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MARYLAND'S NEW CONDEMNATION CODE

By GEORGE W. BAKER, JR.,*
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I. INTRODUCTION

At its 1963 session, the General Assembly of Maryland completely revised the Eminent Domain Law of Maryland by substituting for the existing Article 33A of the Annotated Code of Maryland an entirely new and comprehensive body of laws. Its action was not precipitous, for it had long been apparent that the Condemnation Laws¹ were inadequate.

Historically, the Constitution of Maryland provides that the "General Assembly shall enact no Law authorizing private property to be taken for public use, without just compensation."² A similar limitation is contained in the Fifth Amendment of the Constitution of the United States.³ But the universally accepted translation of "just compensation" has been limited to "fair market value" of the real estate on the valuation date,⁴ such an inflexible limitation

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¹ As used herein, the word "Condemnation" means acquisition of private property for public use by condemnation (eminent domain) proceedings.

² MD. CONST., Art. III, § 40. For a history of this section, see Patterson v. Baltimore, 127 Md. 233, 96 A. 458 (1915). Cf. Declaration of Rights, Art. XXIII. It has long been a fundamental principle of constitutional law that the power of eminent domain is a prerogative of sovereignty and does not require the sanction of the Constitution for the State to exercise it. Riden v. Philadelphia, B. & W. R. Co., 182 Md. 336, 35 A. 2d 99 (1944); Moale v. Baltimore, 5 Md. 314 (1854). In the absence of a constitutional limitation, private property could theoretically be taken for public use without payment to the owner, but the requirement of "just compensation" was a part of the common law of England and the general law of European nations. Pumpelly v. Canal Co., 13 Wallace 166, 178 (U.S. 1872); Turnpike Road v. Railroad Co., 81 Md. 247, 256, 31 A. 854 (1869); I NICHOLS, EMINENT DOMAIN (3rd ed. 1950) § 1.2, *et seq.*

³ The limitation in the Fifth Amendment originally was held to apply only to condemnation by the federal government, Barron v. City of Balto., 7 Peters 243 (U.S. 1833), but since the passage of the Fourteenth Amendment it has been held also applicable to condemnation by the States, Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897); Scott v. Toledo, 36 F. 385, 1 L.R.A. 688 (6th Cir., 1888).

⁴ State Roads Commission v. Warriner, 211 Md. 480, 485, 128 A. 2d 248 (1957); Pumphrey v. State Roads Commission, 175 Md. 498, 506, 2 A. 2d 663 (1938); Cons. G.E.L. & P. Co. v. Baltimore, 130 Md. 20, 30, 99 A. 968 (1917).

of damages often resulted in hardship to the property owner.⁵

The Condemnation Code which was enacted in 1912⁶ gave no more than the Constitutional minimum and had remained basically unchanged until the revision in 1963.⁷ With the increased tempo in the last decade of public acquisition of property for new schools, highways and urban renewal, complaints multiplied because of its inadequacies and inequities. As a result, the Legislative Council in 1955 requested its Research Division to make a thorough analysis of the State's Condemnation Laws and to report its findings to the Council. Its report was submitted in August, 1958, and following recommendations therein, bills were introduced and passed by the General Assembly providing for payment of moving costs where property is condemned and for compensation where condemnation is abandoned.⁸

Dissatisfaction with the Condemnation Law continued, however. In 1959 the Bar Association of Baltimore City appointed a special committee of ten persons to consider revision of the Condemnation Laws. Thereafter, on September 9, 1960, the Chairman of the Legislative Council designated five members of the General Assembly and the ten members of the Bar Association committee as a joint committee of the Legislative Council, under the Chairmanship of Senator Harry R. Hughes, to review the Condemnation Laws.

The final report of that committee, dated November 14, 1962, recommended a complete revision of the Condemnation Laws and contained a proposed new Condemnation Code. It was approved by the Legislative Council at its November, 1962, meeting, and the proposed new Code, with a few amendments, was thereafter enacted into law by Chapter 52 of the Laws of 1963.⁹

⁵ It should be noted that the constitutional provision requiring the payment of just compensation is not a grant of power, but a limitation upon the exercise of the sovereign power. *Riden v. Philadelphia, B. & W. R. Co.*, 182 Md. 336, 35 A. 2d 99 (1944). It establishes merely the minimum to be paid, and does not prevent the Legislature from increasing the amount above the minimum, within the limits of equity and justice. *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923).

⁶ MD. LAWS 1912, ch. 117, which added Art. 33A, entitled "Eminent Domain".

⁷ As hereinafter mentioned bills were passed in 1959 providing for payment of moving costs where property is condemned and for compensation where condemnation is abandoned, but even those provisions were substantially revised in the new Condemnation Code.

⁸ MD. LAWS 1959, ch. 526 and 688 (codified 3 MD. CODE (1957) Art. 33A, §§ 21A and 21B, prior to the adoption of the new Condemnation Code).

⁹ Effective June 1, 1963, it completely repealed Art. 33A and enacted the new Condemnation Code as Art. 33A. The authors would be remiss were it not to be noted that the Legislative Council Committee, its Chairman,

It is not the purpose of this article to point out every change, but rather to examine the major codifications or substantive changes of the prior statutes and case law which are of most importance to the practitioner and to comment on the rationale thereof.

II. THE MORE SIGNIFICANT PROVISIONS

A. *Various Condemnation Procedures*

Section 1 provides:

“All proceedings for the acquisition of private property for public use by condemnation shall be governed by the provisions of this article and of Subtitle U of the Maryland Rules of Procedure; provided, however, that nothing herein shall prevent the State of Maryland or any of its instrumentalities or political subdivisions, acting under statute or ordinance passed in pursuance of Section 40A or Section 40B of Article III of the Constitution of this State, from taking private property for public use immediately upon making the payment required thereunder and giving any security required thereunder; and provided further that nothing herein shall prevent the use by the State Roads Commission of the procedure set forth in Sections 10 through 20, inclusive, of Article 89B of this Code; and provided further that nothing herein shall prevent the use by the City of Baltimore of the procedure set forth in Sections 674 through 685, inclusive, of the Charter and Public Local Laws of Baltimore City.”

Section 1 does not confer the power of condemnation on anyone. It merely requires that those having such powers use the procedure set forth in Article 33A, with the exceptions therein set forth.

Although the sovereign State has inherent powers of condemnation, political subdivisions of the State have no condemnation powers other than those directly, or by necessary implication, conferred upon them by the State Legislature. Where such power has been conferred upon them, the manner of procedure provided in the Enabling Act must be strictly followed.¹⁰

Baltimore City has been given the power in section 6(2) of its Charter to acquire for public use by condemnation

members and staff, were warmly and deservedly commended by the Senate Judiciary Committee, after its public hearing, for their outstanding work on the new Code.

¹⁰ *Barnett v. Charles County*, 206 Md. 478, 484, 112 A. 2d 492 (1955).

any property in Baltimore City. Some incorporated municipalities have similar power under Article 23A, section 2(24) of the Annotated Code of Maryland. Article 25, section 3(b) grants a like power to the County Commissioners of the counties (sixteen counties being excepted, however). Some of the excepted counties have been given condemnation powers by specific sections of Article 25, or by Public Local Law. The charter counties of Maryland have been given condemnation powers under Article 25A, section 5(B). Section 162 of Article 23A confers specific condemnation power for erosion districts in the counties; and section 138 confers on them specific condemnation power for roads.

Various quasi-public corporations have been given the right to acquire property by eminent domain,¹¹ and they are also limited to the method set forth in Article 33A.

Certain specific State and county agencies have been granted the right to condemn property and they too are confined to the procedure contained in Article 33A.¹² The State Roads Commission of Maryland may use the procedures in Article 33A or may utilize the procedures under Article 89B.

Section 1 preserves for Baltimore City the use of sections 674-685 of the Charter and Public Local Laws of Baltimore City. These sections provide a simple and economical method for condemning and opening and closing streets after giving public notice, similar in some respects to that which the State Roads Commission has under Article 89B, as well as a quick-take procedure hereafter discussed.¹³

Quick-Take Procedures

Section 1 preserves any power derived through statute or ordinance under section 40A or 40B of Article III of the

¹¹ Aeronautics — 1 Md. CODE (1957) Art. 1A, §§ 13(C) & (D); Bridge Companies — 2 Md. CODE (1957) Art. 23, § 141; Electric Cooperatives — Art. 23, § 832; Gas Companies — Art. 23, § 341; Mining Companies — Art. 23, § 168; Railroad Companies — Art. 23, § 193; Telegraph & Telephone Companies — Art. 23, § 340; Water Companies — Art. 23, § 333.

¹² Board of Drainage Viewers — 2 Md. CODE (1957) Art. 25, § 80; Drainage Commissioners — Art. 25, § 114; Erosion — Art. 25, § 162b; Executive Department, Board of Public Works — 4 Md. CODE (1957) Art. 41, § 183; Ferries — Art. 37, §§ 4-6; Housing Authority — Art. 44A, § 8(d); Maryland Port Authority — 5 Md. CODE (1957) Art. 62B, § 6(c); Prison Farms — 2 Md. CODE (1957) Art. 25, § 128 (excluding Frederick, Garrett, Harford, Howard, Washington and Worcester Counties); Public Roads — Art. 25, § 138; Sanitary Districts — 4 Md. CODE (1957) Art. 43, § 650(d)(8); State Board of Agriculture — Inspections, Mosquito Control — Art. 48, § 29; University of Maryland — MD. LAWS 1963, ch. 332; Water Sheds — 2 Md. CODE (1957) Art. 25, § 201.

¹³ See text, *infra*, at n. 16.

Constitution to take private property for public use immediately upon making the payment and giving any security required thereunder.¹⁴

Constitutional authority for quick-take procedures for acquiring property has been conferred only on Baltimore City, Baltimore County, Montgomery County, the State as to properties in Baltimore City, and the State Roads Commission as to properties anywhere in the State.¹⁵

Article III, section 40A authorizes the State or the City of Baltimore to take immediate possession of property in Baltimore City upon payment to the owners of such amount as the State or the City of Baltimore, as the case may be, shall estimate to be the fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be added by a jury.¹⁶

As to property in Baltimore County, section 40A provides that the Baltimore County Council may have a court of record appoint a real estate appraiser to establish a value of the property to be taken and that upon payment of that sum to the owner or into court, and securing the payment of any further sum that may be awarded by a jury, the property may be taken.¹⁷

With regard to property in Montgomery County, section 40A provides that Montgomery County may use quick-take proceedings, but only as to unimproved property to be used for roads or streets. It may take such property after payment into court of the amount which a licensed real estate broker, appointed by the County Council, estimates to be the fair market value, provided the Council secures the payment of any further sum that may be awarded by a jury.¹⁸

Article III, section 40B provides that the Legislature may authorize the State Roads Commission to acquire prop-

¹⁴ Md. CONST., Art. III, §§ 40A and 40B.

¹⁵ *Supra*, n. 14.

¹⁶ The specific procedure for quick-take proceedings in Baltimore City is set forth in section 678 of the Charter and P.L.L. of Baltimore City as amended in 1963. Prior to the 1963 amendment, quick-take in Baltimore City could be accomplished only by the court appointing three disinterested appraisers to evaluate the property. That procedure proved too cumbersome to be effective, and in 1962 Art. III, § 40A of the Constitution was amended to eliminate the requirement of court appointed appraisers. Thereafter section 678 of P.L.L. of Baltimore City was amended by Md. Laws 1963, ch. 372, to enable Baltimore City to take immediate possession upon payment of the amount it estimates to be the fair value of the property, which must be substantiated by the affidavits of two qualified appraisers. It must, of course, pay any further sum that may be awarded by the trier of the facts.

¹⁷ The specific procedure for quick-take proceedings in Baltimore County is set forth in Code of P.L.L. of Baltimore County (1962) § 2-1.1.

¹⁸ The specific procedure for quick-take proceedings in Montgomery County is set forth in Code of P.L.L. of Montgomery County (1961) § 26-14A.

erty for highway purposes by estimating the fair market value of the land in question and paying to the property owner or depositing with the court its estimate of the fair value of the property, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury.

Pursuant thereto, the Legislature has given the Commission two methods of obtaining immediate possession. The first method¹⁹ provides for the State Roads Commission to estimate the fair market value of the property to be condemned and to tender this money to the owners or to deposit it in court. If sixty days elapse after completion of the highway and the State Roads Commission and the property owner are unable to agree on damages, then the Commission is empowered to institute condemnation proceedings under Article 33A if it has not already been done at the request of the condemnee.²⁰

The second method,²¹ which is available only as to unimproved property, provides for the State Roads Commission to file plats with the court where the action is docketed and to pay its estimate of damages to the owner or into court and thereupon take possession. If six months pass after recordation of the plats and the parties have not agreed on damages, then the case is certified to the Property Review Board to determine an award. Any dissatisfied litigant may appeal the action of the Board to the court and have his case tried *de novo* under Article 33A.

B. Damages — Date of Valuation

Section 4 provides that:

“The value of the property sought to be condemned and of any adjacent property of the defendant claimed to be affected by the taking shall be determined as of the date of the taking, if taking has occurred, or as of the date of trial, if taking has not occurred, unless an applicable statute specifies a different time as of which the value is to be determined.”

Section 4 of the new Condemnation Code provides that the date of valuation shall be the date of the taking,²² if

¹⁹ 8 MD. CODE (1957) Art. 89B, § 9.

²⁰ *Veirs v. State Roads Commission*, 217 Md. 545, 143 A. 2d 613 (1958).

²¹ *Supra*, n. 19, §§ 10-20.

²² 3 MD. CODE (Cum. Supp. 1963) Art. 33A, § 14, provides that property shall be deemed to have been taken:

“1. In cases in which the plaintiff is lawfully authorized to take the property before trial pursuant to Section 40A or Section 40B of Article

taking has occurred, or the date of the trial, if taking has not occurred, unless an applicable statute specifies a different time as of which the value is to be determined.²³ Section 4 is a new provision, but it follows the case law generally as to the date of valuation,²⁴ while preserving certain statutory provisions for other dates of valuation.²⁵

C. Measure of Damages

1. Total Taking

Section 5(a) provides that the damages to be awarded for the taking of an entire tract shall be its fair market value as defined in section 6. That follows, without any change, the case law which has been established by the Court of Appeals.²⁶

III of the Constitution of this State, when the payment required thereunder has been made to the defendant or into court and any security required thereunder has been given and the plaintiff has taken possession of the property and actually and lawfully appropriated it to the public purposes of the plaintiff.

"2. In all other cases, upon payment of the judgment and costs by the plaintiff pursuant to Subtitle U of the Maryland Rules."

²³ The determination of damages to be awarded as compensation for taking of property in Maryland and the valuation date were determined by the courts prior to the passage of the new Condemnation Code. For purposes of clarity and easy understanding, the various factors making up damages are set forth in the new Code. The new Code fixes the date of valuation for determining damages (§ 4), defines the measure of damages (§ 5), and defines what is the fair market value of condemned property (§ 6). The Code follows generally the existing Maryland case law on those matters, with certain adjustments, however, to meet particular problems.

²⁴ State Roads Commission v. Warriner, 211 Md. 480, 484, 128 A. 2d 248 (1957); La Fontaine's Heirs v. La Fontaine's Heirs, 205 Md. 311, 318, 107 A. 2d 653 (1954); Building & Loan Assn. v. Safe Deposit & Trust Co., 166 Md. 348, 351, 171 A. 43 (1934); Dunne v. State, 162 Md. 274, 159 A. 751, *cert. den.* 287 U.S. 564 (1932).

²⁵ See, for example, 8 Md. CODE (1957) Art. 89B, § 15, which provides that after the State Roads Commission records the plats and maps describing the condemned property and pays an amount of money estimated as fair market value with the Clerk of the Court, it shall then attempt to negotiate with the property owner in an attempt to agree on the question of damages. The date of valuation is fixed as of the date the plats and maps are recorded and the money paid but if both have not been done simultaneously, then the valuation is determined as of the date of the latter. Section 18 provides that if the State Roads Commission fails to acquire title to the condemned property and to ascertain the amount to be paid for it within one year from the date the plats or maps are recorded, or fails to file a condemnation suit in the proper court, the value of the property shall be determined as of the time of acquisition unless the value is less at that time, in which case it will be the value as of the recordation date.

²⁶ State Roads Commission v. Warriner, *supra*, n. 24; State Roads Commission v. Wood, 207 Md. 369, 114 A. 2d 636 (1955); Johnson v. Gas & Electric Co., 187 Md. 454, 50 A. 2d 918, 170 A.L.R. 709 (1947); Pumphrey v. State Roads Commission, 175 Md. 498, 2 A. 2d 668 (1938); Consolidated G.E.L. & P. Co. v. Baltimore, 130 Md. 20, 99 A. 968 (1917).

2. *Partial Taking*

Section 5(b) provides as follows:

“The damages to be awarded where part of a tract of land is taken shall be the fair market value (as defined in section 6) of such part taken, but not less than the actual value of the part taken plus the severance or resulting damages, if any, to the remainder of the tract by reason of the taking and of the future use by the plaintiff of the part taken. Such severance or resulting damages are to be diminished to the extent of the value of the special (particular) benefits to the remainder arising from the plaintiff’s future use of the part taken.”

Section 5(b) does not substantially alter the present case law regarding a partial taking. The courts have consistently defined the damages to be awarded in partial taking as the value of the part taken plus any severance or consequential damages to the remainder of the tract by reason of the taking. Ordinarily that measure can be ascertained by comparing the fair market value of the entire tract before the taking with its fair market value after the taking, excluding from consideration any enhancement in value resulting from the utilization of the land taken for the purpose for which it was taken.²⁷

Where the size and shape of the land taken preclude the theory that it has any market value, the owner is nevertheless entitled to receive as an irreducible minimum the actual value of what was taken, whether it be the fee or an easement. In addition to that amount, he is entitled to receive the consequential damages, if any, to the remainder of the tract or parcel after the taking by reason of or in consequence of the condemnor’s future use and enjoyment of the part taken. Such consequential damages are to be diminished to the extent of the particular benefits, if any, to the remainder of the tract or parcel arising from the condemnor’s future use of the part taken as distinguished from the general benefits in which such remainder would share with the other contiguous land in the neighborhood.²⁸

3. *Tenant’s Chattels*

Section 5(c) provides:

“For the purpose of determining the extent of the taking and the valuation of the tenant’s interest

²⁷ *Johnson v. Gas and Electric Co.*, *supra*, n. 26, 470; *Pumphrey v. State Roads Commission*, *supra*, n. 26, 505, 17 Md. L. Rev. 277 (1957).

²⁸ *Johnson v. Gas & Electric Co.*, *supra*, n. 26, 469; *Realty Improvement Co. v. Consolidated Gas, Elec., Light and Power Co. of Baltimore*, 156 Md. 581, 588, 144 A. 710 (1929).

in a proceeding for condemnation, no improvement or installation which would otherwise be deemed part of the realty shall be deemed personal property so as to be excluded from the taking solely because of the private right of a tenant, as against the owner of any other interest in the property sought to be condemned, to remove such improvement or installation, unless the tenant exercises his right to remove the same prior to the date when his answer is due, or elects in his answer to exercise such right."

Although the Maryland courts have always followed the general rule that fixtures are considered as part of the land in determining its value in a condemnation proceeding,²⁹ there has been some doubt in that regard as to fixtures which a lessee or tenant has the right to remove. In order to understand the problem and the purpose and intent of section 5(c), it is well to review the law of fixtures with particular reference to trade fixtures of a lessee.

The term "fixture" is generally used in reference to some originally personal chattel which has been actually or constructively³⁰ affixed either to the soil itself or to some structure legally a part of the soil.³¹ Under the early rule of the common law, all fixtures were considered to be a part of the freehold and passed with it. Thus, a tenant could not remove from leased premises fixtures which he

²⁹ The condemnee is entitled to the "fair market value of the land taken as enhanced by the buildings and fixtures thereon." *Baltimore City v. Himmel*, 135 Md. 65, 71, 107 A. 522 (1919). See n. 36, *infra*.

³⁰ Originally, the article had to be actually annexed to be a fixture. That rule proved to be too rigid in the case of machinery where the principal part becomes a fixture by annexation, but a subsidiary part is not so physically annexed. The courts in many states, including Maryland, solved that dilemma years ago by adopting the principle of constructive annexation. Under that rule, if the subsidiary part which is not fastened to the soil would not of itself be well adapted for general use elsewhere, and if its removal would render the principal part unfit for use, the subsidiary part is treated as a fixture. *Anderson v. Perpetual Bldg. & Loan Ass'n.*, 172 Md. 94, 99, 190 A. 747, 109 A.L.R. 1419 (1937); *Warren Mfg. Co. v. City of Baltimore*, 119 Md. 183, 201, 86 A. 502 (1913); *Dudley v. Hurst*, 67 Md. 44, 50, 8 A. 901 (1887).

³¹ *Schofer v. Hoffman*, 182 Md. 270, 274, 34 A. 2d 350 (1943); *Dudley v. Hurst*, *supra*, n. 30, 47:

"The tests by which a fixture is determined are generally these:

"1st. Annexation to the realty, either actual or constructive.

"2nd. Adaptation to the use of that part of the realty with which it is connected.

"3rd. The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed."

installed.³² As a matter of public policy, however, a well-recognized exception has evolved which permits a tenant to remove trade fixtures installed or erected by him during his term if such removal can be accomplished without serious injury to the realty.³³

In condemnation proceedings, if the owner occupies the premises being condemned, all fixtures are unquestionably taken into consideration in determining the value of his property being taken.³⁴ Similarly, if a lessee installs fixtures which by the terms of the lease would revert to the lessor at the end of the lease,³⁵ those fixtures also are considered in determining the fair market value of the real estate. Such fixtures also are considered in the valuation of the lessee's interest, because the lessee is entitled to receive the difference for the unexpired term of the lease between (1) the economic or fair market rental value of the leased premises as improved by the tenant, and (2) the contract or lease rent.³⁶ Thus, if the rental value of the leased premises is increased by the fixtures installed by the lessee in reasonable proportion to the amount expended for them, the lessee, in effect, is reimbursed for them.³⁷

Since the condemnor should pay the fair market value of the land as enhanced by the fixtures thereon, one might

³² *Thompson Ry. Co. v. Young*, 90 Md. 278, 281, 44 A. 1024 (1899).

³³ *Anderson v. Perpetual Bldg. & Loan Ass'n.*, *supra*, n. 30, 98; *Dudley v. Hurst*, *supra*, n. 30, 50. By virtue of Art. 53, § 38, the right of a tenant to remove fixtures erected by him under one demise or term shall not be lost or in any manner impaired by reason of his acceptance of a new lease of the same premises without any intermediate surrender of possession.

³⁴ *Baltimore City v. Himmel*, 135 Md. 65, 71, 107 A. 522 (1919).

³⁵ The general right of a tenant to remove trade fixtures may be controlled by an express contract with the landlord, but covenants restricting, or claiming to restrict, the tenant's ordinary right to remove such fixtures are always strictly construed and cannot be extended by implication. *Rasch v. Safe D. & T. Co.*, 136 Md. 435, 438, 111 A. 121 (1920).

³⁶ *City of Baltimore v. Gamse*, 132 Md. 290, 296-298, 104 A. 429 (1918). To be precise, the measure of the lessee's damages is more correctly stated as the difference in market value of the lessee's interest before and after the taking. Where there is a complete taking of the lessee's interest, the damages will be the difference between the economic or market rent and the contract or lease rent, but that is not necessarily so where there is only a partial taking of the lessee's interest. The market value of the lessee's interest after a partial taking may be affected by any of the terms of the lease (for example, whether he has to pay for alterations or repairs necessary to make the property tenantable), in addition to the amount of rent he will have to pay thereafter. *Veirs v. State Roads Commission*, 217 Md. 545, 143 A. 2d 613 (1958); *City of Baltimore v. Rice*, 73 Md. 307, 21 A. 181 (1891). The total allowance to all defendants, including lessors and lessees, may not exceed the value of the land taken plus the consequential damages, *Veirs v. State Roads Commission*, except in cases involving property subject to ground rents, *Baltimore v. Latrobe*, 101 Md. 621, 61 A. 203 (1905).

³⁷ *Supra*, n. 36.

expect that the result would be the same even if the lessee had the right to remove the fixtures. Most courts hold that all fixtures must be treated as real estate in determining the total award, but that, in apportioning the award as between lessor and lessee, the fixtures installed by the lessee must be treated as personal property and credited to the lessee if he has the right to remove them³⁸ or if the lessor is required to pay him the value of the fixtures under the terms of the lease or other agreement.³⁹ Some courts, however, hold that the right of removal releases the condemnor from its obligation to pay for such fixtures, on the theory that, since they are treated as personal property as between the lessor and lessee, they should not be valued as part of the real estate.⁴⁰ Prior to the enactment of the new Condemnation Code, Maryland was generally considered as being in accord with the latter view.⁴¹

Section 5(c) of the new Condemnation Code now puts Maryland with the majority in requiring all fixtures to be considered as real estate in determining the extent of the taking, unless the tenant exercises his right to remove them prior to the time his answer is due or elects in his answer to exercise such right.

4. Valuation of Church

Section 5(d) of the new Code provides:

"The damages to be awarded for the taking of a structure held in fee simple, or under a lease renewable forever, by or for the benefit of a religious body and regularly used by such religious body as a church

³⁸ *Supra*, n. 35.

³⁹ 4 NICHOLS, EMINENT DOMAIN (Rev. 3rd ed. 1962), § 13.12, pp. 364-365, § 13.121, pp. 376-378.

⁴⁰ *Ibid.*, § 13.121, p. 377.

⁴¹ *Ibid.*, fn. 17, citing *City of Baltimore v. Gamse*, *supra*, n. 36; Report No. 31 of the Research Division of the Legislative Council, dated August, 1958, pp. 9, 14, also relying on the *Gamse* case. It should be observed that the *Gamse* case did not specifically decide the question (the actual decision having been that it was error to instruct the jury that it could consider moving costs in assessing the lessee's damages), and could have been otherwise distinguished. For example, the Court there noted at pp. 295-6:

"The appellees, as we have said, have not shown that they were to be paid for the permanent improvements made by them or that such improvements were to be their property at the expiration of their tenancy, and, therefore, to allow them for said improvements, which they have not shown they are entitled to, might result in paying them for something to which they have no claim or right."

It is thus possible that had the specific issue been raised in a later case, the Court of Appeals might have followed the majority rule. *Cf.* the reference to the *Gamse* case in Anno., "Condemnation — Tenant's Structures", 75 A.L.R. 1495, 1499; Anno., "Eminent Domain — Lessee's Damages", 3 A.L.R. 2d 287, 305.

or place of religious worship, shall be the reasonable cost as of the valuation date, of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body. Such damages shall be in addition to the damages to be awarded for the land on which the condemned structure is located."

Because of the unique nature and use of church structures and the difficulty of finding a suitable replacement on the market, a bill⁴² was enacted by the Legislature in 1945 providing that, where a place of worship is condemned, the jury shall take into consideration the fair value of the place of worship so condemned and the difference between its fair value and the cost of erecting or constructing a new building of substantially the same size, type, design and character of construction as the condemned structure.

The Legislative Council committee's original draft of section 5(d) provided that the damages for the taking of a place of worship "shall in no event be less than the minimum reasonable cost of erecting a new structure of substantially the same size, type, design and character of construction as the acquired structure at some other suitable and comparable location within the State of Maryland to be provided by such religious body."

That provision would have allowed full reproduction costs, without depreciation. It was pointed out to the Committee that frequently in urban renewal areas old ornate churches will have been bought a relatively short period of time prior to condemnation for a small fraction of their reproduction cost and that a considerable portion of the reproduction cost would be attributable to ornate and non-utilitarian features that would not be included in any church being built today. An amendment was proposed under which the church would receive the fair market value, "but not less than the minimum reasonable cost of erecting a new structure of substantially the same capacity that would serve the same purposes."

The Legislative Council committee thereafter redrafted section 5(d) and adopted it in its present form, "changing the statute to make the damages the reasonable cost of erecting a comparable new structure at another location."⁴³

⁴² MD. LAWS 1945, ch. 804, § 9A.

⁴³ The Committee's Report, November 14, 1962, p. 17.

D. *Fair Market Value*

Section 6 reads as follows:

“The fair market value of property in a proceeding for condemnation shall be the price as of the valuation date for the highest and best use of such property which a seller, willing but not obligated to sell, would accept for the property, and which a buyer, willing but not obligated to buy, would pay therefor excluding any increment in value proximately caused by the public project for which the property condemned is needed, plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning such public project, and was beyond the reasonable control of the property owner.

If the condemnor is vested with a continuing power of condemnation, the phrase the effective date of legislative authority for the acquisition of such property, as used in this section, shall mean the date of specific administrative determination to acquire such property.”

The traditional concept of fair market value of condemned property has always been the amount which a willing buyer would pay a willing seller as of the valuation date, taking into consideration the highest and best use of the property, but excluding any enhancement in the value of the property caused by the public project for which the property is condemned.⁴⁴ The latter factor is excluded from the determination of the fair market value of the condemned property so that the owner will not receive a windfall.

On the other hand, the public project may have the effect of depreciating the value of the condemned property. Tenants frequently move when they learn that the property is to be condemned. In addition, a more or less frequent turnover of tenants is normal in urban renewal areas. It is obviously difficult to get new tenants to move into an area slated for condemnation. The result is vacant structures which frequently are vandalized and badly dam-

⁴⁴ *State Roads Commission v. Warriner*, 211 Md. 480, 485, 128 A. 2d 248 (1957); *Pumphrey v. State Roads Commission*, 178 Md. 498, 506, 2 A. 2d 668.

aged. Such property may thus have depreciated substantially as of the valuation date.

Prior to the enactment of the new Code, property owners had to bear such losses. That inequity, however, is cured by section 6. It allows the condemnee to receive as part of his damages the amount, if any, by which the property has diminished in value between the effective date of legislative authority for the acquisition of the property⁴⁵ and the date of actual taking if the trier of facts finds that such diminution in value was proximately caused by the public project itself or by announcements or acts of the plaintiff or its officials concerning such public project and was beyond the reasonable control of the property owner.

Thus it will be observed that section 6 follows substantially the present case law except for the allowance of damages for any such announcements or acts of the condemnor. That addition, however, is one of the most dramatic in the new Code.

Methods of Valuation

There are three acceptable methods of valuation: (1) comparative sales,⁴⁶ (2) replacement cost (the reproduction cost of the buildings and fixtures, less physical and economic depreciation, plus the value of the land),⁴⁷ and (3) capitalization of income.⁴⁸ Which is more reliable will vary with the type of property being evaluated. One of the methods may be given principal reliance, with the others being used as a method of checking its validity.⁴⁹

⁴⁵ In a municipality having the power of condemnation, but requiring an ordinance to implement it, the effective date of legislative authority for the acquisition of the property would be the date of the enactment of the condemnation ordinance. In the case of the State Roads Commission or any other agency having a continuing power of condemnation, the effective date of legislative authority for the acquisition of the property would be the date of the specific administrative determination to acquire the property.

⁴⁶ *Hance v. State Roads Commission*, 221 Md. 164, 174, 156 A. 2d 644 (1959); *Lustine v. State Roads Commission*, 217 Md. 274, 280, 142 A. 2d 566 (1958); *State Roads Commission v. Wood*, 207 Md. 369, 373, 114 A. 2d 636 (1955); *Baltimore v. Brick Co.*, 80 Md. 458, 473, 31 A. 423 (1895); 1 ORGEL, *VALUATION UNDER EMINENT DOMAIN* (2nd Ed.) § 136, *et seq.*; 5 NICHOLS, *EMINENT DOMAIN* (Rev. 3rd ed. 1962) § 21.1, *et seq.*

⁴⁷ *Bergeman v. State Roads Commission*, 213 Md. 137, 143, 146 A. 2d 48 (1958); 2 ORGEL, *op. cit. supra*, n. 46, § 188, *et seq.*; 5 NICHOLS, *op. cit. supra*, n. 46, § 20.1 *et seq.* The use of this method is allowed only if the buildings are well adapted to the land and its surroundings, and their structural value represents a fairly proportionate enhancement of the market value of the land. *Baltimore City v. Himmel*, 135 Md. 65, 70-72, 107 A. 522 (1919). 4 NICHOLS, *op. cit. supra*, n. 39, § 13.12.

⁴⁸ *Bergeman v. State Roads Commission*, *supra*, n. 47; *Pumphrey v. State Roads Commission*, *supra*, n. 44, 510; 1 ORGEL, *op. cit. supra*, n. 46, § 176, *et seq.*; 5 NICHOLS, *op. cit. supra*, n. 46, sec. 19.1, *et seq.*

⁴⁹ 5 NICHOLS, *op. cit. supra*, n. 47, § 19.1. *Cf. Bergeman v. State Roads Commission*, *supra*, n. 47, 143.

In using the income method, income in the nature of profits for a business is generally not admissible evidence of the value of the premises on which the business is located, but income in the nature of rentals is admissible. To the extent, however, that the business profits of a particular location will affect the fair market rental for such place, business profits are admissible.⁵⁰

Historically the condemnee has been entitled to market value based on the highest and best use for which his property was fitted even though it was not actually being used for that purpose at the time of the condemnation.⁵¹ His award, however, must be based upon actual market value at the time of the trial or at the time of the taking if taking has already occurred. If it is claimed then, that the property has a higher and better use than the one for which it is being used on the valuation date, there must be at least some probability that it would be used for such purpose within a reasonable time.⁵²

E. Costs

Like the prior Code,⁵³ section 7 provides that all costs in the trial court shall be paid by the plaintiff. In addition it contains several new provisions. One of them requires the plaintiff to pay the cost of all documentary stamps that may be required in the transfer of the property to the plaintiff.⁵⁴ However, the Internal Revenue Code provides that a municipality condemnor shall not be liable for federal documentary stamps and that the affixing of stamps by such condemnor shall not be deemed payment for the tax, which may be collected by assessment from the condemnee.⁵⁵

Another noteworthy change is the allowance to the defendant of reasonable legal, appraisal and engineering fees

⁵⁰ State Roads Commission v. Novosel, 203 Md. 619, 102 A. 2d 563 (1954).

⁵¹ Bonaparte v. City of Baltimore, 131 Md. 80, 101 A. 594 (1917); City of Baltimore v. Carroll, 128 Md. 68, 96 A. 1076 (1916). The general measure of damages in condemnation cases is the fair market value of the land at the time of the taking, and in determining this, consideration may be given to any utility to which the land is adapted and for which it is immediately available. Testimony may be admitted to show a substantial probability of a rezoning of the property for a different use which would make the property more valuable, but no element or enhancement of market value may be based upon the mere possibility that at some time in the future a reclassification or rezoning might occur. State Roads Commission v. Warriner, 211 Md. 480, 485, 128 A. 2d 248 (1957).

⁵² The trier of fact was never permitted to enter the realm of speculation and swell damages beyond the value on the valuation date by fantastic visions as to future possibilities or exigencies. Brack v. City of Balto., 128 Md. 430, 441, 97 A. 548 (1916).

⁵³ Formerly Art. 33A, § 14; formerly MD. RULE U-9.

⁵⁴ 3 MD. CODE (Cum. Supp. 1963) Art. 33A, § 7b(4).

⁵⁵ 26 U.S.C.A. § 4361 (1955); Internal Revenue Ruling 57-72.

actually incurred by the defendant due to the condemnation proceedings if the judgment is for the defendant on the right to condemn.⁵⁶ Under the former law, only a counsel fee was awarded and then only where the Court of Appeals decided that the petitioner was not entitled to condemn the property.⁵⁷

Another new provision is that, when the condemning authority has elected to use the "quick-take" procedure under section 40A or section 40B of Article III of the Constitution of Maryland, the defendant is entitled to receive interest at the rate of 6% on the difference, if any, between the amount of money initially paid into court and the award of the jury, from the date the money was paid into court until the date of the inquisition or final judgment, whichever date is later.⁵⁸

F. Moving Costs

It has been noted earlier that both the federal and state constitutions guarantee "just compensation"⁵⁹ for the taking of private property for a public purpose. However, this safeguard pertains solely to real property. In the absence of statutory provisions, the condemnee is required to bear the cost of moving his personal property whether he is a businessman or a home owner. For the first time in Maryland, an express statutory grant of moving costs was enacted in 1959.⁶⁰ It was extended in 1961⁶¹ and an even further liberalization has been achieved through the enactment of section 12 of the new Condemnation Code.

When Allowed

Section 12(a) provides for the condemnor to pay a pecuniary allowance for the removal of personalty to another location, within a reasonable distance, provided the condemnee has made his claim for these moving costs within six months after the actual removal. It excludes, however, the loss of profit or of good will or the cost of acquiring another location.

As originally drawn section 12 provided that moving costs would be paid only if the removal and relocation were

⁵⁶ *Supra*, n. 54, § 7b(5). Similar expenses are allowed under § 13d when condemnation proceedings are abandoned.

⁵⁷ Formerly Art. 33A, § 16.

⁵⁸ *Supra*, n. 54, § 7c.

⁵⁹ *Supra*, n. 2-3.

⁶⁰ Md. LAWS 1959, ch. 688 (codified as Art. 33A, § 21B, prior to the adoption of the new Condemnation Code).

⁶¹ Md. LAWS 1961, ch. 286 (codified as Art. 33A, § 21B, prior to the adoption of the new Condemnation Code).

accomplished within one year after the date of acquisition of the real estate. That was later discarded by the Legislative Council committee as being unduly restrictive. It was pointed out to the committee that in a large urban area a condemnor may acquire a number of properties by negotiation more than a year before it is necessary for the owner or tenant to vacate, inasmuch as it might take that much time to acquire the other properties.

Since a condemnor would not require an occupant to move until it actually needs the property, a one year mandatory restriction would unduly penalize the occupant and cause him to move before it was necessary or else forfeit his moving expenses. The committee then imposed a requirement that the claim for moving expenses must be submitted within six months after moving. A similar requirement is imposed by the federal government where federal funds are involved.⁶²

Subsection (g) also requires the person moving to give a written notice to the condemnor at least ten days prior to the date of removal stating the date of intended removal, the identification of the things to be moved and the place of relocation. He also must give the condemnor, upon request, a reasonable opportunity to inspect the articles to be moved.

Premises Occupied By Tenants

Subsection (b) cures what was a constant complaint of tenants whose leases had only short terms remaining. Under the law as amended in 1961,⁶³ the owner or tenant occupying residential property and the owner occupying commercial or industrial premises were allowed full moving costs. However, any occupant of business premises other than the owner was not entitled to receive moving costs in excess of \$2,500.00 if the term of his lease did not extend three years or more beyond the date of acquisition, and, in any event, not more than \$5,000.00.

Under new section 12, full moving costs are allowed for personal property which the lessor could have required to be removed at the expiration of the lease, with the exception that the allowance of moving costs to any lessee is diminished by one-fifth for each year by which five years exceeds the number of full years remaining in the term

⁶² Regulations of the Housing and Home Finance Agency, § 3.109(2)(b), dated June 27, 1961 (26 Fed. Reg. 5712-15), prescribed pursuant to § 106(f) of the Housing Act of 1949, as amended, 42 U.S.C.A. § 1456 (1957).

⁶³ Md. LAWS 1961, ch. 286 (codified as Art. 33A, § 21B, prior to the adoption of the new Condemnation Code).

of his lease at the time when the premises are acquired and with the further exception that the adjustment may not be used in any event to reduce the allowance below \$2,500.00. Any option to renew or extend the lease is treated as having been exercised and the term is deemed to include such renewal term or extension.

Not To Exceed Value

Section 12(c) provides that the moving allowance shall not exceed the fair market value of the property moved. It also provides, however, that the condemnor shall not be required to obtain an expert or detailed appraisal before payment of moving costs. The latter phrase was added after it was suggested to the committee that the condemnor might otherwise be expected to have appraisals made of all personal property to be moved in order to be assured that the moving costs do not exceed the value of the property moved. Obviously, such appraisals would add immeasurably to the cost of property acquisition and the aggregate appraisal cost would greatly exceed the aggregate moving costs that might be saved.

Unreasonable Distance

Subsection (d) provides that when personal property is moved an unreasonable distance, the allowance of moving costs shall not be totally defeated, but that no compensation shall be allowed for any additional cost resulting from the unreasonable distance of the new location. The prior moving cost statutes did not contain that provision; there was, accordingly, some doubt as to whether the lessee was entitled to any moving allowance if he moved his personal property to a new location that was not within a reasonable distance.

Claimant Must Be User

Subsection (e) simply provides that no person may be allowed moving costs for personal property unless the personalty was used by him at his original location and is to be used by him at the new location. It was inserted to prevent abuse of the moving costs provisions.

Determination of Amount and Limitation

Subsection (f) applies when the condemnor and the person entitled to moving costs are unable to reach an

amicable agreement on the amount of moving costs. In that case, either of the parties may file a petition in the court where the condemnation proceedings were filed, or, if there were no such proceedings, in any court of law in which any part of the premises is located. No such petition may be filed more than one year after the date the personal property was removed from the premises.⁶⁴

Federal Funds

Subsection (i) provides that nothing in section 12 shall be construed as placing a limit on the amount of compensation that the condemnor may allow for moving expenses in cases where such compensation may be paid or where the condemnor will be reimbursed wholly or partly out of federal funds.

G. Abandonment

In the past, a condemnor had an unfettered right⁶⁵ to abandon condemnation proceedings until compensation had been paid or tendered or until the authorized appropriation of the property for public use had actually taken place.⁶⁶ That right, however, is now limited by section 13.

Section 13, subsection (c), provides that no proceeding for condemnation may be abandoned after taking⁶⁷ has occurred, nor more than 120 days after the entry of final judgment, unless an appeal is taken therefrom, nor more than 120 days after receipt by the clerk of the lower court of the mandate of the Court of Appeals if an appeal is taken from a final judgment.

For the purposes of section 13, if an appeal taken by the condemnor is stricken out pursuant to Maryland Rule 813 or voluntarily abandoned, it shall be deemed not to have been taken; but if an appeal taken by the defendant is so stricken out or voluntarily abandoned, the plaintiff may abandon the proceeding within 120 days after the appeal

⁶⁴ 3 Md. CODE (Cum. Supp. 1963) Art. 33A, § 12(h).

⁶⁵ *Friendship Cemetery v. City of Baltimore*, 197 Md. 610, 81 A. 2d 57 (1951); *State v. Ambrose*, 191 Md. 353, 62 A. 2d 359 (1948); *Beall v. Redmiles*, 176 Md. 677, 6 A. 2d 551 (1939); *Norris v. Baltimore*, 44 Md. 598 (1876). The owner, however, was protected where there was bad faith, *Friendship Cemetery of Anne Arundel County v. Baltimore*, 200 Md. 430, 90 A. 2d 695 (1952).

⁶⁶ *Lord Calvert Theatre v. Baltimore*, 208 Md. 606, 611, 119 A. 2d 415 (1956); *LaFontaine's Heirs v. LaFontaine's Heirs*, 205 Md. 311, 319, 107 A. 2d 653 (1954); *State v. Ambrose*, *supra*, n. 65; *Pittsnogle v. Western Md. Ry. Co.*, 123 Md. 667, 91 A. 831 (1914); *Norris v. Baltimore*, *supra*, n. 65.

⁶⁷ As to when taking occurs, see 3 Md. CODE (Cum. Supp. 1963) Art. 33A, § 14.

is so abandoned or stricken out, provided a taking has not occurred.

The new Code also directs the procedure to be used for abandoning a condemnation proceeding. Subsection (a) of section 13 provides that the exclusive method of abandoning a proceeding for condemnation shall be by filing in the proceeding a written election to abandon it. A copy of such election must be served as provided in Maryland Rule 306 upon each defendant who has been personally subjected to the jurisdiction of the court, and every other defendant must be notified of such election by service of a copy thereof or by such other means as the court may direct.

Under prior law, it frequently was difficult to ascertain whether there had been an abandonment. Generally, it was a question of fact for the jury rather than a question of law.⁶⁸ The new Code eliminates the uncertainty.

Subsection (d) of section 13 provides that upon an abandonment the defendants are entitled to recover from the condemning authority the reasonable legal, appraisal and engineering fees actually incurred by them as a result of the condemnation action.⁶⁹ That provision was originally passed in 1959⁷⁰ and was made a part of the new Code without change.

III. FINAL OBSERVATIONS

The major contributions of the new Condemnation Code are twofold: (1) it simplifies and streamlines the procedure for condemnation cases, and (2) it requires condemnees to be compensated for monetary losses and damages not previously compensable. It is believed that the new Code will be of benefit to both condemnor and condemnee, without imposing an undue burden on either of them.

⁶⁸ *Wagner v. Bealmear & Son Company*, 135 Md. 690, 109 A. 466 (1920); *Petrol v. Mayor & City Council of Baltimore*, 166 Md. 431, 171 A. 45 (1934); *Black v. City of Baltimore*, 50 Md. 235 (1879).

⁶⁹ This provision is similar to Art. 33A, § 7b(5), allowing similar fees when the judgment is for the defendant on the right to condemn.

⁷⁰ Md. LAWS 1959, ch. 526 (codified as Art. 33A, § 21B, prior to the adoption of the new Condemnation Code).