co. v. City of Mount Vernon*, 11 Ill. 2d 547, 144 N.E.2d 729 (1957); *Webb v. Dameron*, 219 S.W.2d 581 (Tex. Civ. App. 1949); *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953). The procedure is further restricted by holding that while the action in equity will lie to restrain a taking without compensation, it will not lie to restrain an injury, because a suit at law for damages is an adequate remedy. *Scott v. City of Robinson*, 404 S.W.2d 330, 332 (Tex. Civ. App. 1966).

91. Note, *Urban Renewal: Problems in Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 517 (1959):

It would be desirable to provide a means by which issues of the legality of a plan and action to be taken thereunder could be determined conclusively as early as possible . . . . In achieving this objective, however, account must be taken of the right of an individual to receive, at some time, a judicial hearing on questions of the legality of official action which affects his property interests.

92. Notes 103-05 *infra* and accompanying text.

93. It is widely felt that the danger of peripheral damages is compelling enough to require a change from present procedures:

Effective and equitable use of . . . [eminent domain], however, is hindered by procedural laws which are far from creditable to an allegedly progressive society. Urgently needed public works are delayed [*sic*] or made prohibitively expensive, while the real interests of landowners are often more abused than protected. . . . Yet the reform movements which have invaded practically every field of law seem to have neglected condemnation procedure.

*Wasserman, Procedure in Eminent Domain*, 11 MERCER L. REV. 245, 246 (1960); *see Graves, Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 328 (1963); Note, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 136.

### A. Challenge at the Public Hearing

One suggestion that has recently received much comment would permit objections to the right to condemn to be raised during the public hearings to determine the desirability and feasibility of the project.<sup>94</sup> During the plan approval process there are a number of public hearings. For instance, federal law requires as a prerequisite to financial aid for urban renewal that there be a public hearing held at the local level.<sup>95</sup> Some state statutes make hearings either mandatory or available upon application.<sup>96</sup> One of these hearings can be designated as the proper time for the owner to raise his challenge to the condemnor's right to condemn. This is the earliest opportunity built into the process at which a challenge might be made,<sup>97</sup> and has the added advantage of assuring a decision on the issue before the public agency makes large financial commitments.<sup>98</sup>

The Connecticut statute previously discussed<sup>99</sup> requires the condemnee to object at the hearing on the final project report, and bars any subsequent adjudication of right. The Connecticut court approved this procedure, holding that since the owner was afforded a full opportunity to appear, the method constituted a complete hearing on the issue of the taking.<sup>100</sup>

94. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 514 (1959):

A public hearing is potentially more effective than a judicial proceeding in accommodating the needs of the program to private interests. Such a hearing provides an opportunity for the presentation of objections and suggestions bearing upon the desirability as well as the legality of public action.

See Sullivan, *Administrative Procedure and the Advocatory Process in Urban Redevelopment*, 45 CAL. L. REV. 134, 135 (1957); cf. Glaves, *supra* note 93, at 328 (date when property was first mentioned for probable public acquisition or when designated as blighted).

95. 42 U.S.C. § 1455(d) (1964).

96. E.g., ILL. ANN. STAT. ch. 67½, §§ 91.11, -12 (Smith-Hurd 1959) (mandatory); MASS. ANN. LAWS ch. 121, § 26KK (1960) (upon request).

97. The time of the hearing has been described as "the date when the improvement became so probable that buyers and sellers would take it into account in their negotiations." Glaves, *supra* note 93, at 328.

See also *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961): "The Court must exclude any depreciation in value caused by the prospective taking once the government 'was committed' to the project." While the decision considers the act of authorizing or appropriating funds for a project as fixing the date of "commitment," this may not be early enough to protect the owner from the worst of the peripheral damages. STAFF OF HOUSE COMM. ON PUBLIC WORKS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 88TH CONG., 2D SESS., 65 (Comm. Print 1964).

98. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 513-14 (1959).

99. Notes 82-84 *supra* and accompanying text.

100. *Graham v. Houlihan*, 147 Conn. 321, 160 A.2d 745, *cert. denied*, 364 U.S. 833 (1960).

While this procedure may be an expedient means for early disposal of the issue of right to condemn, it allows the condemning agency to be the sole judge of its own right and power.<sup>101</sup> Perhaps this problem can be solved if the owner is permitted, within a specified time, a judicial appeal from the agency's decision. A further drawback is that the prospective condemnee is forced to expend money and effort in a protest that may occur before he can be sure that his property will be among those taken.<sup>102</sup>

There are a number of reasons why a challenge at this stage may not present the best opportunity to litigate the question of right to condemn. The public authority may be forced, before it is ready, to specify in the plan which properties are to be taken.<sup>103</sup> Of course, how specifically the plan is drawn at the hearing stage will depend on what type of project is involved. Hearings on highway projects occur before the route is designated, while project boundaries are usually fairly well set by the time final hearings are held on urban renewal plans. A second objection is that the challenge by the condemnee can be narrowly conceived on the basis of his own lot; his purpose may only be to prevent *his* property from being taken.<sup>104</sup> If the project is of the type in which boundaries are flexible at the time of the hearing, the authority will be interested solely in the general aspects of project feasibility. In addition, a challenge at the final project plan

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101. *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N.E. 132 (1924).

102. *Grisanti v. City of Cleveland*, 18 Ohio Op. 2d 143, 179 N.E.2d 798 (C.P. Cuyahoga County 1961), *appeal dismissed per curiam*, 173 Ohio St. 386, 182 N.E.2d 568, *appeal dismissed per curiam*, 371 U.S. 68 (1962); *accord*, *Emery v. City of Toledo*, 121 Ohio St. 257, 167 N.E. 889 (1929); Note, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 134.

103. *Glaves*, *supra* note 93, at 357. The problem of forcing the authority to designate acquisition sites before it is ready can be alleviated by use of advance acquisition procedure, such as that which is discretionary under the Federal Aid Highway Act, 23 U.S.C. § 108(a) (1966), and the Federal Urban Renewal Program, 42 U.S.C. § 1452(a) (1964). If a more widespread and judicious use is made of this procedure, the land can be acquired and the rights of the parties settled long before the worst effects of the peripheral damages are felt. It is possible, however, that the decision as to which land is necessary cannot be made long enough before the actual necessity for taking arises. Further, since taking at such an early stage involves a degree of speculation on the part of the public authority, it may not be wise to require such a procedure. Finally, if the decision to employ advance acquisition is left discretionary, it will lose much of its efficacy in avoiding peripheral damages.

104. The challenge can also seek to prove that the condemnor has no right to condemn *any* parcels for the particular project. However, the plaintiffs in most of the cases seek an adjudication as to their own lot. The leading case of *Berman v. Parker*, 348 U.S. 26 (1954), for example, involved a department store owner who claimed that his building was not blighted and therefore should not be condemned. Compare *In re Certain Parcels of Land*, 420 Pa. 295, 216 A.2d 769 (1965), with *State v. Land Clearance for Redev. Auth.*, 364 Mo. 974, 270 S.W.2d 44 (1954), both discussed in note 33 *supra*.

stage may unduly reinforce the delay strategies of either the condemnor or the condemnee. By the time the final plan is prepared the condemnor's commitment may be substantial; the greater the public commitment, the more reluctant the courts are likely to be to interfere with a project. On the other hand, an early challenge may be abused by potential condemnees who will pursue the relief, including court appeals, solely to delay the taking of their property.<sup>105</sup>

### B. *Challenge After Approval of the Project Plan*

Another suggestion would make it possible to raise the issue in court within a reasonable time after the approval of the project plan.<sup>106</sup> As already suggested, however, courts will not hear the controversy at such an early stage.<sup>107</sup> Even when courts recognize that peripheral damages may be generated by plan approval, they hold such damages non-compensable. The rationale is that the courts lack jurisdiction to hear the case in the absence of a "taking." There are other theories courts have used to avoid hearing a challenge to the right to condemn before condemnation: the administrative action taken is insufficient to permit adjudication; the owner has no standing; the court has no jurisdiction prior to the commencement of proceedings.<sup>108</sup>

### C. *Challenge After Filing*

Finally, it is suggested that those jurisdictions not now doing so should allow the challenge to right immediately after the filing of the petition. This is the approach taken by the new Pennsylvania statute: title passes to the condemnor upon filing of the petition of condemnation, but the owner can file preliminary objections to contest the taking within thirty days.<sup>109</sup> If the condemnor wishes immediate possession and the owner refuses to allow entry, the owner has five days in which to show cause why a writ of possession should not issue upon payment into court of the estimated compensation.<sup>110</sup>

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105. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 515 (1959).

106. Note, *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 135.

107. Notes 89-90 *supra* and accompanying text.

108. Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 516 (1959).

109. PA. STAT. ANN. tit. 26, § 1-406(a) (Supp. 1966). This provision is set out in note 78 *supra* and discussed in the accompanying text. *See generally* E. SNITZER, PENNSYLVANIA EMINENT DOMAIN § 406-1 (1965); Drafters' Comment to PA. STAT. ANN. tit. 26, § 1-406(a) (Supp. 1966).

110. PA. STAT. ANN. tit. 26, § 1-407(a) (Supp. 1966). This provision is set out in note 80 *supra* and discussed in the accompanying text.

The Pennsylvania code was revised to clarify whether the challenge lay collaterally in equity<sup>111</sup> or by answer.<sup>112</sup> Even though there was a conflict in the decisions, one authority felt that no problem existed because, in practice, the question of right was almost never raised at the condemnation proceeding.<sup>113</sup> The new statute reflects a policy that the question of right should be disposed of as soon as possible after the petition is filed, and that it is preferable to raise these matters in the condemnation proceeding rather than in a separate suit.

The few cases which have arisen under the statute have effectuated this policy and procedure. In *In re Certain Parcels of Land*,<sup>114</sup> the condemnee had filed his preliminary objections<sup>115</sup> with the Court of Common Pleas of Lancaster County, the same court in which the redevelopment authority had filed its declaration of taking. The court, ignoring the statutory procedure, dismissed the preliminary objections and agreed with the authority's contention that an action in equity was the proper procedure. The Supreme Court of Pennsylvania vacated and remanded on the ground that the legislature intended the statute to be a complete and exclusive method of challenge.<sup>116</sup> It was further held, in *Valley Forge Golf Club v. Upper Merion Township*,<sup>117</sup> that the new statute contemplates two proceedings: the first to determine the propriety of the taking, and the second to determine the compensation.

The advantage of quick-take provisions such as Pennsylvania's is that since there is a prompt determination of right, title vests and the condemnee receives his compensation quickly. This enables the landowner to re-invest and relieves him of the burden of holding the property under threat of condemnation.<sup>118</sup> While this procedure by no means avoids the peripheral damages occurring between planning and filing, it provides the earliest

111. *Frank Mashuda Co. v. Allegheny County*, 256 F.2d 241 (3d Cir. 1958) and related cases cited *supra* note 64.

112. *Pittsburgh Rys. v. Port of Allegheny County Auth.*, 415 Pa. 177, 202 A.2d 816 (1964) and related cases cited *supra* note 52. See generally Drafters' Comment to PA. STAT. ANN. tit. 26, § 1-406(a) (Supp. 1966).

113. E. SNITZER, *supra* note 109, § 406-1.

114. 420 Pa. 295, 216 A.2d 769 (1966).

115. Including a challenge to the "power and right" of the Lancaster Redevelopment Authority to condemn his property on the grounds that "the said property is not, *in fact*, blighted. . . . [S]ince the only basis for the Authority's present taking is that the elimination of a blighted area is such a public use . . . Faranda seeks to show that the area is not blighted thereby negating the *power or right* of the Authority to condemn." *Id.* at 300, 216 A.2d at 722 (emphasis in original).

116. *Accord*, *Mahan v. Lower Merion Township*, 418 Pa. 558, 212 A.2d 217 (1965); *Percy v. Commonwealth*, 47 Erie 192 (1965).

117. 422 Pa. 227, 221 A.2d 292 (1966).

118. *Wasserman*, *supra* note 93, at 262 (discussing a similar New Jersey procedure).

practicable challenge to right. The challenge is not so early that it forces the condemnor to speculate on what land it will take, nor will the courts refuse to hear it as prematurely brought.

Nevertheless, it is doubtful, in a practical sense, that many condemnees will succeed in their challenges under this procedure. There will be great pressures on the court to affirm the condemnor's action at this stage, because the plan has progressed far enough that the condemnor is heavily committed financially and otherwise. This procedure is subject to the further criticism that it might discourage the adjudication of right: the ready availability of compensation may persuade the owner not to challenge.

If determination of right at the time of filing does not eliminate all or even most peripheral damages, other means of reducing them must be found. The most obvious possibility is to define taking to include the depreciation which occurs prior to filing. While consideration of this proposal is beyond the scope of this note, it may be said that the courts have been reluctant to recognize as a taking anything other than physical dispossession.<sup>119</sup> If this problem is not solved by a redefinition of taking, peripheral damage may ultimately require allowing the challenge to right before filing, despite the legitimate problems which would be created for planning agencies.<sup>120</sup>

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119. See notes 18, 22, and 30 *supra*.

120. "If the designation of property for acquisition causes the value to decrease, then the public should not benefit from its own action." Glaves, *supra* note 93, at 344.