

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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DANIEL GOLDSTEIN, et al.,

Plaintiffs, CV-06-5827 (NGG) (RML)

-against-

ECF Case

GEORGE E. PATAKI, et al.,

Defendants.

----- x

AARON PILLER and ROCKWELL PROPERTY  
MANAGEMENT, LLC,

Plaintiffs, CV-06-5827 (NGG) (RML)

-against-

ECF Case

GEORGE E. PATAKI, et al.,

Defendants.

----- x

**CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO  
MAGISTRATE JUDGE LEVY'S REPORT AND RECOMMENDATION**

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**PRELIMINARY STATEMENT**

The City defendants, having joined in the ESDC defendants' objections ("ESDC Objections") to Magistrate Judge Levy's Report and Recommendation, dated February 23, 2007 ("Report"), here join the further arguments submitted by the ESDC defendants in opposition to the plaintiffs' objections to the Report, dated March 9, 2007 ("Pl. Objections"). In addition, the City defendants are compelled to respond separately to plaintiffs' objections to Magistrate Levy's recommendation to dismiss the amended complaint pursuant to abstention doctrine first established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

The City of New York has long been in the forefront of the urban renewal movement, a movement which depends, in large part, on the power of eminent domain, and the integrity and consistency of the condemnation process. Allowing plaintiffs to side-step the comprehensive and uniform procedures set forth in the Eminent Domain Procedure Law ("EDPL") in favor of litigation in federal court would present a serious threat to the City's ability to move forward with critical projects that depend on private-public partnerships for their success, including the construction of affordable housing and the creation of viable mixed-use developments in blighted urban areas.

As Magistrate Judge Levy recognized, allowing plaintiffs' lawsuit, and ones similar to it, into federal court would result in forum shopping for condemnation challenges. In the face of an uncertainty regarding where, and when, opponents to a condemnation might bring a challenge, urban revitalization in the City of New York would be crippled. The EDPL was created for the express purpose of avoiding such a disastrous result. Accordingly, the Court should accept the recommendation to abstain on *Burford* grounds.

ARGUMENT

**APPLICATION OF BURFORD ABSTENTION  
IS APPROPRIATE IN THESE  
CIRCUMSTANCES BECAUSE FEDERAL  
COURT REVIEW WOULD UNDULY  
INTERFERE WITH THE POLICIES  
CODIFIED IN THE EDPL**

Magistrate Judge Levy correctly observed that where timely and adequate state court review is available, *Burford* abstention is appropriate if *either* (1) there are difficult questions of state law bearing on policy problems of substantial public import, *or* (2) federal court review “would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” Report at 33-34, quoting *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361 (1989). *See also, e.g., Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976); *Bethpage Lutheran Service, Inc. v. Weicker*, 965 F.2d 1239, 1247 (2d Cir. 1992); *American Disposal Services, Inc. v. O’Brien*, 839 F.2d 84, 87 (2d Cir. 1988); *Feiwus v. Genpar*, 43 F.Supp. 2d 289, 295 (E.D.N.Y. 1999).

Here, there is no question that timely and adequate state court review is available. *See Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) (post-determination review procedure set forth in EDPL § 207 sufficient to satisfy the constitutional requirement of due process). Thus, the issue is whether either of the two *Burford* prongs applies. Magistrate Judge Levy correctly found that the second prong applies: the federal court review of a condemnation commenced under the EDPL would be highly disruptive of the State’s efforts to establish a coherent policy with respect to the quintessentially local issue of eminent domain.

**A. The EDPL Reflects an Important and Coherent State Policy**

Plaintiffs argue that the EDPL does not reflect a coherent policy of the type that warrants abstention under *Burford*. Pl. Objections at 24-31. Plaintiffs’ primary argument on this

point is that the EDPL purportedly “does not reflect any *substantive* policy of the State of New York with respect to eminent domain,” and is “entirely *procedural*.” Pl. Objections at 24 (emphasis in original). The plain meaning of the EDPL’s statutory language and the legislative history of the statute clearly show otherwise.

New York enacted the EDPL with the intention of standardizing the means for the exercise of eminent domain throughout the State and the methods to determine just compensation. *East Thirteenth Street Community Assoc. v. New York State Urban Dev. Corp.*, 84 N.Y.2d 287, 293-94, 641 N.E.2d 1368, 1370 (1994). Thus, the EDPL states:

It is the purpose of this law to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state; to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of the power of eminent domain; to establish opportunity for public participation in the planning of public projects necessitating the exercise of eminent domain; to give due regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment, and to that end to promote and facilitate recognition and careful consideration of those interests; to encourage settlement of claims for just compensation and expedite payments to property owners; to establish rules to reduce litigation, and to ensure equal treatment to all property owners.

EDPL § 101 (emphasis supplied). By its own terms, then, the EDPL is intended not to establish a procedure for its own sake, but to provide an “exclusive procedure” that ensures equal protection; just compensation; public participation in planning public projects; a balance of the considerations of public use with those of private interests, community interests and the environment; and the reduction of litigation.

The legislative history of the EDPL underscores the importance of these broad purposes of the statute. A copy of relevant portions of that history, recorded in Bill Jacket, L. 1977, c. 839 (Aug. 11, 1977), is appended hereto as Appendix A. As noted by Governor Hugh Carey, the enactment of the EDPL in 1977 was “the culmination of nearly seven years of effort

by the members of the State Commission on Eminent Domain,” which was established to “eliminate the dissatisfaction caused ... by the variety and complexity of existing laws,” and put in place “a uniform and equitable procedure.” Memorandum of Gov. Hugh Carey, August 11, 1977 (“Governor’s Memo.”) at 1. The bill, having been disapproved in 1974 and again in 1975, managed to standardize more than fifty procedures then used in the State, involving more than 150 sections of the law. *Id.*

Importantly, here, the EDPL permits judicial review of four questions, as to whether: (1) the proceeding conformed with the Federal and State Constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in the EDPL; and (4) whether a public use, benefit or purpose will be served by the acquisition. EDPL § 207(C). The New York State Court of Appeals has interpreted the legislative history to specifically affirm that the judicial review procedures codified in Section 207 reflect the State's desire to ensure that development is allowed to proceed efficiently once a condemnor's determination has been made:

[W]hen the proposed legislation reached the Legislature, the provision for public hearings was its most controversial feature. There had been increasing public resistance to some projects, accompanied by time-consuming litigation, and many viewed the hearing requirement as an additional step to the condemnation process which would inject further uncertainty and delay in the completion of public projects [citations omitted]. The Commission recognized the charge that increased public participation could delay or even halt projects, but it believed that the proposed procedures of notice and hearing could forestall the increasing amount of litigation and that the narrow scope of judicial review authorized by section 207 would expedite development once the hearing was concluded. The “partnership of planning” envisaged by the statute, the Commission stated, would lessen the public's “natural” resistance to projects (citation omitted).

*East Thirteenth St. Community Ass'n*, 84 N.Y.2d at 294-95. *See also* Appendix A, March 1973 Memorandum of State Commission on Eminent Domain (“Comm’n Memo.”), at 4-9.

Indeed, the efficiency of judicial review in the EDPL process was at the heart of the State's decision to amend the EDPL to expand the scope of judicial review to include review of a condemnor's compliance with the State Environmental Quality Review Act ("SEQRA"). *Id.*, at 297 ("The 1991 amendment was intended to permit a reviewing court to pass on both the EDPL issues and the SEQRA issues in one proceeding thereby facilitating prompt review and conserving judicial resources"). Accordingly, a condemnee's challenge to the environmental review must be brought within the 30 day statute of limitations established in Section 207, rather than within the standard four-month statute of limitations applicable to challenges brought under Article 78 of the CPLR. *See* EDPL § 207; *In re City of New York*, 6 N.Y.3d 540, 547 (2006). For these same reasons, EDPL § 207(b) requires that the Appellate Divisions and Court of Appeals treat Section 207 challenges on an expedited basis.

In light of the State's policy to promote efficiency and reduce litigation in condemnation proceedings, Magistrate Judge Levy's recommendation that the Court "respect the state's concern for rationalizing and centralizing its eminent domain laws," including its intent to establish the "exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York," was correct. Report at 34-35.

**B. Federal Court Retention of This Matter Would Cause Undue Interference With the EDPL**

Magistrate Judge Levy was also correct in finding that "allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power." Report at 39. This legislative scheme has been found to satisfy constitutional requirements. *See Brody, supra*. As Magistrate Levy further states, "no prospective condemnee, given the choice, would opt for narrow, on-the-record (yet

constitutionally adequate) review in the Appellate Division if all of the benefits of federal review were freely available.” *Id.*

The potential that condemnees would opt out of the EDPL’s standard procedures in favor of federal court litigation poses a serious risk to the City’s ability to revitalize its blighted urban areas. The City of New York uses its power of eminent domain to acquire property in these areas for urban renewal, which includes affordable housing, mixed uses, commercial redevelopment and industrial revitalization. These urban renewal projects frequently involve the transfer of property acquired through eminent domain, or an interest in property acquired through eminent domain, to private developers. For instance, in a sample of 21 affordable housing projects undertaken by the New York City Housing and Preservation Department (“HPD”) in partnership with private developers between 1995-2005, approximately 5,832 of 14,369 units required acquisition by eminent domain.<sup>1</sup> Under plaintiffs’ theory, the owners of those lots acquired by eminent domain and then transferred to private developers to facilitate the construction of the City’s plan for affordable housing would all be able to bring a challenge to the taking in federal court.

Plaintiffs, of course, claim that these circumstances are unique, and that there will be no flood of condemnation challenges brought into the federal courts. *See* Transcript of Oral Argument before Hon. Robert M. Levy, February 7, 2007, at 37:5-37:14. There is, however, nothing unique about plaintiffs’ circumstances. Plaintiffs have done nothing more than attack a process that has conformed with all of the State’s substantive and procedural requirements by tagging it with the conclusory claim of “conspiracy.” Any condemnee confronted with the

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<sup>1</sup> This statistic was obtained by this office from HPD, which was already in possession of the compiled information. A copy of relevant documentation may be made available at the Court’s request.

prospect of having their property taken for a use that involves a private developer could make the same claim.

Making every acquisition by eminent domain that involves a public-private partnership or transfer of property to a private developer into a federal case would, without question, undermine the values of efficiency and uniformity embodied in the EDPL. Discovery and trial, such as is sought by plaintiffs here (Pl. Objections at 37) would only increase the uncertainty of vital public projects moving forward. Moreover, allowing federal litigation would allow plaintiffs to sue innumerable parties who are not, in fact, directly involved in the condemnation of their properties, such as these plaintiffs have done, thus clogging up the courts with unnecessary parties and voluminous motion practice. *Cf.* Pl. Objections at 37.

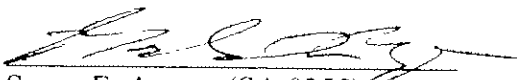
#### CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the papers submitted by the Empire State Development Corporation, the Report of Magistrate Judge Levy should be adopted, and the complaint should be dismissed.

Dated: March 23, 2007  
New York, New York

Respectfully submitted,

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APPENDIX A

# GOVERNOR'S BILL JACKET

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## 1977 CHAPTER 839

132 PAGES

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### EMINENT DOMAIN PROCEDURE

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STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY 12224

AUG 11 1977

MEMORANDUM filed with Assembly Bill Number 5108, entitled:

CHAPTER # 839  
APPROVAL # 50

"AN ACT to establish the eminent domain procedure law, constituting chapter seventy-three of the consolidated laws, and to repeal the condemnation law, relating to the acquisition, by condemnation, of real property for a public use"

A P P R O V E D

This bill repeals the State's Condemnation Law and enacts a new Eminent Domain Procedure Law. The purpose of this new Eminent Domain Procedure Law is to recodify the procedural law applicable to the acquisition of land by governmental units and public corporations.

The bill which I have now approved is the culmination of nearly seven years of effort by the members of the State Commission on Eminent Domain. The Commission, established in 1970, was charged with the responsibility of studying the law in this area and recommending the changes which it finds appropriate to eliminate the dissatisfaction caused in part by the variety and complexity of the existing laws.

Those recommendations were first submitted to the Legislature in 1974 and again in 1975. On these occasions my predecessor and I disapproved those bills because of specific issues raised by them (1974 Disapproval Memorandum Nos. 218, 219 & 220 and 1975 Disapproval Memorandum No. 170). It was thought best to resolve the remaining issues before enactment of the new law. Since that time members of the Commission have labored to revise the bill and meet the objections. The present bill has done so.

The bill creates a uniform and equitable procedure which assures that the public will be adequately informed through hearings of proposed public projects requiring the acquisition of land; that environmental and community impact will be weighed before the acquisition can go forward; and that every effort will be made to negotiate with owners for the acquisition of their property.

In this endeavor the Commission sifted through the more than fifty different procedures utilized in this State, extracting the most desirable provisions of each. Not all of the new law was derived in this way. Much of it has been improved upon and much is innovative.

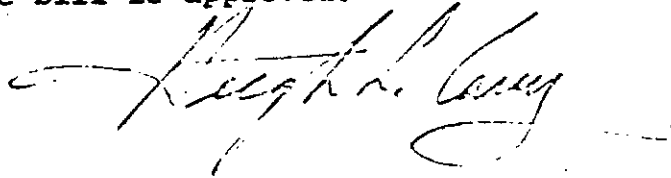
This bill, together with Assembly Bill Number 5234, which I have also approved, establishes substantial uniformity in the procedures with variations in limited circumstances involving acquisitions by the State. This accomplishment alone is worthy of praise. It involved the identification, repeal, reenactment and amendment of over 150 separate sections of law.

-2-

As in any undertaking of this magnitude, errors and oversights are likely to occur. Many agencies have advised me of the difficulties they will encounter as a result of these. The bills are not perfect; it would be unrealistic to expect them to be. The major areas of concern have been addressed. The remaining issues can be resolved. But the time has come for New York to make the larger commitment to reform in this area.

The effective date of this bill and Assembly Bill Number 5234 is July 1, 1978, nearly one year away. I hereby request each State and local agency, and all others directly affected by these bills to evaluate their provisions and recommend the remedial legislation necessary to improve the operation of the new Eminent Domain Procedures Law. I further request the Department of State to coordinate this effort so that appropriate legislation can be enacted at the next session of the Legislature.

The bill is approved.

A handwritten signature in cursive script, appearing to read "Joseph P. Casey". The signature is written in dark ink and is positioned below the text "The bill is approved."

CALENDAR NO. 1030

BILL NO. A. 5108

S.

INTRODUCED BY: Mr. Koppell

AN ACT

to establish the eminent domain procedure law, constituting chapter seventy-three of the consolidated laws, and to repeal the condemnation law, relating to the acquisition, by condemnation, of real property for a public use

SUMMARY OF PROVISIONS - Creates a new chapter of New York State Laws to be Chapter 73, Eminent Domain Procedure Law, to provide a simplified and uniform procedural code for exercising the power of eminent domain.

RATIONALE - Currently New York Law authorizes a variety of procedures which can be utilized to acquire property for public purposes. This bill is intended to remove most of the inconsistencies and duplication within the present procedures, and achieve the benefits of a singular, comprehensive policy.

LEGISLATIVE HISTORY - 1976- A.12510 passed Assembly; died on Senate Floor.  
1975- A. 7038 vetoed by Governor.

PERTINENT CONSIDERATIONS - See A.5234 (Calendar No. 1031) which repeals various sections of law inconsistent with this bill.

FISCAL IMPLICATIONS - None.

EFFECTIVE DATE - January 1, 1978.

B-201

TEN DAY BILL

BUDGET REPORT ON BILLS

Session Year: 1977

Handwritten initials and date: 7/18

JUL 18 1977

SENATE

Introduced by:

ASSEMBLY

As. No. 21,024

Mr. Koppell

No. 5108

Law: Special Act/Eminent Domain Procedure Law

Sections: Chapter 73 (new) of the Consolidated Laws

Division of the Budget recommendation on the above bill:

Approve: X Veto: No Objection: No Recommendation:

1. Subject and Purpose: Effective July 1, 1978, this "Eminent Domain Procedure" bill would establish a comprehensive and exclusive procedure governing the acquisition of real property in New York State by all public entities or government jurisdictions at the local and State level.

2. Summary of Provisions: The "Act":

- Repeals the Condemnation Law and explicitly takes precedence over all other general or special provisions in State law relating to the public acquisition of real property;
- Defines key terms used in eminent domain proceedings;
- Provides for a public hearing on the need for, and location of, a public project and requires the agency or government jurisdiction involved -- defined as the "condemnor" -- to give public notice in local newspapers at least 10 days prior to the hearing. However, the Act does permit condemnors to waive hearings on small projects which do not have an adverse effect on the public interest or because an emergency requires rapid action;
- Requires the condemnor to make a determination within 90 days of the hearing and to publish a synopsis of the determination in two successive issues of a local newspaper;
- Establishes a procedure to insure that condemnors quickly and justly compensate individual owners whose property has been acquired under the power of eminent domain. This procedure requires, for example, that the owner be justly compensated for his property at an amount determined by an appraiser; that all offers must be in writing and that the owner can reject an offer and accept it as an advance payment pending a full settlement;
- Requires condemnors to complete acquisition in three years. Failure to complete acquisition in this time would require that the project be abandoned;
- Provides for procedural judicial review by the Supreme Court and a judicial review of claims by the Court of Claims for actions taken pursuant to the Act in cases of dispute;
- Provides a special procedure to expedite settlement of small claims cases (under \$5,000);

Date: Examiner:

Disposition:

Chapter No.

Veto No.

- 2 -

- Applies to acquisitions -- through eminent domain -- of property other than real property.

3. Prior Legislative History:

- a. In recent legislative sessions, several iterative versions of a comprehensive Eminent Domain Procedure Law have been introduced, based on original drafts and recommendations prepared by the Temporary Commission on Eminent Domain. Initial versions of an EDPL were vetoed by the Governor in 1974 (S.7969, amended by S.10587-A) and 1975 (A.7038-A, Veto Message #170), primarily because of the failure to repeal existing eminent domain procedures and the presence of major technical defects

In 1976, a further revision of the bill was introduced (A.12510-A), accompanied by companion "repealer" legislation (A.8662-A) that revised existing law to create consistency with the EDPL. Both bills failed to pass. The instant legislation is substantially similar to the 1976 proposals.

- b. A proposed chapter amendment to the instant legislation (S.5921-A) is currently awaiting the Governor's action. The proposed amendment would establish a new procedure for the institution of appropriation claims and would authorize the filing of claims by certain classes of individuals currently barred by their failure to file within applicable time limits.
- c. This bill is accompanied by companion legislation (A.5234) which would revise current statutory procedures in conformance with the proposed EDPL. This companion bill, in turn, would be amended by A.8110 which would change the effective date of this "repealer" legislation to coincide with that of the EDPL on July 1, 1978. Both bills are currently awaiting the Governor's action.

4. Arguments in Support: The power of eminent domain is now exercised by public corporations and government jurisdictions under a bewildering variety of special and general provisions of law. The Condemnation Law, for example, permits condemnors to devise their own unique procedures to exercise the power of eminent domain. As a result, there are over 400 procedures in actual use.

This patchwork legal framework has caused great inequities in the treatment of property owners ranging from inadequate notification that their property is to be publicly acquired, to varying methods for determining just compensation and vague or confusing judicial remedies. By establishing a single and exclusive set of procedures governing the exercise of eminent domain, this bill attempts to insure that equity is achieved.

The bill also creates new procedures to expedite the settlement of small claims and requires that the impact of a public project on a community and its environment be taken into account in a public hearing prior to the usual exercise of eminent domain authority.

Other key desirable features of the bill include:

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- a. The bill allows the condemnor to enter, possess or use property prior to final acquisition, while establishing such protections as advance notice to the owner, compensation for damages resulting from use or entry (with no upper dollar limits) and possess only upon court order;
- b. The bill, unlike many current provisions, put a time limit on acquisition and permits the advance payment of offers prior to final agreement to insure that owners are not kept either interminably in doubt about the disposition of their property or waiting for compensation;
- c. The bill recognizes the need for compensating owners for incidental expenses incurred during acquisition proceedings (such as legal fees) and requires that offers itemize -- where practical -- consequential or severance damages to the owner;
- d. The bill permits negotiations between the condemnor and owner only after the condemnor has made a written offer for one hundred percent of the appraised value of the property in question, thus safeguarding unwary owners who might otherwise have agreed to settle for less compensation;
- e. The bill provides an adequate pre-title vesting discovery procedure which should insure that a condemnor has access to all data necessary to establish a just appraisal of property to be acquired;
- f. The bill establishes procedures and time limits governing property that is acquired in stages over a number of years.

Finally, the bill corrects five deficiencies noted in the Governor's veto message of August 9, 1975:

- a. Entry damages, if any, are specifically deemed not to constitute appropriation or acquisition of abandoned property.
- b. Inadvertent failure, despite good-faith, reasonably diligent efforts, to ascertain the identify of persons entitled to notice under this section, will not invalidate disposition of property.
- c. The condemnor's reasonable access to property prior to vesting for test and appraisal purposes is specifically sanctioned.
- d. In the adjudication of any claim, the condemnor is specifically exempted from any requirement to justify the condemnation.
- e. Allowance for extraordinary expenses to the condemnee can occur only after an opportunity for hearing.

5. Possible Objections:

- a. This bill weakens a number of provisions in some earlier versions that were designed to give maximum protection to owners whose property is to be publicly acquired, but which were subsequently

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criticized as too costly and time consuming to administer. Specifically, it:

- Eliminates the requirement that property owners subject to public acquisition be notified in advance of a public hearing and that they receive a copy of the determination resulting from the hearing. As noted in the Summary of Provisions, this version of the bill requires only public notice in local papers in both instances. Although this version does retain the provision that owners be personally notified in advance of actual State acquisitions, it provides no special protection for the owner in the event of inadvertent failure to accomplish such notifications.
- Allows an interested party, the condemnor, to make the judgment as to whether or not a public hearing should be waived in the case of small projects or for projects where delay would endanger the public interest (§206(d)). Further, the language that discusses the grounds for waiver seems vague.

b. The bill fails to specify the extent to which "alternate locations" must be addressed by the condemnor at the public hearings. Experience with other State and Federal administrative hearing procedures has demonstrated that the law's failure to define and specify the scope, range and depth into which the project sponsor must go has often resulted in confusion, delay, extended legal challenges, administrative and judicial interpretations, and "defensive" document-writing, with attendant dollar, manpower, and temporal costs (e.g., Article VIII of the Public Services Law and the National Environmental Policy Act).

However, the waiver provisions of the instant bill which exempt the condemnor from the hearing requirement whenever other federal, state or local laws or regulations already require similar hearings, will ameliorate the possible difficulties that might otherwise ensue from this deficiency.

c. The term "approved" appraisal (§303) is not defined. Specifically, the bill does not specify who "approves" the appraisal or on what criteria. The section also requires that "the highest" appraisal is to be used in setting just compensation -- implying that more than one is to be made. Yet, no where does the bill explicitly require more than one appraisal.

6. Other State Agencies Interested: Almost all State agencies potentially have an interest in this bill. From among the ones more directly affected we obtained the following positions:

a. The Department of Law has stated that it will take the position that the bill is deserving of approval, although it will also discuss a few technical concerns which it would like to see addressed by amendment;

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- b. The Department of Transportation will take a position of "no objection;"
- c. The Department of Environmental Conservation has indicated informally that it will recommend approval;
- d. The Power Authority of the State of New York has indicated informally that it will not oppose the bill;
- e. The Office of Parks and Recreation has yet to adopt a formal position on the bill. The inadvertent failure of the companion legislation (A.5234) to revise OPR's current procedure coupled with the enactment of the EDPL, however, may pose special problems for the agency's acquisitions.

The Departments of Law, Transportation and Audit and Control and the Power Authority recommended disapproval of all previous versions of this legislation.

7. Known Position of Others: The Bar Association of the City of New York supports this legislation. The Long Island Lighting Company opposes the bill because of the provisions for public hearings.
8. Budgetary Implications: The bill's overall budgetary impact cannot be measured at this time. However, our research revealed nothing that would indicate a substantial change, either positively or negatively in the costs incurred by the State in eminent domain proceedings. For example, an increase in costs due to the requirement for hearings may be offset by more rapid settlement of other cases, particularly via the small claims procedure. However, some agencies may incur additional program costs and adjustments to reflect these increases may be requested.
9. Recommendation: This bill, enacting an "Eminent Domain Procedure Law" establishes a comprehensive and exclusive procedure governing the exercise of eminent domain in New York State and thus represents a major step in insuring that property owners are equitably treated and have some voice in acquisition proceedings. Enactment of such procedure has been widely advocated for several years. The continued absence of such a code would perpetuate existing difficulties for property owners and for the State. This edition of the bill is the product of extensive, iterative revision designed to address the myriad of technical difficulties inherent in codification efforts.

No such codification is likely to be universally satisfactory. However, the triple goals of this codification -- the protection of property rights, the provision for public review, and the assurance of administrative feasibility appear to be adequately provided for and reasonably balanced in this legislation.

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Consequently, we recommend approval.

NOTE: If this legislation is approved, we recommend that the companion bill, A.5234, which amends, repeals, and reenacts existing statutes to insure uniformity with the new law and A.8110, which corrects the effective date of A.5234 to make it identical to that of this bill (A. 5108) also be approved.

DATE: July 15, 1977

*Paul J. Elster*

**NEW YORK STATE  
COMMISSION ON EMINENT DOMAIN**

**MEMORANDUM**

**RE: The Commission's proposed  
EMINENT DOMAIN PROCEDURE ACT**

**March 1973.**

**THIS DOCUMENT HAS BEEN ADDED BY  
NY LEGISLATIVE SERVICE, INC.  
IT IS NOT CONTAINED IN THE  
GOVERNMENT FILE, HOWEVER, WE  
FEEL THAT IT MAY BE HELPFUL.**

MEMORANDUM

RE: AN ACT in relation to establishing uniform procedures in eminent domain cases to assure just compensation to individuals whose property rights are acquired.

PURPOSE OF BILL

To provide a simplified and uniform procedural code in order to eliminate the maze of conflicting procedures that are now utilized by the myriad of authorities, agencies, and local government units empowered with the authority to acquire property through eminent domain. The Bill will also facilitate and insure the constitutional mandate that property shall not be taken for public use without "just compensation."

STATEMENTS IN SUPPORT OF BILL

As was stated in the Commission's 1971 Report, one proposal consistently offered at Commission hearings and through written submissions, was the call for a uniform procedure in New York State to govern all eminent domain matters. This sentiment takes on even greater significance when it is realized that there were no statements presented indicating a contrary position. Presently, New York law authorizes a variety of procedures which can be utilized to acquire property. Most acquisitions in the name of New York State are governed by a standard procedure which permits administrative

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appropriation of property, while on the other hand, the New York State Condemnation Law, a general statute applicable to all non-state condemnors, establishes judicial condemnation as the method of exercising the power of eminent domain. However, there is contained within section 27 of the Condemnation Law, an exception to the law's applicability which has permitted the adoption of various procedures tailor-made to the wishes of the particular condemnor receiving a grant of the power of eminent domain. Consequently, a large number of codes applicable to various municipalities and governmental bodies, has evolved in New York. As was portrayed in the Commission's Interim Report, there are approximately 3372 local government units with the power of eminent domain. This figure did not include state departments and agencies, public authorities, utilities, and even private entities whose addition would swell the number of condemnors to more than several thousand above the 3372 figure. While each of these condemnors does not have its own distinct procedure, there are well over 50 various procedures utilized in New York State today.

It becomes apparent that the multiplicity of procedures is confusing to the property owner and his representatives, who usually find it difficult to determine whether the proceeding is being properly conducted, and also whether the property owner's rights are being fully protected. The rights of the owner will vary greatly depending upon the identity of the condemnor acquiring his property.

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Additionally, many condemnors acquiring property under their own specialized procedure frequently adopt variances in the basis of determining and paying just compensation. For example, depending on the jurisdiction, the claimant may or may not receive damages for loss or impairment of access, changes of grade, street closings or business losses. In specific jurisdictions the claimant will receive costs, legal fees and allowances if the award exceeds the condemnor's offer, while in others he will not. The end result is a system of confusing and inconsistent procedures which frequently result in arbitrary application of the constitutional requirement of just compensation. It is this latter factor which makes the situation unpalatable. If, under these numerous procedural codes, property owners were treated uniformly, and at the conclusion of the proceeding all owners received compensation based on a uniform standard, the effect of a multitude of procedures would be merely wearisome. However, the many procedures employed directly, produce a varied result to the property owner and an owner's recovery will depend on the fortuitous circumstances of who acquires his property.

With these thoughts in mind, the Commission in 1971, began drafting a uniform procedural code. A draft of the code appeared in the Commission's 1971 Report and during the past year has been subjected to further public hearings and revision. The following is a brief description and explanation of the salient factors of each article contained in the revised code including both the Commission's

rationale for its adoption and the reasoning behind the more significant amendments to the earlier draft.

ARTICLE 1. Purpose; Short title; Definitions; Applicability.

The thrust of this article is to make the code applicable to all acquisitions. Acquisition as defined by the code, means the taking of property by the condemnor for a public use, benefit or purpose by virtue of the exercise of the power of eminent domain. As the first step toward uniformity, the word "acquisition" is used to eliminate any distinction, technical or otherwise, between "condemnation" which currently connotes a non-state taking, and "appropriation" which implies a state taking.

ARTICLE 2. Determination of the need and location of a public project prior to acquisition.

In its 1971 Report, the Commission recommended that during the planning phase of a public project, a procedure (public hearing) should be established to afford citizens the opportunity of participation. It was felt that a condemnor's decision concerning the necessity and location of a proposed public project should reflect both consideration of the project's detrimental and beneficial effect on a locality as well as a specific statement of the basis of the condemnor's decision. It was further recommended that the condemnor's decision should be reviewable by an impartial administrative agency which would have the power to approve, conditionally approve, or to

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disapprove the condemnor's decision. In this regard, judicial review of the questions of public purpose and location of a proposed project was to be limited to a review of the condemnor's compliance with the statutory procedure of arriving at its determination and enforcement of constitutional guarantees. However, the Commission's recommendations in this area were subjected to further study. This study resulted in retention of certain proposals and modifications of others.

The Commission continues to endorse the necessity for a public hearing to provide an opportunity for citizen participation and has included the same in Article 2. It was obvious to the Commission that the public is increasing its demand that public projects (and private projects for that matter), be evaluated not only for their direct benefits, but also in light of their impact upon the environment. It is also readily apparent that the public will no longer tolerate disruption and destruction of natural resources, of communities, and of irreplaceable assets. There is an increased willingness to fight for such a determination and predictions are that this will continue to be a growing phenomenon. As a result, attempts must be made to balance the beneficial and adverse results of public projects.

Enactment of Federal statutes which require public participation as a pre-condition to federally financed projects, is a response to public displeasure. These same Federal statutes have provided an

impetus for statutes like New York's General Municipal Law, section 505, which was specifically enacted to qualify under the federal urban renewal program's mandate for a public hearing. Section 505 requires that local planning agencies conduct one public hearing within ten weeks after an Urban Renewal Plan has been submitted to it for review. Thereafter, the local governing body must hold a second hearing on the same plan prior to granting its approval.

Another example, is New York's Highway Law, which provides that highway plans which may affect a city, county, or other political subdivision, must be submitted to the local governing body for approval. In such cases, the local governing body "may" conduct a public hearing. A search through New York's statutes in regard to other condemnors however, finds only sporadic requirements to conduct public hearings before acquisition. The two major eminent domain procedural codes, the Court of Claims Act, and the Condemnation Law, do not have sections governing public participation in the decision making process.

Several condemning agencies have voiced concern with the requirement of a public hearing, since it provides an additional means of delay in the form of judicial review of the condemnor's administrative determination as well as the time expended in the hearing itself. It is felt that in addition to the increasing problem

of a legal blockade of a project, it would now be possible to resort to the courts for a review of a project's possible adverse effects. There is a concern that this can result in a lengthy period of delay before ultimate disposition. This in turn, is translated into increased costs; if a project is eventually approved, construction costs will have greatly increased over the estimate, or if disapproved, alternative solutions must then be devised, further delaying fulfillment of the need. Parenthetically, during this delay, the property owner often neglects his property causing it to decline in value and utility. The result is often a situation of "condemnation blight."

The Commission however, does not envision that the requirement of a public hearing will result in bringing construction of public projects to a standstill. Rather, the early inclusion of local citizens' groups should result, in the long run, in a more favorable acceptance of the project, and a project more attuned to the needs of the locality. By entering into a "partnership of planning," the natural resistance to a project may be lessened. If so, court contests of the decision to proceed with the plan may be eliminated or reduced to a reasonable number. The hearing requirement presents an increased burden on the government sponsoring the project, but the positive results outweigh this detriment. This conclusion is even more readily supported by the realization that we no longer have the luxury of unlimited natural resources to sacrifice for public project purposes; a balance must be reached.

It is the Commission's belief that in addition to creating a "partnership of planning", increased public participation in the early planning stages of a project requiring eminent domain will accomplish several other beneficial results. First, at the earliest possible point in time it will bring to the attention of the planners any unconsidered problems affecting the community and environment, as well as any potential condemnees who may have been overlooked. As a result, alternatives may be considered and planned at an earlier stage reducing the likelihood of a detrimental impact and unnecessary delay. Secondly, the condemnor will have extended to the people directly affected, the courtesy that should be mandatory when one is threatened with the loss of his property because it is embodied in the plans for a proposed public project.

One of the important criticisms voiced to the Commission was the complaint that the property owner did not feel adequately informed about the existence of a public hearing. Article 2 provides ample notice and should eliminate this problem. The mailing of notice, as well as the additional requirement of publication, provide the best and least expensive method of adequately notifying affected parties. The additional requirement that the condemnor must, if it desires to acquire the property, proceed with the acquisition within one year from the date of publishing its hearing determination and findings or within one year from the filing of the decision or

judicial review thereof, should considerably reduce the incidence of condemnation blight, another serious problem.

The factors which a condemnor should consider in determining the merit of a proposed project are seldom codified. Due to the varied segments of our society and environment, it is impossible to list comprehensively all factors which must be considered. Therefore, the Commission did not list in specific detail what factors should be determinative. Rather, broad guidelines are set forth in order to aid in the review of a proposed project's beneficial and adverse effects. The determination of each project's impact should be guided by the general concepts of avoidance of adverse effects on the environment and locality to the fullest extent practicable.

#### Review of the condemnor's determination

As was mentioned, the Commission recommended in its 1971 Report, administrative review of the condemnor's determination outside the sponsoring agency. Once again, the Federal government has laid the groundwork by enacting legislation taking such a step. The National and Environmental Policy Act of 1969 created a Council on Environmental Quality, which obtains and reviews environmental impact statements from federal agencies on the anticipated effects of their major activities. It is felt by some that this process provides an excellent mechanism for environmental advocacy by private interest groups, where federal aid is contributing to an undesirable effect,

thus insuring the consideration of the environmental issues by the involved agencies.

The Environmental Quality Improvement Act of 1970 strengthens the Council on Environmental Quality by creating the office of Environmental Quality which will provide the Council with professional administrative staff support. However, this act evidences national policy by stating that the primary responsibility for implementing its policy rests with state and local governments. This intent is implemented by the Council's interim guidelines which require federal agencies to consult with state and local governments in preparing environmental statements. These statements must be forthcoming whenever a major federal action is proposed which will significantly affect the environment. This includes projects which are localized, if the environment is significantly affected or if the environmental impact is highly controversial. It seems likely that there will be an environmental statement required in nearly every federally aided project.

In summary, a discernible trend appears in the federal legislation. In most cases, as mentioned, public hearings are mandatory. The factors which must be considered by the agency sponsoring a proposed project have to be broad enough to cover the wide range of possibilities of a project's impact. The mechanism for an administrative review of these considerations after receiving public input is designed to insure that the sponsoring agency truly

complied with the intent of protecting the environment and locality from detrimental effects. In addition, the review of the condemnor's decision by a de novo hearing in the reviewing agency's discretion, appears to be developing.

The federal regulation clearly places the burden of compliance with the federal programs on the state and local agencies receiving federal funding. The Commission foresaw the need for a mechanism to insure a thorough review and proper consideration at the local level, and in its 1971 Report, in addition to the public hearing, recommended the creation of an impartial administrative agency to review the condemnor's determination. This conclusion stemmed, in part, from the previously discussed federal requirements, particularly in conjunction with the filing of environmental impact statements. When this recommendation was made, the Commission contemplated establishment of regional review agencies, across the state, which would review proposed public projects within their districts for condemnation and planning purposes, as well as for environmental impact at one time, rather than subjecting a proposed improvement to separate time consuming hearings on each of these matters. By eliminating the availability of further administrative review on the planning and environmental questions, a final determination could be reached more expeditiously without sacrificing the rights of a party to be heard and have his statement thoroughly considered.

The Commission rejected the idea proposed at hearings, of expanding an existing state agency to review determinations regarding planning and environmental impact, since it was apparent that any existing agency qualified to handle the review would be one which is involved in the construction of public projects and would thus be in a position of passing on its own activity. It was the Commission's concern that such an agency would not have a detached view, but would consider how the proposed project fits in with the agency's overall program. An independent agency it was theorized, would not be subject to intra-departmental pressures and would have jurisdiction to review any proposed public project. While such an agency seemingly could be included within the framework of the state's Regional Development Council as outlined in the Governor's 1973 message to the Legislature, the magnitude of establishing this agency seemingly lies beyond the scope of the Commission. If the impartial agency were to consider only the condemnation aspect of a project, it possibly would be a duplicative requirement. As a result, the Commission has had to tentatively modify this recommendation and instead include within its proposed code, only the condemnor's hearing which will be subject to judicial review in the form of an article 78 Proceeding and not a separate administrative hearing.

In addition to this modification, a condemnor who, prior to acquisition, is required by other law to conduct one or more public hearings (on reasonable notice), similar in nature to the hearing

required by this article, will be exempt from the provisions of Article 2, other than judicial review. The determination exempting condemnors confronted with a similar hearing, stems in part, from the fact that the hearing contemplated by this article may be mandated, presently or at a future date, by federal, state, or local law, and to require a condemnor to undergo both would be unduly burdensome. The end result should significantly reduce delay in the final determination of whether a project should proceed. Limiting standing to commence judicial review to those who appeared at the first opportunity, while also limiting the scope of review, should significantly reduce delay in final disposition.

ARTICLE 3. Offer and Negotiations

As was stated in the Commission's 1971 Report a study of the area of offer and negotiation leads to a conclusion that the condemnor is leaving a majority of property owners with the impression that its offer and entire negotiating procedure is unfair. The causes leading to such impressions must be erased.

Most agencies are turning to the "one offer" system, that is, the agency will establish the appraised amount of damages and offer this full amount to the property owner. This system avoids the procedure of giving a negotiator authority to bargain. It was discovered that when a negotiator was permitted to bargain, he would obtain acceptances of his low offer with the embarrassing and inequitable result of settling cases below the agency's determination of just compensation. While the one offer system has been attacked as a "non-negotiating" procedure, it is felt that overall it is more equitable.

The Code grants statutory recognition to the "one offer" system making it mandatory. It also sets up a time-table for negotiations — they cannot start until an approved written appraisal has been made and either the appraisal or some form of statement of damages is furnished to the property owner.

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The proposals for reform presented to the Commission as well as its own studies indicate that what is truly needed is sympathetic and courteous treatment of the property owner. Obviously, statutory reform cannot guarantee such treatment. But laws can set forth the mechanism to encourage a condemnor to accomplish what it reasonably should in easing the transition forced upon the owner or occupant of acquired property. The settlement procedure found in the Commission's proposed code will create such a mechanism. It will provide a solid basis for the offer, disclose to the condemnee this basis, and not allow a holding back on the offer or an advance payment based on the offer in order to force a settlement.

Article 3 is derived primarily from Title III of the Federal Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970. State and local governments requesting federal aid for projects they are sponsoring, must conform to the procedure set forth in Title III. To insure uniformity and equal treatment, it is proposed that all such procedures be made applicable in every acquisition. This article provides that an offer based on a full appraisal of the property to be acquired must be made within the time limit of sixty days after acquisition. The basis for the offer must be supplied to the condemnee. An advance payment of 100% must also be made if the parties are unable to agree to a settlement. If a

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condemnee refuses the advance payment or is unable to present evidence of clear title, deposit provisions are included so that the condemnee will not lose interest nor would said sum deposited be charged with fees, commissions or poundage. In summary, the basic principles germane to this article are fairness to all parties and the desirability of encouraging and obtaining just settlements.

ARTICLE 4. Vesting: Possession: Abandonment

The Commission continues to endorse one tribunal to hear acquisition claims as recommended in its 1971 Report (and as has been recommended by the Temporary Commission on the New York State Court System). However, we must realistically fit our reform recommendations embodied within the proposed Eminent Domain Procedural Code into existing court organization since the breadth of the task involved in achieving one tribunal lies beyond the scope of our Commission. For this reason, jurisdiction for all state takings must remain with the Court of Claims, while the jurisdiction for all non-state takings would rest with the Supreme Court. Additionally, the Commission reasserts its recommendation that the practice of appointing Commissioners of condemnation to hear, determine and report just compensation due a property owner should be discontinued.

Presently in New York State, there are three tribunals which deal with eminent domain proceedings. The Court of Claims, a constitutional court since 1950, is the forum which hears all claims against the state in actions instituted by claimants within three years after service of a Notice of Appropriation and an Appropriation Map. In the Court of Claims, title is perfected in the state prior to the commencement of the proceedings as the state "appropriates" property. Claimants in all non-state takings try their

claims before three court-appointed property owners of the judicial district where the real property is situated, or before a Justice of the Supreme Court.

Of the many individuals who addressed the Commission on the subject of the selection of the tribunal, the majority favored the elimination in non-state acquisitions, of the practice of referring cases to Commissioners of condemnation. The primary argument against this method was the repeated delay in hearing cases; some matters being extended over a period of two years from commencement of the hearing to the actual filing of a report. One reason given for this delay was that Commissioners are paid on a per diem rate of \$25.00 so that when they meet, the hearings are brief. Another factor cited was that the Commissioners are not on a full time basis and it is difficult to schedule a convenient time for three otherwise busy individuals to meet. Suggestions were made to increase compensation for Commissioners, but as was shown in a field study report, the per diem compensation on a basis of time spent in hearings far exceeded the sum of \$25.00. In addition, there would continue to be the scheduling difficulty. The fact that there is no requirement for a legal or appraisal background prior to being designated a Commissioner, was also criticized by the participants at the hearings.

As public projects increase in scope, the process of valuation of property becomes more complex. Legal questions are presented and very difficult appraisal problems must be solved. Since the review of a Commissioner's report is extremely limited on confirmation and appeal, many participants criticize the nature and basis of the awards made by Commissioners as contrasted to court decisions, which are carefully scrutinized on appeal. It was felt by many that a trial before a single judge produces a prompt and fair result. Moreover, it affords an aggrieved party the right to appellate review on the issues of law and fact. The Supreme Court, the third forum, is used by some municipalities or governmental subdivisions which have special condemnation procedure. Basically, various municipalities have adopted some form of the condemnation procedure utilized by New York City. Under this procedure the condemnor's initial petition is to the Supreme Court in the judicial district where the property is located. On the return date, the court, after assuring itself of the condemnor's compliance with the notice provisions of the code, enters an order granting the application to condemn. Thereafter, all affected property owners are notified by publication of the time within which to file his claim or demand with the clerk of the court in which the order granting the application to condemn was filed.

After the time for filing has expired and proof of ownership of a claim has been supplied to the corporate counsel, the corporation counsel files a note of issue with the clerk of the court and the

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matter is entered on the calendar. The trial of all parcels in the project is then held before a Supreme Court Justice without a jury. Similar to the Court of Claims, the judge determines questions of law and fact. After hearing the testimony, a tabular abstract of estimate of damages is prepared, setting forth the damages for each parcel, and is filed with the clerk of the court as the tentative decree. The parties then have a limited time to file objections to its decree. After considering the same, the court may make alterations or corrections and order the preparation of a final decree. This final decree is filed in the county clerk's office and unless reversed or modified on appeal, is final and conclusive on the condemnor and condemnee.

#### METHOD OF ACQUISITION

While the call for a uniform code was unanimous, the same cannot be said for which procedure should be adopted. Within New York State there are presently two procedures whereby the condemnor acquires title to property. The state "appropriates" property; an administrative action whereby the designated official of the state department or agency involved prepares a map of the subject property which shows the extent of the acquisition. In addition, the map is required to contain a description of the property and of the interest acquired, i.e. fee title, permanent or temporary easements. highway land, with or without access. The maps, when approved by the agency, are then filed in the office of the Secretary of State; thereafter, the state agency

may lawfully enter onto the property. Upon the filing of the maps in the office of the county clerk in the county in which the property is situated, title automatically vests in the state. Thereafter, the state may not revise or change the terms of its taking or the extent thereof except that additional property may be taken by further appropriations. There is no requirement or procedure which mandates that notice of the pending acquisition be given to the property owner. However, the time for filing a claim does not commence to run until personal service is completed. A separate map is prepared and filed for each specific parcel, which means that there may be several taking dates for the parcels within a project. However, the state has, on occasion used a project map encompassing several or many individual parcel appropriations.

One of the advantages of this system is rapidity. The state acquires title when it files the map in the county clerk's office. Another distinct advantage is that the state's title to the property is then superior to other claims of title and is incontestable. Since notice to various owners of interest in the property is not required, the procedure cuts off other interests in the property. (The interests are then converted to damage claims for just compensation)

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All other condemnors utilize the Condemnation Law or a modification thereof. In these cases, the proceeding must be brought by the condemnor against owners of interest in the property. Failure to name certain parties having such an interest will result in the condemnor not having a superior claim to the title. The condemnor is thus liable to an unnamed party even if it has completed its proceeding and paid other parties. By contrast, the state procedure cuts off all interests in the property. The condemnor under the Condemnation Law, does not obtain title and possession until after the Commissioner's report has been confirmed and payment made. This can result in substantial delay and again demonstrates an advantage of the state's appropriation procedure. However, the delay in acquiring title can aid the condemnor since it will know exactly how much the property will cost before it is acquired — if the cost is excessive the condemnor may abandon the acquisition and not acquire title, although it will have to pay certain costs to each property owner involved in the proceeding. Thus, while the Condemnation Law does not provide for speed or certainty of title, it does provide flexibility to the condemnor but only at the expense and inconvenience of the claimant.

The modifications of the Condemnation Law adopted by many municipalities under their own statutes result in different dates of acquisition of the property. There is often an attempt to accelerate the process. This may be important to the condemnor who wishes to commence a large scale project covering many parcels. Thus, under New York City's Administrative Code, Section B15-36.0, title normally vests upon the entry of the order granting the application to condemn in a capital project proceeding. Under the Code, the notice of the application to condemn will set forth the map of the entire project. In addition, each parcel therein will be set forth in a "damage" map. Upon granting an order to condemn, title vests for the entire project. This allows for a uniform taking date for all parcels. But if the Board of Estimate votes otherwise it may select a date after the entry of this order but one not later than the date of filing the final decree for title to vest. Nassau County's Code provides that vesting shall be upon the filing of the final decree of the court or entry of confirming order, unless the Board of Supervisors directs otherwise. Under this code the vesting may then occur at a specified time — as early as entry of the order granting the application to condemn. Other local codes contain similar provisions.

In addition, the General Municipal Law which governs urban renewal projects, has a quick taking provision modifying the Condemnation Law. Under this provision, Section 506, the condemnor can gain early possession and not wait until the determination and payment of just compensation. As indicated in the Commission's 1971 Report many proposals presented at the Commission's hearings dealt with the proper method to acquire property. The decision of selecting the method of acquisition was most difficult. At the Commission's hearings advocates for both judicial condemnation and appropriation were heard. There did not appear to be a clear consensus from the participants as to which method is preferable. Indeed, the overall impression from the testimony received was that neither method was totally satisfactory. Accordingly, the Commission investigated the two approaches and reached the conclusion that the overall effect of the methods was similar. However, it was felt that with modifications, the appropriation method would be best adapted to the needs of the condemnors and still offer the utmost protection to property owners. These modifications included a pre-acquisition phase embodied in the public hearing which could be subjected to judicial review.

During the past year the Commission received criticism from certain quarters for recommending utilization of administrative appropriation to acquire property instead of through judicial condemnation. Primarily, those who voiced opposition to administrative

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appropriation were individuals directly involved in the use of the judicial condemnation approach. One of the major criticisms, which was correctly stated, is that judicial condemnation permitted condemnation of all lands involved on a project basis, a much faster method, rather than the more time consuming filing of separate claims mandated under the appropriation method. The Commission feels, however, that it has satisfactorily eliminated this problem by requiring within the proposed Procedural Act, that acquisitions be made on a project basis with one map delineating the perimeter of a project rather than separate parcels. Upon the filing of the map the title to the condemnee's property would immediately vest in the condemnor and all parcels in the project would be valued as of the same date.

Additionally, it is recognized that a common practice in large metropolitan areas is to have joint trials of several parcels in an area covered by the same acquisition. This has resulted in substantial savings of time and money, particularly as it relates to establishing land values. The Commission has included within Article 6 of this code a section which will allow the continuance of such joint trials. It is anticipated that to save time, land valuation claims in the project could be severed from valuation claims for improvements on each parcel so that the land valuation claims could be tried together. Thus, land values can be determined without needless repetition.

Another common criticism offered by the proponents of the judicial form of acquisition is that by petitioning a court for an order of condemnation an opportunity is provided for the claimant who wishes to attack the necessity of the taking, although usually in practice the court's granting of the petition is perfunctory. It is the Commission's conclusion however, that the availability of judicial review subsequent to a public hearing which must be conducted prior to acquisition will satisfy this requirement. The New York City Administrative Code, while providing for a judgment of condemnation, precludes meaningful judicial review of the determination. Section B15-8.0 refers to the content of the petition to be used by the city to apply for the judgment of condemnation, and this section does not require inclusion of the proof of the public use or necessity. It does require a recitation of the prior actions of the Board of Estimate or Site Selection Board. It is stated in Section B15-9.0 of the Administrative Code that the court after satisfying itself of adequate notice being given to the owners, etc., "shall enter an order granting the application". Such language hardly appears to insure the availability of significant judicial review. In other local codes, such as Nassau County's, use of similar language to that of New York City's Administrative Code, apparently with the same result, affords little opportunity for judicial review of the condemnor's

determination. The judicial review available is perfunctory at best. Nonetheless, in an attempt to alleviate the concern expressed by the proponents of judicial review, the Commission has adopted a modified form of administrative appropriation which would permit, in non-state takings, the application for a judicial order before filing of the map of acquisition. It is the Commission's conclusion that by proceeding in this manner the visualized benefits of both the administrative taking and the judicial approach can be guaranteed and included within one proceeding without significantly affecting uniformity.

ARTICLE 5. Special procedure for claims under \$5,000

In its 1971 Report the Commission endorsed the establishment of an optional small claims procedure. Under the original recommendation a small claim was defined as a claim where the total demand is \$50,000 or less and the difference between the offer of the condemnor and the condemnee's demand is \$5,000 or less. The Commission has modified this recommendation since it could have encompassed claims that were too large in dollar amount. In its place the Commission has substituted a special procedure patterned after the small claims procedure found in the Uniform City Court Act. It is apparent that a claim for damages which is less than \$5,000 is uneconomical to try under normal trial procedures since legal and appraisal fees would take too large a portion of the eventual award (often over 50%). When faced with this choice the property owner is frequently forced to accept the condemnor's offer.

As depicted in the 1971 Report, the condemnee's bitterness at being placed in such a situation, with no apparent relief, was all too evident at the Commission's hearings. Because economic considerations, including appraisers' and attorneys' fees took such a large percentage of the award on small claims, participants pleaded for an alternative procedure which would restore public confidence and instill a genuine belief that the system was fair and "just compensation" an obtainable goal.

The Commission's recommendation for a special procedure for claims under \$5,000 would mean that under the auspices of the court, and in an informal atmosphere, the property owner would be able to present information that he feels reflects a higher value than the amount of the condemnor's offer. The property owner at his option would be permitted to appear without the assistance of an attorney or appraiser and is not faced with stringent rules of evidence as required in a normal trial. The right to appeal would still be available to both parties but on the sole ground that substantial justice has not been done between the parties according to the rules and principles of substantive law.

In summary, the procedure outlined by Article 5 would result in a final determination with a limited right to appeal as described above. The elimination of such cases from normal trial calendars will do much to speed disposition of eminent domain matters yet reserve to all condemnees the right to have a judicial determination of their claims at reasonable expense.

ARTICLE 6. Procedure for determining just compensation

This article places jurisdiction for all acquisitions of property appearing in the name of the people of the State of New York in the Court of Claims and for all non-state takings in Supreme Court. This article also eliminates Commissions of Condemnation.

Personal Services

Additionally, a requirement of personal service of the notice of acquisition is established. This recommendation is based simply on the concept of fairness. If a person's property is taken not through any fault or action of his own, but by the fortuitous circumstances of its location, the notice of such an act should be personally served, if at all possible. To expect a property owner to read the legal notices in the localities official papers to see if his property has been taken is a grossly unfair burden. It is felt that a condemnee should be entitled to be personally notified.

Disclosure

As stated in the Commission's 1971 Report there is a discernible trend in New York eminent domain cases toward requiring greater disclosure through the use of pre-trial discovery. This has been accomplished in part by judicial opinion and the adoption of more liberal discovery rules both by "statute" and through "rules".

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One reason for the increase in the use of discovery methods has been the realization that the condemnor not only has greater economic power than the condemnee but that it also can control the timing of the proceeding.

The courts have clearly stated that information exchange, such as appraisals, results in a better prepared presentation at the trial, particularly the cross-examination of experts. This has aided in reducing the length of trials since counsel are better prepared. In addition, it has enabled the courts to reduce their calendars by forcing the preparation and filing of the expert appraisals at an early date.

A significant departure from current practices are the recommendations for pre-trial stipulations and conferences. Both recommendations will result in making an eminent domain proceeding more compatible with practice in other types of litigation. Use of these practices will enlarge the scope of disclosure and aid significantly in increasing the possibility of settlement.

Their use should be of great assistance in reducing actual trial time by eliminating the need to prove and introduce exhibits that will not be subject to objection and to further define and narrow the contested issues. While the rules vary in each judicial department to a minor degree, the intent of full disclosure prior to

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trial should be accomplished by this article. Additionally, the Court of Claims and the courts of the various departments are permitted to continue rules which they feel have worked well. Full use of modernized disclosure procedures as set forth in the CPLR will be available to aid in the prompt disposition of eminent domain matters. There is also a provision allowing joint trials of all parcels in a project.

ARTICLE 7. Miscellaneous provisions.

This article codifies the rules regarding interest suspension and certain costs. It also, for purposes of uniformity, applies the Civil Practice Law & Rules to all areas of practice and procedure, except in those instances where other procedure is specifically provided by this act or laws or rules governing or adopted by the appropriate court.

Judicial Review

The Commission is presently conducting a further review of the current procedure which requires appellants from the First and Second Departments (the metropolitan New York area) to prosecute appeals of a Court of Claims' judgment to the Third Department of the New York State Supreme Court, Appellate Division, located in Albany. The Commission is aware that this has been required because of the heavy case load imposed upon the First and Second Departments. Nonetheless, the Commission, also aware of the increased inconvenience and expense a claimant incurs as a result of having to send an attorney several hundred miles to argue an appeal, recommended in its 1971 Report that appeals from the trial court's decision should be taken to the department of the Appellate Division of the New York State Supreme Court in which the property is situated. However, while the

Commission continues to endorse its determination that both questions of law and fact should be reviewable in the Appellate Division, additional time is required to determine the effect the proposals of the Temporary Commission on the New York State Court System would have on our recommendation that appellate division appeals should be in the department where the property is located.

Finally, the Commission has modified its recommendation on appeals to the Court of Appeals and has concluded that they should be pursuant to the requirements of the CPLR.

#### CONCLUSION

Based upon all the concepts embodied in the proposed Eminent Domain Procedure Act, the Commission believes that the Act represents a distinct improvement over the current practices and procedures utilized in the area of eminent domain law. The Act would benefit both condemnors and condemnees alike, and provide a fair and expeditious determination for property taken. Accordingly, the Commission recommends the passage of the Eminent Domain Procedure Act.