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A CONTEMPORARY APPRAISAL OF CONDEMNATION IN MARYLAND

By JOHN J. GHINGHER, JR.*
and
JOHN J. GHINGHER, III**

The steadily increasing need for public roads, public buildings, public utilities, and particularly for urban redevelopment has made commonplace the condemnation of private property for those purposes and has drawn increased attention to the plight of the condemnee. In addition to the "fair market value" of his property, he now receives moving expenses, an allowance for machinery and equipment which he must abandon, assistance in relocating his business or residence, and rent concessions pending relocation; but these fringe benefits are primarily underwritten by federal aid.1 In Maryland, as in most other states, the legal process whereby private property is taken for public use still contains many imperfections, most of which operate to the detriment of the condemnee. This article will focus upon some of the more important aspects of the present Maryland law, its interpretation by the courts and some of the consequences resulting from its administration. It is not intended as a comprehensive review of Maryland condemnation law, but as a commentary upon certain salient aspects of that body of law.

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Central to the right of the State to condemn property is the requirement that the taking contemplated be for a "public use." This important limitation on the power of eminent domain is imposed in express terms by article III, section 40 of the Maryland Constitution and is echoed in each of the other constitutional provisions which confer the power. However, the requirement of public use manifests itself in two distinct forms in the Maryland Constitutional scheme. Sections 40, 40A, 40B and 40C of article III simply state that takings of private property must be for "public use," while the eminent domain provisions of articles XI-B, XI-C and XI-D declare that the specific purposes for which condemnation is authorized by those articles are "public uses." Judicial interpretation of these two different manifestations of the public use requirement has resulted in a rather unique theoretical enigma.

The case of *Riden v. Philadelphia, Baltimore & Washington R.R.* is cited most frequently for the definition of public use as that term is employed in article III. In that case the Maryland Court of Appeals was asked to decide whether a private railroad company's construction of a branch line to the Bowie Race Track was a public use for which private property could be condemned. The court concluded that "public use" meant not a use which benefits the public but rather an actual use by the public. The court, noting that "horse racing has been one of the most popular sports in Maryland since Colonial days," deemed the proposed branch line a proper public use.

In considering the power of Baltimore City to condemn property for the purpose of urban redevelopment under article XI-B of the Maryland Constitution for condemnation is embodied in seven different sections of the constitution. Md. Const. art. III, §§ 40, 40A, 40B, 40C; Md. Const. arts. XI-B, XI-C, XI-D.

3. Md. Const. art. III, § 40 is the basic source of authority for the power of eminent domain. It provides: "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Sections 40A, 40B and 40C invest Baltimore City, Baltimore County, Montgomery County, the State Roads Commission and the Washington Suburban Sanitary Commission with "quick-take" powers. Each of these sections uses the same language as to public use employed in section 40.

4. Md. Const. arts. XI-B, XI-C and XI-D, respectively, authorize the Maryland General Assembly to invest Baltimore City with the authority to acquire urban property by condemnation for the purpose of urban redevelopment, off-street parking and port development.

5. 182 Md. 336, 35 A.2d 99 (1944).

6. The court shunned the "public benefit" definition applied by some states because it would leave judges "free to indulge their own views of public utility or advantage." 182 Md. at 341, 35 A.2d at 101, quoting Ansperger v. Crawford, 101 Md. 247, 253, 61 A. 413, 415 (1905).

7. 182 Md. at 345, 35 A.2d at 103.

8. The "use by the public" standard articulated in the *Riden* case apparently would include such uses as a public highway, Bond v. Mayor & City Council, 116 Md. 583, 82 A. 978 (1911); a railroad line necessary for operation of coal mines, New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537 (1873); the taking of oysters by the public, Cox v. Revelle, 125 Md. 579, 94 A. 203 (1915); conveyance of water to the city, Kane v. Mayor & City Council, 15 Md. 240 (1860); and the supplying of electric power to the public, Webster v. Susquehanna Pole Line Co., 112 Md. 416, 76 A. 254 (1910).
Maryland Constitution, the court, in Herzinger v. Mayor & City Council,\(^9\) took an altogether different view of "public use." The property owner in that case challenged article XI-B on the theory that its provisions authorized a taking for a private use in contravention of the fourteenth amendment, in spite of the assertion in the article that any taking authorized therein was deemed to be a public use.\(^{10}\) The Court of Appeals held that the proper standard of "public use" to be applied under the fourteenth amendment was not the "use by the public" test articulated in Riden, but the "public benefit" definition which Riden had rejected as overly speculative, explaining that "the fact that after the taking the property may be put into private hands does not destroy the public character of the taking insofar as that taking may accomplish a proper public benefit."\(^{11}\)

As a result of Riden and Herzinger, the concept of public use in the Maryland context varies depending upon the constitutional authority for the taking. This unusual development has created a situation whereby a use which would fall outside the standard of "use by the public" articulated in Riden, such as the condemnation of slum dwellings for the purpose of constructing a more modern and sanitary housing development, would be perfectly proper if authorized by article XI-B, as long as the use is for the "public benefit" under the fourteenth amendment standard articulated in the Herzinger ruling. This apparent anomaly was recognized by the Court of Appeals in Master Royalties v. Mayor & City Council\(^{12}\) in which the court declared that article XI-B embodies a broader concept of public use than that contained in article III, section 40, as interpreted by Riden. Thus, Maryland has two distinct concepts of public use, both of which are of constitutional dimension: a taking under article III, section 40 is constitutional only if the property is to be used "by the public," while the purpose of the takings authorized by article XI-B is constitutional if it is for the "public benefit."

The second element which must be present before the condemning authority may take the designated property is that there be some necessity for the taking. Unlike the issue of public use, which is a question of law for the consideration of the court, the question of necessity has been characterized by the court as a matter for legislative or administrative determination.\(^{13}\) Accordingly, the Court of Appeals

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\(^9\) 203 Md. 49, 98 A.2d 87 (1953).

\(^{10}\) Because article XI-B was itself a constitutional provision, no attack on its validity could have been based on a conflict with article III, section 40. Since both articles were of constitutional dimension, article XI-B could be unconstitutional only as a result of conflict with the fourteenth amendment. See Master Royalties Corp. v. Mayor & City Council, 235 Md. 74, 200 A.2d 652 (1964). For a detailed presentation of the public purpose standard of federal due process, see Berman v. Parker, 348 U.S. 26 (1954).

\(^{11}\) 203 Md. at 60, 98 A.2d at 92 (emphasis added).

\(^{12}\) 235 Md. 74, 200 A.2d 652 (1964).

of Maryland has repeatedly declared that the courts will not interfere with the decisions of the condemning authority as to the extent and nature of the taking, and the necessity therefor, unless the condemnee can show that the decision to take his particular property amounted to an abuse of the legislative or administrative discretion conferred upon that condemning authority by the legislature. To make such a showing, the condemnee apparently must prove either that there is no necessity whatsoever for the taking or that the action of the condemning authority was so "oppressive, arbitrary or unreasonable as to suggest bad faith." 14

II. THE THREE APPROACHES TO VALUE

Article III, section 40 of the Maryland Constitution commands that no property may be taken by condemnation without "just compensation." This standard is explained by article 33A, section 5 of the Maryland Annotated Code, which interprets "just compensation" as the "fair market value" of the property being condemned. 15 "Fair market value," according to section 6 of that same article, is defined as "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 . . ." 16 It is obvious that these criteria do not provide sufficient specificity to be of practical value to an appraiser or to a jury in the valuation of a particular property. The courts, therefore, have been obliged to supply the required specificity and, accordingly, have accepted within the statutory definition of "fair market value" three separate "methods" 17 of valuing condemned property:

(1) the use of sales of comparable properties as evidence of value, 18 frequently referred to as the "market data method";

(2) the estimation of the cost of replacing the improvements on the property, less the depreciation of such improvements, plus the fair market value of the land, 19 sometimes called the "summation method"; and


16. Md. Ann. Code art. 33A, § 6 (1971). The "valuation date" is defined by section 4 of article 33A as "the date of the taking, if taking has occurred, or as of the date of trial, if taking has not occurred. . . ."


the capitalization of the net rentals which the property is capable of producing,\footnote{E.g., Bergeman v. State Roads Comm'n, 218 Md. 137, 146 A.2d 48 (1958).} often described as the “income method.”

While the intricacies of the three valuation methods are, of course, the realm of qualified real estate appraisers, a knowledge of the more fundamental aspects of the three approaches is indispensable to an attorney involved in a condemnation suit.

As a practical matter, the appraisers retained by both the condemnor and the condemnee will compute the value of the condemned property according to each of the three methods, if applicable, and will arrive at a final opinion as to that value through a weighted balancing of the three figures so obtained.\footnote{The failure of an expert witness to testify as to one of the three methods does not render his testimony inadmissible, but simply goes to the weight of his testimony. First Nat'l Realty Corp. v. State Roads Comm'n, 255 Md. 605, 258 A.2d 419 (1969).} Of course, the specific nature of the property being condemned will often preclude the use of one or more of the three methods. For example, the “replacement cost” method is singularly inappropriate for determining the value of unimproved real estate because it applies only to the valuation of improvements; and the “income approach” would hardly be appropriate in evaluating a church or hospital.

Because the present use to which a property is devoted is not always its most productive use, the law requires that the appraiser formulate an opinion as to its “highest and best” use.\footnote{MD. ANN. CODE art. 33A, § 6 (1971); Burton v. State Roads Comm'n, 251 Md. 403, 247 A.2d 718 (1968).} In most cases this “highest and best” use is in fact the use to which the property is actually being put by its current owner; but in some cases, depending upon the location, zoning and topographical nature of the property, the appraiser might conclude that the property is capable of a use higher than that to which it is currently devoted. In making this determination an appraiser, and the jury when weighing his appraisal, may consider such elements as the reasonable probability that, but for the condemnation, the property would have been rezoned in the near future\footnote{Burton v. State Roads Comm'n, 251 Md. 403, 247 A.2d 718 (1968); State Roads Comm'n v. Warriner, 211 Md. 480, 128 A.2d 248 (1957).} or that the property would have been subdivided within the near future,\footnote{Lustine v. State Roads Comm'n, 217 Md. 274, 142 A.2d 566 (1958).} both of these probabilities are admissible as evidence of value.

A. The Market Data Approach

While there can be no property which will be identical in every respect to the property under condemnation, the reliability of the market data approach is nevertheless dependent upon the similarity of recently sold properties comparable to the condemned property. The courts generally will afford the appraiser considerable latitude in his selection of comparable sales and will permit him to use any sale
which appears to embody enough of the various elements of comparability to make its use helpful in reaching his conclusion.\textsuperscript{25}

Once the highest and best use is assigned to the property, the range of properties which can be fairly deemed comparable is considerably narrowed. Within this range, the appraiser will consider such elements of comparability as the location of the two properties, their proximity, the similarity of the physical nature or topography of the two tracts, the similarity of the improvements or the potential for improvement if the properties are undeveloped, the zoning of the two tracts, their relative size, shape, frontage, type of soil or subsurface, and other factors affecting value, such as any special utility possessed by one property but not by the other.\textsuperscript{26} Each of these elements must be weighed and compared by the appraiser in reaching his opinion.

One absolutely essential prerequisite to the use of a sale of comparable property as evidence of value is that the comparable sale be the result of an arm’s length transaction.\textsuperscript{27} If the comparable sale were, for example, the product of condemnation, or the threat thereof, the sale would not be evidence of the price at which a willing seller and a willing buyer would arrive through the natural give and take of a bargaining situation, as required by the definition of “fair market value.”\textsuperscript{28} Thus, evidence of such sales is invariably excluded as a matter of law.\textsuperscript{29}

Another important consideration is the date on which the comparable sale occurred. A sale which is significantly remote in time will not be reliable evidence of the fair market value of the condemned property as of the date of taking, no matter how similar the two properties are in other respects. As a practical matter, most trial courts apply a rule of thumb which excludes from consideration all comparable sales concluded more than five years before the date of the taking.\textsuperscript{30}

Of course, under the market data approach, the sale which is most indicative of value in the eyes of the jury will necessarily be a

\textsuperscript{25} Id.
\textsuperscript{26} For example, the existence of mineral deposits on the land may enhance its value appreciably. Smith v. Potomac Elec. Power Co., 236 Md. 51, 202 A.2d 604 (1964); State Roads Comm’n v. Creswell, 235 Md. 220, 201 A.2d 238 (1964).
\textsuperscript{28} See notes 16–17 supra.
\textsuperscript{29} See Bonaparte v. Mayor & City Council, 131 Md. 80, 101 A. 594 (1917).
\textsuperscript{30} Taylor v. State Roads Comm’n, 224 Md. 92, 167 A.2d 127 (1961); see Bergeman v. State Roads Comm’n, 218 Md. 137, 146 A.2d 48 (1958). The five-year rule is not a rule of law. Taylor v. State Roads Comm’n, supra; State Roads Comm’n v. Adams, 236 Md. 371, 380 n.5, 209 A.2d 247, 252 n.5 (1965). In First Nat’l Realty Corp. v. State Roads Comm’n, 255 Md. 605, 258 A.2d 419 (1969), the owner of the property under condemnation was permitted to testify to his purchase of that property nine years earlier. The Court of Appeals held that this was not reversible error. It is clear, then, that the five-year rule of thumb is not a hard and fast proposition. In a quick-take situation, evidence of comparable sales concluded after the date of taking, but before trial, can be used as a basis for valuation. See Hance v. State Roads Comm’n, 221 Md. 164, 175–76, 156 A.2d 644, 650 (1959).
prior sale of the condemned property itself. Thus, if the condemned property were purchased by the condemnee within a reasonable time prior to the proposed taking, the condemnee's chances of receiving an award or offer significantly in excess of the purchase price are negligible unless some aspect of the prior sale would undermine the persuasiveness of that sale as evidence of value. Of course, the existence of a recent purchase of the condemned property also effectively precludes an award which is significantly less than the prior purchase price.

B. The Replacement Cost Method

The "replacement cost, less depreciation" approach is, of course, workable only where the condemned land is improved by a structure of significant value in relation to the total value of the property. Simply stated, "replacement cost" is the cost which would be incurred in replacing a structure if that structure were to be rebuilt at the same site on the date of valuation. However, this concept does not require that the final valuation reflect the cost of reproducing the structure in its original form. On the contrary, the term "replacement cost," as used for valuation purposes, embraces only the cost of constructing a structure with the capacity to perform the same function according to modern standards of economy and utility. For example, the "replacement cost" of a two-story factory or warehouse of early twentieth century design, with vaulted ceilings and an antiquated elevator system, might be the cost of building a factory capable of similar production, but of modern design, with low ceilings and, possibly, a single-story layout for greater production efficiency. The obvious difficulty which would attend the use of the cost of reproducing the identical structure as evidence of value was noted in Chesapeake & Potomac Telephone Co. v. Public Service Commission, in which the Court of Appeals explained that "[e]stimates of reproduction cost are conjectural at best, not merely because they rest on opinion, but for the obvious reason that probably no plant would ever be reproduced in its present form." Thus, the use of a "reproduction cost" approach would result in a valuation based on the estimated cost of duplicating facilities which are obsolete and which could be reproduced only at prohibitive cost.

The determination of replacement cost is only the first step in the "replacement cost, less depreciation" approach. The second step is to subtract from the replacement cost an amount representing the...
extent to which the existing structure has depreciated since its construction. Three distinct types of depreciation are considered:

(1) physical depreciation,
(2) functional depreciation, and
(3) economic depreciation.\(^{34}\)

Physical depreciation, the variety most often associated with the term "depreciation," represents the actual structural deterioration of the improvement as a result of age and use. Functional depreciation reflects the improvement's loss of utility due to technological obsolescence in plant, design, layout and other similar factors. Because the replacement cost method is based on concepts of modern utility, this functional obsolescence may be partially or totally reflected in the determination of the replacement cost of a particular improvement.\(^{35}\)

Thus, the appraiser must take care to avoid duplication when considering this form of depreciation in the context of this method. The third type of depreciation, sometimes called economic obsolescence, involves factors which apply not to the structure itself but rather to its relationship to the surrounding area; it generally reflects the extent to which the neighborhood in which the condemned property lies has deteriorated and the effect of this decline on the value of the property being condemned. This species of depreciation may be caused by unfavorable changes in zoning, gradual changes in the size and social characteristics of neighborhood population, or shifts from a "higher" to a "lower" predominant use of property in the surrounding area. Because the "replacement cost, less depreciation" method necessarily involves a computation of the value of the underlying land under the market data approach and because land does not depreciate physically or functionally, the value of the land is added to the figure representing "replacement cost" only after physical and functional depreciation have been deducted. The only form of depreciation which can apply to land, economic depreciation, is reflected as a natural and necessary result of the market data approach since this factor is implicit in the consideration of comparable sites in the neighborhood.

The "replacement cost, less depreciation" method, however, is usually considered the least reliable approach to valuation except in the case of structures of relatively recent construction. The estimation of replacement cost necessarily involves some degree of conjecture. Moreover, the selection of a depreciation factor is often an arbitrary process, based almost exclusively upon the appraiser's judgment. The weakness in this method can be partially remedied by additional expert testimony. For example, the testimony of construction or engineering experts as to the special structural attributes of the improvements

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and current building costs can be used to bolster the testimony of the appraisers.

C. The Income Method

The third method of valuation, the "income" approach, is considerably more complex in application than either of the two other methods, if only because it involves economic and mathematical concepts which are particularly foreign to the thought processes of the average juror. The purpose of this approach is to arrive at the price which a buyer would pay in order to receive the annual income which the property can produce. This price is determined by "capitalizing" the potential net income of the property at a rate which reflects the buyer's desired percentage of annual return. Because the courts forbid the use of profits generated by a business conducted on the condemned property in computing the potential income from that property,36 admissible evidence of value is restricted to that of the potential rent from the property. Despite this restriction, the income approach may be applied both to property which is normally leasehold property and to property which is owner-occupied. In the former case, the "rent" which is capitalized is most often the net rent at which the property is actually leased since that rent is presumptively the best evidence of the rental income which the property is capable of producing. With respect to owner-occupied commercial property, the appraiser must compute a hypothetical rent using as a basis for his computation the rents produced by comparable leasehold property in the area. Thus, the hypothetical rent assigned to an owner-occupied property is determined in much the same manner as value is computed under the market data method.37

The result which the appraiser must reach, whether he bases his computation on past rents of the property or computes a hypothetical rent, is the "fair market rental" of the property. Once this fair market rental is determined, the expenses which are normally chargeable against that rental must be deducted in order to get an accurate picture of the net income which the property can generate. The expenses deducted should be those which, under a normal lease, the landlord is obligated to defray, including taxes, heat, water, power, maintenance and insurance.38 In the case of multi-tenant property, a reasonable vacancy allowance should be subtracted; a building which can maintain

36. See notes 109-14 infra and accompanying text.
37. See Brinsfield v. Mayor & City Council, 236 Md. 66, 202 A.2d 335 (1964). Brinsfield points out that the same degree of latitude applies with respect to the admissibility of comparable rents as to comparable sales. Also, as under the market data method, comparable rents considered as evidence of the hypothetical rent of the condemned property must stem from leases negotiated at arm's length. The rent paid by a corporation under a lease from its principal shareholder should not, for example, be used as a basis for arriving at the hypothetical rent.
38. In some instances an adjustment must be made for normal burdens of the landlord which are assumed by the tenant through covenants in the existing lease, such as the payment of any excess property taxes caused by an increase in the tax rate or in the assessed value of the property. In certain cases, the lease may require all expenses to be paid by the tenant, in which case no adjustments need be made.
only one tenant may also require a vacancy allowance where there is a rapid tenant turnover. This vacancy allowance can vary in amount depending upon the rental history of the structure. For example, a greater allowance should be deducted for a property with a history of short-term tenants. Also, since multi-tenant properties may require management, a reasonable allowance for this expense should be made.

When such expenses are deducted from the "fair market rental," the result is the net rent attributable to the property. The next step is to determine what a willing buyer would pay, as of the date of valuation, to receive an annual return from his investment which is equal to this net rental figure. In order to arrive at this result, the appraiser will "capitalize" the net rental using a specific percentage figure which represents the rate of return which a buyer would expect to realize from the property. This percentage, or "capitalization rate," consists of two distinct elements of return: the return which a buyer would expect to realize on his investment and the expected return of his investment. The return on the investment is, simply stated, the annual rate of return which the buyer would expect to receive from another investment of comparable risk; the greater the risk involved, the higher the rate of return which the buyer will expect on his investment. The return of the investment reflects the buyer's consideration of what portion of his original invested capital will be recoverable when he decides to liquidate his investment. Since the improvements on the property would undoubtedly depreciate physically during the term of his ownership and may depreciate functionally as well, the price at which the buyer can ultimately liquidate the structure is likely to be smaller than the price of his initial purchase. Naturally, the hypothetical buyer will expect to recoup this ultimate loss from the annual income which the property will produce during his term of ownership.

The appraiser will compute percentage figures representing the two forms of desired return, add those percentages together to arrive at the "capitalization rate," and divide that rate into the net rent in order to produce the figure which the hypothetical willing buyer would pay in order to receive an annual return in the amount of the net rent. Because the "capitalization rate" is a percentage or fraction, a high rate will produce a smaller value than a lower rate. This result reflects the realities of the market — a buyer will pay less for a piece of property capable of producing a given level of income if that property is a high risk investment with a limited usable life expectancy than he will pay for a piece of property capable of producing the same income, but representing a safer investment with the prospect of a longer usable life.

In "capitalizing" the net rental, the appraiser must make an adjustment for the amount of that net rental which is attributable to the underlying real estate. Because land does not depreciate physically or functionally, that portion of the "capitalization rate" reflecting the expected return of the investment should not apply to the income attributable to the underlying land; an adjustment in the capitaliza-
tion process must be made to compensate for this factor. Some appraisers make this adjustment by reducing their capitalization rate according to a formula based on the proportionate amounts of income attributable to the improvements and the real estate. However, most appraisers compensate for the inapplicability of physical and functional depreciation to the underlying land by subtracting the amount of rent attributable to that land from the total net rent before the net rent is capitalized. The rent attributable to the land is normally calculated by applying the capitalization percentage determined for purposes of return on investment to the value of the land as computed under the market data approach. The resulting figure represents the rate of return which a buyer would expect from the land, taking into account the element of risk involved but not considering any factor of depreciation. After this figure has been subtracted, the remaining net rent is capitalized to obtain a value for the improvements; the value of the underlying land is then added to this value to reach the final income valuation of the property as a whole.39

Because the major premise of the income approach is that a purchaser will expect a reasonable return on his investment in the property, this method is best suited to the valuation of investment property. Investment property, as the term itself implies, is property which is purchased because of its potential to produce income for the purchaser.40 Thus, almost any business property can be classified as investment property. Even though purchased as an "investment," owner-occupied residential property, because it does not produce income, must be valued by the replacement cost or market data method. Similarly, other types of non-investment property, such as hospitals, schools, and similar public service property, because of their peculiar nature, are not normally appraised by this method but rather are appraised by applying the replacement cost approach to the improvements on such property and then complementing that result with a valuation of the underlying realty based on comparable sales, if any. Certain special types of property present appraisal problems which do not submit readily to conventional valuation according to any of the three approaches. Department stores, for example, present special difficulty because of their uniqueness. The comparable sales approach proves unrewarding in such cases because of the scarcity of comparable properties in the area and the even greater infrequency of sales of any such comparable properties within recent years. Thus, the

<table>
<thead>
<tr>
<th>Gross rental value</th>
<th>$12,500</th>
<th>$8,000 capitalized at 10% (2% return on investment; 8% return on investment)</th>
<th>$80,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less projected expenses, allowances, etc.</td>
<td>2,500</td>
<td>Plus value of land estimated pursuant to market data approach</td>
<td>25,000</td>
</tr>
<tr>
<td>Net Rental Value</td>
<td>$10,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less rent attributable to land (8% return on land value of $25,000)</td>
<td>2,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rent attributable to improvements</td>
<td>$8,000</td>
<td>Total value—Income approach</td>
<td>$105,000</td>
</tr>
</tbody>
</table>

39. An example of this "add back" method can be found in Stickell v. Mayor & City Council, 252 Md. 464, 467, 250 A.2d 541, 543 (1969).

appraiser is obliged to rely on the replacement cost and income approaches, neither of which yields results which are totally satisfactory. The replacement cost approach is somewhat inappropriate because of the earnings emphasis which pervades such a property. The income method, seemingly the most fitting, is difficult to apply because of the frequent lack of comparable rentals. In rare situations such as this, where none of the three methods seems completely suitable, the appraisers and the jury simply must improvise as best they can within the valuation framework of the three accepted methods. Other examples of such "special purpose" properties include churches, funeral homes, theatres, parking lots, and grain elevators.

III. THE PERMISSIBLE LIMITS OF A VERDICT

The extent to which a jury's verdict in a condemnation case may deviate from the expert testimony as to the property's value was examined in Bergeman v. State Roads Commission. In that case the landowner brought an appeal alleging that the jury below had based its verdict on its own speculation as to the proper valuation instead of on the expert testimony presented in the case because the jury had rendered a verdict $3,000 lower than the lowest appraisal presented by the condemnor's experts. The landowner concluded from this that the jurors had based their verdict on their own impressions of the property which had been formed when the jury viewed the property. While the court agreed that a verdict based entirely on the jury's view could not be sustained, it rejected the landowner's claim that the view could have been the only foundation for the verdict.

After analyzing the evidentiary factors which could have motivated the jury in rendering its verdict, the court concluded that the jury could have founded its award on the appraisers' testimony as to valuation by the income method, but had interchanged the figures on which that testimony was based. The court speculated that the jury could have accepted the net rent figure of one of the condemnor's experts, but, concluding that the capitalization rate used by that expert was too low, had then arrived at a rate representing a compromise between that rate and the rate employed by the condemnor's other appraiser. Because the net rent figure of the first expert was considerably lower than that estimated by the second appraiser, the application of the higher capitalization rate to this lower rent figure resulted in an award lower than the appraisal of either expert. Citing the hackneyed

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41. The damages to be awarded for the taking of a church are specifically prescribed in Md. Ann. Code art. 33A, § 5(d) (1971), as follows: "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. . . ." This language appears to place a greater emphasis on the actual reproduction of the structure than does the "replacement cost, less depreciation" method.
43. 218 Md. 137, 146 A.2d 48 (1958).
44. See Md. R.P. U18.
45. One of the condemnee's appraisers applied a 6% capitalization rate to an annual net rent of $1,602, arriving at an estimated value of $26,700. The other expert
rule that the weight of expert testimony is a matter for consideration by the jury, the court held that this "out-of-context" application of the evidence by the jury was proper. Because the value of such expert opinion depends on its underlying facts, the court concluded that there could be no objection to permitting the jury to "draw their own conclusions from such basic facts as they may choose to find. . ."\(^4\)

The danger of such a practice is obvious. Each of the expert appraisals offered as evidence in a condemnation case is a consistent whole, resting on a given set of carefully conceived assumptions. The assumptions underlying each appraisal are different and depend upon the viewpoint of the individual appraiser. If a jury can pick and choose among the facts and figures of the different experts, the final award will lack this element of consistency. The use of different factors gleaned from different appraisals, each based on differing assumptions, by a jury with little, if any, independent knowledge of property valuation, can result in awards which do not remotely reflect the true value of a piece of property. Such uncontrolled latitude in the jury's consideration of the expert testimony seems inconsistent with the constitutional mandate that no property may be taken without just compensation.

A situation similar to that in \textit{Bergeman} arose in \textit{Greater Baltimore Consolidated Wholesale Food Market Authority v. Duvall},\(^4\) except that in \textit{Duvall} the verdict rendered by the jury was $92,000 greater than the highest valuation of any expert and, thus, it was the condemnor who complained that there was no legally sufficient basis for the verdict. The court concluded that the verdict was proper, noting the wide range of comparable sales which had been admitted into evidence, from which, apparently, the jury was free to select the sales which it considered most applicable.\(^4\) The landowner had testified, over the objection of counsel for the condemnor, that nearby developed industrial lots had been sold for a price per acre which was almost $15,000 in excess of the highest unit price referred to by any of the appraisers.\(^4\) The court nevertheless observed that "the jury is free

\(^4\) called by the condemnee applied an 8\% capitalization rate to a net rent of $2,150 and arrived at a final figure of approximately $27,000. The court concluded that the jury had presumably applied a 7\% capitalization rate to the $1,602 net rent figure and had come up with a value of approximately $23,000, which was the amount of the verdict. 218 Md. at 140-44, 146 A.2d at 51-52.

\(^4\) \textit{Id.} at 144, 146 A.2d at 52.


\(^{46}\) The court noted that the comparable sales admitted below ranged from $1,250 to $10,504 per acre and commented that the average of these sales was approximately $6,000. \textit{Id.} at 97, 256 A.2d at 885. Since the jury's award was $7,250 per acre, the inference is overwhelming that the jury had based its verdict only on the highest of the comparable sales.

\(^4\) There is a rebuttable presumption that an owner of property under condemnation is qualified to testify as to its value. \textit{E.g.}, \textit{Mayor & City Council v. Schreiber}, 243 Md. 546, 221 A.2d 663 (1966). Where the property is owned by a corporation, however, a director, officer or shareholder of the corporation does not enjoy the benefit of this presumption, but must demonstrate sufficient knowledge of the property if he is to qualify to testify as to its value. \textit{M.A. Realty Co. v. State Roads Comm'n}, 247 Md. 522, 233 A.2d 793 (1967); \textit{Smith v. Potomac Elec. Power Co.}, 236 Md. 51, 202 A.2d 604 (1964). In \textit{Duvall} the owner testified that the property was worth $8,500 per acre, which, as the court inferred, could have affected the jury's verdict.
to apply its independent judgment as to the weight of any facts before it," and closed with the comment that the "appellants' main difficulty seems to be that the jury did not accept their appraiser's valuation." In fact, the jury had not accepted the valuation of any of the appraisers.

The suggestion in Duvall that the jury can place crucial reliance on "selected" comparable sales is rather disturbing, especially in light of the considerable latitude exercised by the trial courts in admitting evidence of comparability. The Court of Appeals has stated that, where a sale offered as evidence of value embodies any reasonable elements of comparability, testimony concerning that sale should be admitted and the weight of the comparison left to the jury. Any excesses of the trial court in admitting such testimony are likely to go unchecked since the Court of Appeals has also stated that the issue of comparability is largely discretionary with the trial court and that even the abuse of that discretion does not compel reversal, unless there is a showing of "substantial injustice" to the complaining party.

IV. SPECIAL PROBLEMS OF VALUATION

A. Partial Taking

The damages to be awarded where only part of a property is taken are prescribed by section 5(b) of article 33A. That section provides:

The damages to be awarded where part of a tract of land is taken shall be the fair market value (as defined in § 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 used [sic] 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.

While section 5(b) begins with the declaration that damages for a partial taking shall be the "fair market value" of the part taken, a familiar condemnation concept, the application of this formula is complicated by the statutory qualification that such damages may not be "less than the actual value of the part taken" plus any severance or resulting damages. The literal application of this language to a partial taking situation would seem to require that two distinct standards of valuation be employed and that the standard which

255 Md. at 97, 256 A.2d at 885. He also testified, over objection, that comparable properties had sold for $25,000 per acre. Id. at 92, 256 A.2d at 884.
50. 255 Md. at 97, 256 A.2d at 885.
51. Id.
54. MD. ANN. CODE art. 33A, § 5(b) (1971).
produces the larger amount of damages be accepted as controlling.\textsuperscript{55} The case law prescribes that the "fair market value" of the part taken is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder retained by the property owner after the taking.\textsuperscript{56} There is no legislative or judicial definition of "actual value." However, because it can safely be presumed that an appraiser making a computation of "actual value" would be restricted to the use of one or more of the three accepted valuation methods, the most logical definition of "actual value" would be the result obtained when the appropriate valuation method is applied directly to the portion taken.

It is clear that this "actual" valuation standard can produce an award in excess of "fair market value" as determined by the before-and-after method. For example, consider a case where the State Roads Commission institutes proceedings to condemn a strip through the center of a large tract of land which has a value of only $1,000 per acre because of its limited frontage on a narrow country road. The strip contains ten acres of land and is to be used for the construction of a parkway to which each of the two parcels remaining after the severance will have access, and the total of the fair market value of the two parcels after the taking exceeds the fair market value of the whole tract before the taking because of this added frontage. Under the before-and-after method of determining fair market value, the property owner should receive nothing for the lost acreage; but because the "actual value" of the strip taken is $10,000, assuming that the strip has the same per-acre value as the entire tract, section 5(b) seemingly requires that he be awarded not less than that sum. The same result would occur if the before-and-after method produced any "fair market value" less than the $10,000 "actual value."

Therefore, in situations where "actual value" exceeds "fair market value," as determined by the before-and-after method, the property owner may receive an award which is unrelated to the real effect of the taking on the value of the property as a whole. While the Court of Appeals has not yet been called upon to consider this effect of section 5(b), it is conceivable that the court would not affirm an award above "fair market value" less than the $10,000 "actual value."


\textsuperscript{57} Big Pool Holstein Farms v. State Roads Comm'n, 245 Md. 108, 225 A.2d 283 (1967), while not presenting a valuation dilemma substantively analogous to that created by section 5(b), reveals the disposition of the Court of Appeals with respect to awards which do not reflect the condemnee's true loss. In that case, the Commission quick-took a portion of a farm leaving part of the remainder without access. At the trial the Commission was permitted to introduce evidence that it had secured an option to purchase a contiguous strip of land which would provide access to the landlocked acreage and that it had offered to exercise that option and convey the strip to the owner. As the option had not been obtained by the Commission until after the taking, the owner contended that the admission of this evidence was prejudicial. In refusing to accept this position, the Court of Appeals said:

Under the appellant's contention, the measure of damages must be the difference in value between the tract affected with access, and the tract without access.
The language employed in section 5(b) has presented other definitional problems. Although the use of the alternative terminology "severance or resulting damages" implies that there is a distinction that can be drawn between the two, those terms are used interchangeably by the Maryland Court of Appeals in cases involving partial takings. In fact, some of the partial taking cases speak only of "consequential damages" even though this term is also used by the court to describe damages suffered by an abutting property owner whose property is only affected by the condemnation. When used in connection with partial takings under section 5(b), the three terms in fact are synonymous and are best described as "the difference between the value of the remaining portion by itself and its value as a part of the whole."

This difference in value is caused by various conditions resulting from the severance, such as the loss or impairment of access or an undesirable shape or size, either of which would depress the market value of the remainder or subject the owner thereof to remedial expense. Section 5(b) provides further that severance or resulting damages are to be diminished by the value of any "special benefits" which may accrue to the remainder by reason of the taking. Special benefits are those which are peculiar to the property involved, in contrast to general benefits, enjoyed in common with the community surrounding the public project for which the property is taken. The latter apparently are not credited against severance or resulting damages.

B. The Valuation of Separate Interests

Real property is subject to a variety of interests which must be acquired, or released by the holder, before the condemnor can obtain an unencumbered title. Thus, before the condemning agency takes

Under this theory, the owner could obtain damages for most of the value of the tract at the time of the taking, even though, after the taking, he can obtain adequate access for a fraction of the amount he has received.

Id. at 113, 225 A.2d at 285. The court's reluctance to accept the condemnee's position in this situation may provide some indication as to whether it will allow a "windfall" afforded by legislative mandate.

58. Severance damages are sometimes defined as the diminution in value of the remainder by reason of the severance of the parcel appropriated by the condemnor. See 4 J. Sackman, Nichols' The Law of Eminent Domain § 14.11(1), at 476 (rev. 3d ed. 1962). The term "resulting damages" apparently has no accepted definition. Sackman attempts to distinguish between "severance" and "consequential" damages as follows: "While consequential damages are applicable to partial taking cases, they are not peculiar to such situations but arise, in fact, in many cases where there is a complete taking. Severance damages, on the other hand, by their very nature arise only upon the taking of part of an owner's land." Id. at § 14.2, at 507. Orgel insists that consequential damages exist only as a result of the use to which the land taken is put by the condemnor. 1 L. Orgel, Valuation Under the Law of Eminent Domain 303 n.1 (2d ed. 1953). A perusal of the various definitions assigned by the authorities makes it evident that any attempt at precise definition is futile.

59. S. McMichael, Appraising Manual 437 (4th ed. 1970). While this quotation is McMichael's definition of "severance" damages, it describes what the courts are aiming at when they use the three overlapping terms.


61. The language of section 5(b) indicates that severance and resulting damages, as well as special benefits, are to be independently considered only for the purpose of adjusting an award based on "actual value." These factors are automatically taken into account under the "before-and-after" method of computing "fair market value,"
any steps toward the acquisition of a property, it will have the title examined in order to discover the identity of all parties in interest, including the owner of the fee, the mortgagor, lienors and encumbrancers, holders of easements, etc., and the owner of any leasehold interest of seven years or more. If condemnation proceedings are filed, each of these parties is normally joined as a defendant. If the interest has a liquidated value which is uncontested, as in the case of a mortgage, the interested party may need only file a formal answer and appear at the settlement in order to obtain payment out of the proceeds paid or awarded for the property. However, if he holds a subordinated interest in the property, such as a second mortgage, he may find that his interest is in jeopardy, in which case he may desire to actively participate in the litigation in order to protect that interest.

The value of unliquidated interests in the property must be determined by the jury. If the property is held in fee simple absolute, the jury need evaluate only that single interest. However, if there is more than one interest in the property, each of those interests may be entitled to compensation; the jury must then make separate awards to the holders of each interest. The most typical possible combinations of such interests include the ninety-nine year lease and the reversion, commonly known as the ground rent, the life estate and the reversion, mineral rights and the fee, and the respective interests of landlord and tenant where the tenant occupies the property, or part thereof, under a lease from year to year or for a longer term.

The most recent Maryland case dealing with the condemnation of property subject to a ground rent is *Heritage Realty, Inc. v. Mayor & City Council.* In that case the condemnor, after purchasing properties subject to redeemable ground rents, sought to acquire the reversionary interests in those properties through condemnation. The owners of the reversionary interests insisted that this procedure would deprive them of their property without just compensation, claiming that the condemnor, as holder of the leasehold interests, could extinguish the reversions only by redeeming them under the provisions of the ground leases. The owners argued that by initiating condemnation proceedings at a time when interest rates were high and the market value of ground rents consequently depressed, the condemnor could take the reversions at a price which would be considerably less than that which it would be obliged to pay to redeem the ground rent. The court rejected the owners’ contentions, holding that the owner of a reversionary interest, because he cannot compel the leasehold owner to redeem the ground rent, has no right to demand that a condemnor having title to the leasehold be limited to the redemption procedure to the exclusion of condemnation procedures explicitly authorized by statute. When such condemnation procedures are applied, the court explained, the statutory definition of fair market value must prevail; the owner of a reversionary interest can be compensated.

62. A lease for less than seven years need not be recorded, and the identity of a lessee under such a lease can be discovered only through inquiry.
for that interest only to the extent of its value under the prevailing conditions of the market place.

The problem of assigning a value to mineral deposits underlying property which is subject to condemnation has been dealt with in a perplexing fashion by the Maryland courts. It would seem that the most logical approach would be to multiply the estimated volume of the minerals by the prevailing unit value and then subtract the estimated cost of extracting the minerals. However, this method has been flatly rejected by the courts, which have uniformly ruled that mineral deposits cannot be treated as a separate entity for valuation purposes. The courts have conceded, however, that such deposits can be valued as an integral part of the property and have permitted appraisers to take the quantity and quality of such deposits into account in arriving at the fair market value of the land as a whole.

The courts' reluctance to accept quantitative evidence of the value of mineral deposits persists even in cases involving mineral leases. In *Smith v. Potomac Electric Power Co.*, the Court of Appeals held that, in valuing a leasehold interest in minerals, the "value in place" of the minerals could be considered, but that evidence of the lessee's projected costs and profits from the lease was inadmissible. The court indicated that the pertinent evidence of the value of such a lease would be "the prevailing value of [mineral] leases in the neighborhood."

The compensability of a lessee's interest in property subject to condemnation depends on the presence of two favorable circumstances. First, his lease must not contain a condemnation clause which precludes him from asserting a right to claim a part of the proceeds in the event of condemnation. Second, the rental which he pays must be a "bargain rent," i.e., one lower than the fair market rental, which, under the lease, he has the right to enjoy for a term running beyond the valuation date. The latter factor is determinative of the value of his interest in the leasehold. In more precise terms, the lessee's

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64. In *State Roads Comm'n v. Creswell*, 235 Md. 220, 201 A.2d 328 (1964), the Court of Appeals indicated that it would not permit mineral deposits to be valued as a separate entity by the multiplication process, but did not rule on the question because the issue had not been properly preserved below. In *Smith v. State Roads Comm'n*, 257 Md. 153, 262 A.2d 533 (1970), the court transformed the *Creswell* dictum into holding.

65. *See* cases cited note 64 *supra*.


67. This is an illustration of the general rule that the use of business profits in computing potential income from property is prohibited. *See* notes 109-14 *infra* and accompanying text.

68. 236 Md. at 64, 202 A.2d at 611. The court further indicated that the price for the minerals set out in the lease, in addition to the cost of regrading the property pursuant to a covenant therein, had to be deducted from the final valuation of the leasehold in order to arrive at the lessee's compensable damages.

69. For purposes of showing the duration of the lease beyond the valuation date, the lessee can show his intent to have been to exercise renewal options in the lease had the property not been taken. *See* *Mayor & City Council v. Rice*, 73 Md. 307, 21 A. 181 (1891). It is clear from *Sholom, Inc. v. State Roads Comm'n*, 246 Md. 688, 229 A.2d 576 (1967), that an option to renew a lease can be a compensable item of damages whether or not the lessee exercised it prior to the taking. In *Sholom* the court further indicated that an option to purchase was compensable under the same circumstances. As the court pointed out, however, a lessee cannot recover for both of these items where the options are alternative.
interest has a value equivalent to the amount, discounted to present value, by which the annual fair market rental exceeds the actual rent paid by the lessee, multiplied by the number of years during which the lease would have remained in effect after the valuation date but for the condemnation of the property. The fair market rental is, of course, established by evidence of rents paid by lessees for comparable space within the area and, therefore, can be higher or lower than the actual rent paid by the lessee of the condemned property.

Although it would seem logical to assume that the sum of the values given the separate interests in a property can never exceed the value of the property as an entirety, this is not always true. The Court of Appeals has taken the position that in certain types of cases the total of the awards to the owners of separate interests may, in fact, properly exceed the worth of the property in the hands of a single owner, although the general rule is to the contrary.

The exception to the general rule was first applied in Mayor & City Council v. Latrobe, which involved the rather unique problem of a partial taking of property subject to an irredeemable ground rent. The court in Latrobe recognized the possibility that, because of the market fluctuation typical of ground rents, the holders of the leasehold and of the reversionary interest in such property could assign different capitalization rates to their interests and thereby convince the jury to accept values of those interests which, when totalled, could exceed the value of the property in the hands of a single owner. The court concluded that the two owners of the separate interests were each constitutionally entitled to the proven value of their respective interests in the condemned property even if this anomalous result followed and that, therefore, the special circumstances of the case required an exception to the general rule.

The exception carved out in Latrobe has been discussed in several cases but, until recently, was not extended beyond the very limited type of application suggested by the Latrobe holding. In Mayor & City Council v. Gamse, a case involving the taking of a leasehold interest in an entire property, the Court of Appeals deemed the exception inapplicable, explaining that the general rule can "ordinarily

72. E.g., Viers v. State Roads Comm'n, 217 Md. 545, 550, 143 A.2d 613, 615 (1958); see Gluck v. Mayor & City Council, 81 Md. 315, 32 A. 515 (1895).
73. 101 Md. 621, 61 A. 203 (1905).
74. The court explained its conclusion in the following language: [W]e are therefore of the opinion that owing to the peculiar character of this class of property, if it be proven that the reversioner's interest was worth $10,000 and the leaseholder's $52,500, the latter sum could be allowed, although the whole property, if no ground rent had been on it, would only have been worth $60,000. We say that because each is entitled under the Constitution to be compensated in damages for the amount of his interest taken, and if it be true that the values of the two interests are more than what the lots would be worth, if owned by one person, the necessities of the case require an apparent exception to the general rule announced above, as to what the condemning party must pay.
Id. at 631, 61 A. at 206.
75. 132 Md. 290, 104 A. 429 (1918).
be applied without difficulty" to the condemnation of an entire property subject to a lease. In United States v. Certain Parcels of Land, Judge Chesnut, speaking for the Maryland Federal District Court, applied the exception to the taking of a city's interest in a public street, a singularly limited factual context. The court strongly implied that the use of the exception was directly conditioned on the existence of a possible conflict between the general rule and the constitutional right of interested parties to receive just compensation. The existence of the exception was later recognized in dictum in State Roads Commission v. Novosel but in Viers v. State Roads Commission, a case which, like Latrobe, involved a partial taking, the court concluded that the exception was inapplicable because the case before it involved "a short term lease, not a ground rent" as in Latrobe. Up to this point, the effect of the decisions discussing the exception was, therefore, to limit its use to cases involving special valuation problems similar to those present in Latrobe and United States v. Certain Parcels of Land. This strict limitation of the exception is consonant with the constitutional undertones which accompanied its use in those two cases. It is clear from the decisions discussed thus far that the exception should be applied only where the use of the general rule would interfere with the constitutional right of holders of separate interests to prove and receive damages reflecting the full value of their respective interests in the condemned property.

Two recent cases, however, have suggested that the erosion of the general rule has been more substantial than an examination of the earlier cases would indicate. The first of these cases, Sholom, Inc. v. State Roads Commission, involved the partial taking of a property subject to an existing five-year lease which contained alternative options to purchase the property during the five-year term or to renew the lease at the end of that term. The lower court had excluded evidence relating to the alternative options on the ground that they had not been exercised. After holding the lower court's action improper, the Court of Appeals was faced with a choice of either remanding the case for a new determination of the total value of the condemned property or simply directing the lower court to redetermine the relative shares of the landlord and tenant in the sum which the prior jury had found to be the value of the property as an entirety.

76. Id. at 293, 104 A. at 430.
77. 43 F. Supp. 687 (D. Md. 1942).
78. Judge Chesnut cited as support for his holding the case of Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910), which contains the following language: "[T]he Constitution does not require a disregard of the mode of ownership, — of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?"
80. 217 Md. 545, 143 A.2d 613 (1958).
81. Id. at 550, 143 A.2d at 615.
82. 246 Md. 688, 229 A.2d 576 (1967).
The condemnor advocated the latter alternative, relying upon the general rule that "the proper approach is to value the property as though the entire title is vested in one person and then apportion the award among the contending interests." While the condemnor recognized that the tenant might be entitled to a "larger slice of the pie" as a result of the option contained in the lease, it claimed that the size of that pie, that is, the value already placed on the property by the jury, must remain the same. The Court of Appeals rejected this argument, explaining:

Since, as we have said, the possible effect of Sholom's options to renew on the value of its leasehold interest was erroneously excluded we cannot agree that the size of the pie should be accepted and merely re-sliced. If it can be said that there is a general rule demanding the valuation of the entire estate before apportionment to the respective interests therein, one must also take into account how that general rule may have been eroded by our holdings in Latrobe, supra, and State Roads Comm. v. Novosel, 203 Md. 619, 102 A. 2d 563 (1954). See also, U. S. v. Certain Parcels of Land, 43 F. Supp. 687 (D.C. Md. 1942). This language creates the misleading impression that there has been a substantial and continuing "erosion" of the general rule.

A corollary effect of the Sholom holding is the clear implication that the exception might be applicable to the partial taking of property subject to a short-term lease containing alternative options to purchase or renew. Such an implication is directly contrary to the conclusion drawn by the court in Viers that the exception was not suited to the partial taking of property subject to a short-term lease. It is also contradicted by an examination of the Sholom facts: clearly a tenant's proof of the value of an option to renew or to purchase could only reduce proportionately the value of the reversion and could not result in any additional damages over and above the total value of the property in the hands of a single owner. The only rational explanation of the Sholom language is that the court was concerned with the procedural irregularity of remanding the case to a new jury with the restriction that the total damages awarded by that jury could not exceed the verdict rendered by the jury in the original proceeding and, in seeking legal justification to avoid that irregularity, inappropriately invoked the exception. Clearly, Sholom did not involve the special valuation problems and potential constitutional conflict which would justify the use of the exception created in Latrobe.

The unfortunate impression created in Sholom was nurtured by the court's opinion in Heritage Realty, Inc. v. Mayor & City Council. In that case the City of Baltimore sought to condemn the reversionary interests in certain properties subject to ground rents after having already acquired the leasehold interests by negotiation. After their

83. Id. at 702, 229 A.2d at 583.
84. Id.
primary contention had been rejected, the owners of the reversionary interests argued that the owners of the leasehold interests should have been joined in the case to ensure that the total damages awarded for the respective interests would not exceed the full value of the property taken. The court responded, "If the City embarks on a policy of piecemeal taking . . . it may well be that the total cost to the City will be a sum which in the aggregate is greater than the value of the property. Such a result was clearly forecast by our predecessors in Mayor and C.C. of Balto. v. Latrobe . . . and found unobjectionable. . . ." While it is true that the general rule should not have been applied to the situation in Heritage because one of the separate interests was acquired by negotiation, it does not follow that the Heritage result should have been justified by reference to the exception. Heritage did not involve the kind of special circumstance for which the exception created in Latrobe was designed. Neither the general rule nor the exception can apply except where there is a condemnation of both of the separate interests in the property taken. The general rule is, quite simply, a guarantee that the form in which property is held will not affect the price which a condemnor must pay in order to appropriate that property to public use. The exception is designed to limit that guarantee in situations where its application would interfere with the constitutional rights of the holders of the separate interests. Obviously, the exception is unnecessary where the condemnor elects to forego the guarantee by acquiring one of the separate interests through negotiation. Thus, the Heritage court's reliance upon the exception was misplaced.

It can be concluded, therefore, that, notwithstanding Sholom and Heritage, the exception is in fact severely limited in its application and should be invoked only in those unique factual situations where the use of the general rule threatens the constitutional right of the owners of separate interests in condemned property to establish and receive the fair market value of those interests.

V. SHORTCOMINGS OF THE PRESENT LAW

A. Some Procedural Inequities

A suit for the condemnation of private property has long been regarded as a "special proceeding," falling within none of the traditional forms of action, for which special procedures, often in sharp contrast with normal forms of practice, are necessary. While a condemnation suit is a special proceeding in the sense that it is born of express constitutional mandate, some of the procedures which have been historically followed or adopted for the trial of condemnation cases are difficult to reconcile with the prevailing purpose of that mandate, i.e., to ensure that no property is taken without just compensation.

A jury trial in a condemnation case is guaranteed by article III, section 40 of the Maryland Constitution, presumably for the purpose

86. See note 63 supra and accompanying text.
87. 252 Md. at 12, 248 A.2d at 904-05.
of ensuring that the "just compensation" contemplated by that section is in fact awarded to owners of condemned property. As a result, a condemnation case is always tried before a jury unless all parties to the suit agree in writing to submit the case for determination without a jury — a practice which is exactly the opposite of that in the usual case at law, where a jury trial is awarded only if one of the parties so elects. The upshot of this procedure for selecting the trier of fact is that the property owner, who is the constitutionally protected party, must have his property valued by a jury unless he can persuade the condemnor, the party from whom he is constitutionally protected, to agree to dispense with a jury.

It was undoubtedly contemplated by the framers of article III, section 40 that the best method for protecting the property owner was to entrust the final decision as to the value of the condemned property to twelve good men and true. That this conviction is apparently still held by the courts is suggested by Master Royalties Corp. v. Mayor & City Council, in which the Court of Appeals concluded that no prejudice resulted to the property owners "by having a jury trial thrust upon them."

The realities of condemnation cases have eroded the credibility of this assumption. In these days of steadily increasing tax consciousness, the average juror, already jealously protective of his tax dollar, is either already aware or is made aware by his fellow jurors that any award which he will vote to confer upon a property owner will be paid, theoretically at least, out of that tax dollar. His awareness of this fact exists even though comment by condemnor's counsel referring to the jury's status as taxpayers is prohibited. While the jurors' tax consciousness may not affect the size of their award in any given case, it would certainly be consistent with the spirit of constitutional protection of the rights of property owners to permit the owner to elect whether to run the risk that it may. This risk is compounded by the permissiveness which the courts have shown toward those juries which substantially ignore the expert testimony in the case in favor of far less reliable evidence of value or which arrive at their verdicts through piecemeal selection of inconsistent elements of that testimony. Certainly a court trying a condemnation case

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88. Md. R.P. U15a. This rule automatically prevents waiver of a jury.
89. 235 Md. 74, 200 A.2d 652 (1964).
90. Id. at 96, 200 A.2d at 664.
91. Shapiro v. Maryland-Nat'l Capital Park & Planning Comm'n, 235 Md. 420, 201 A.2d 804 (1964). As Shapiro indicates, a violation of this prohibition may not always constitute reversible error. In that case, in his argument to the jury, counsel for the condemnor commented that the award rendered by the jury would be paid from the tax money of the State. The Court of Appeals held that this comment did not constitute reversible error where the attorney for the condemnee had earlier referred to the low budget of the condemnor to illustrate why the appraisals of the condemnor's experts might be too low and, after condemnor's attorney had made the statement complained of, had attempted to counteract its impact on the jury by arguing that the award would come mostly from federal funds instead of State tax receipts. The court apparently viewed this latter act as a condonation by the condemnee's attorney of the improper comment by counsel for the condemnor.
92. See note 47 supra and accompanying text.
93. See note 43 supra and accompanying text.
without a jury would be more apt to weigh the evidence of value in a more judicious and predictable manner. For these reasons, it is submitted that the condemnee should have the unfettered right to elect to have his case tried by a jury or by the court without a jury and that this election should be binding upon the condemnor. 94

In normal trial practice a party in an action at law has the right to remove the case to another forum if he believes that a fair trial may be denied him by the court in which his suit is pending. No such right exists in a condemnation action. According to section 2 of article 33A of the Maryland Annotated Code, 95 a condemnation proceeding must be brought in the county in which the property to be condemned is located or, if the property lies in more than one county, in any county in which any part of the property is situated. Maryland Rule of Procedure U15 ensures that the proceeding will remain in the courts of the property county by unequivocally declaring that the "right of removal granted by Article IV, Section 8 of the Constitution of Maryland does not apply to proceedings for condemnation." 96 This forum-freezing can have serious consequences for certain types of defendants. For example, absentee owners, when required to defend a condemnation suit in the county in which their property lies, may suffer considerable prejudice as a result of the parochial disfavor which some communities hold for "outsiders" or "foreigners." This disfavor may become particularly intense where the absentee owner is a large urban-based corporation or where the taxes of the particular political subdivision are to be the source of the jury's award. It certainly would not greatly subvert the interest of the political unit in which the property is situated to afford such disadvantaged defendants the opportunity to bring their case before an impartial forum in another county. 97 Moreover, there can be no reason for this form of procedural discrimination against the condemnee other than the notion that his fellow constituents are specially qualified to decide the amount of money he should receive for his property — a proposition which is clearly unsupportable. Indeed, any such special qualifications would necessarily stem from the individual's personal knowledge of the particular property and area, a factor which might lead him to base his opinion of value on his personal knowledge rather than on the evidence in the case.

Another inequity arises from the procedural structure of a condemnation case. Because the action is initiated by the condemnor, the condemnor is automatically designated as the plaintiff in the case. 98

94. Bills which would have accomplished this result were introduced at the 1970 Session of the Maryland General Assembly, S.B. 472, 473, 474, 475, but were not reported favorably by the Legislative Council.
96. See Mayor & City Council v. Kane, 125 Md. 135, 93 A. 393 (1915).
97. A bill which would have created a right of removal in condemnation proceedings was introduced at the 1970 Session of the Maryland General Assembly, S.B. 469, but was not reported favorably by the Legislative Council. While the removal of a condemnation case might create obvious practical problems with respect to the jury's view of the property, such problems would not be insurmountable.
Thus, the condemnor enjoys one of the foremost procedural advantages afforded a plaintiff, the right to open and close at trial. The plaintiff in other actions is given this advantage because he is normally the party who must carry the ultimate burden of proof; however, the only burden which the condemnor must shoulder is that of establishing the right to take, which, if it is contested at all, is determined as a preliminary matter by the court without the aid of the jury. Thus, because the only issue presented to the jury is that of the value of the property to be taken and because the condemnee has the practical burden of proving that the condemnor's offer was insufficient, the condemnee becomes, in reality, the constructive plaintiff; yet he does not have the right to open and close which is given as a matter of right to plaintiffs in every other type of action.

B. Non-Compensable Damages

The condemnee usually is informed that his property may be condemned by a newspaper article concerning a public agency's announcement of plans for the widening of a street, a new expressway, an urban renewal area, or some other public project. More often than not, the announced plan is subject to change and delay. This can be the result of federal disapproval of the initial plan (where federal funds are involved), relocation of the project because of concerted protest from those within the affected area, or redesign because of changing circumstances such as increased construction costs. It is not until the passage of the implementing legislation, following which the condemnee receives formal notice from the public agency involved, that he can be reasonably certain that his property will be condemned at some indefinite target date. The term "reasonably certain" must be used because the plans remain subject to change even after the formal notice. In fact, there is no absolute certainty of condemnation until payment has actually been made. Until then, but not more than one hundred and twenty days after the entry of final judgment, the condemning agency can change its mind by filing an election to abandon the proceedings in accordance with section 13 of article 33A of the Maryland Annotated Code. While that section provides for the recovery of reasonable legal, appraisal and engineering fees actually incurred by the condemnee in such event, no provision is made to reimburse him for additional damages which he may suffer.

Consider the plight of the proprietor of a business who finds himself facing the immediate prospect of a trial to condemn the property upon which he conducts his business or who has signed the usual agreement giving the condemning agency an option to purchase the property at a negotiated price. He cannot wait until the last minute to find a new location upon which to operate his business;

99. See note 15 supra.

100. A bill which would have given the condemnee the right to open and close was introduced at the 1970 Session of the Maryland General Assembly, S.B. 470, but was not reported favorably by the Legislative Council.
therefore, relying on the proceeds which he expects to receive from the condemnation suit or from the exercise of the option, he signs a contract for the purchase of a new building. Should the condemning agency then file an election to abandon, his predicament is obvious.

There are other circumstances working against the owner of property, especially commercial property, subject to condemnation which expose him to damages for which he is not compensated under present law. One of these is the effect which the announcement of the project, and of the area in which it will be constructed, has on property within the area. While property surrounding the area may increase in value as a result of the announcement, there is obviously little or no market for the doomed property that lies within it. If the project is of any magnitude, considerable time elapses following the announcement before the condemning agency is in a position to make an initial offer for the purchase of the property; more time is consumed in negotiation after an offer has been made. If the owner is unwilling to accept the final price which the agency offers to pay, he must wait for the legal representatives of the agency to institute condemnation proceedings and then for the case to come to trial. Even under the most favorable conditions, the time span between the announcement and the payment of compensation is usually measured in years, not months, except where the quick-take procedure is employed.

The consequence to the condemnee of such delay can be serious. He is frequently forced to buy or lease another building before the condemnor acquires title to the first one, in which event he must bear the expense of both during the interim.\(^{101}\) Should the condemnee elect to build his new quarters, he will be obliged to acquire land upon which to build long before the taking, so that he will be subject to double expense for a much longer period.

If his building is leased when the project is announced and the lease terminates before it is taken, he will usually be left with a vacant building on his hands; the rental income which he thereby loses is never recovered. Conversely, if the building is leased for a term which runs beyond the date of the taking, the lessee must buy or lease elsewhere before he is dispossessed; yet he is obliged to continue to pay rent to the owner until the condemnor acquires the property. In this situation, however, the lessee does have some leverage with which to deal with the landlord if his interest as a lessee has compensable value.\(^{102}\)

If the condemnee is unwilling to accept the price offered for his property and remains in the building until his case is tried and settled, he may find himself existing in a virtual no-man's land because the other buildings in the project area either are vacant or have been demolished. Arson, burglary and vandalism may then become costly problems.

The prospect of undergoing the travail just described is necessarily a persuasive influence on the condemnee to accept the price offered

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101. Often, the condemnee is permitted to lease the condemned property, in some cases rent free, for a short period after the condemnor acquires title. However, this grace period still may not provide sufficient planning leeway to avoid the necessity of maintaining two properties for a significant period of time.
102. See notes 69–70 supra and accompanying text.
by the condemning agency and to forego his right to have the value of his property judicially determined. Should he nevertheless decide to take the latter course, he is faced with additional expense in order to have his day in court. He must employ an attorney, two appraisers and, perhaps, other experts, and must pay them out of the sum which he is awarded by the jury.

The common law does provide some protection to the property owner against administrative delay caused by bad faith, negligence, or default by the condemnor in its performance of some legal duty, but the existence of these prerequisites to recovery is obviously difficult to prove. Even where the delay is unreasonably long, no recovery is available if the delay is attributable to "governmental inertia." It is undeniable that administrative delay in the acquisition of property by condemnation has become the rule rather than the exception and that such delay following the public announcement of the project can have a depressing effect on the value of properties lying within the project area. In 1963, the Maryland General Assembly evinced some recognition of this problem by adding the following language to the definition of "fair market value," found in section 6 of article 33A:

["fair market value" shall include] 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.

This addendum is designed to protect the condemnee against the possibility that his property may become less valuable by reason of delay or other circumstances following the public announcement of the project. Unfortunately, even with the broad interpretation given it by the Court of Appeals, this statute does not go far enough to

103. See Friendship Cemetery v. Mayor & City Council, 200 Md. 430, 90 A.2d 695 (1952).

104. Lord Calvert Theatre, Inc. v. Mayor & City Council, 208 Md. 606, 119 A.2d 415 (1955). It is clear that deliberate acts on the part of the condemning authority to depress or freeze the value of property to be condemned will not be permitted. For example, in Carl M. Freeman, Inc. v. State Roads Comm'n, 252 Md. 319, 250 A.2d 250 (1969), the Court of Appeals struck down a county ordinance which prohibited upward rezoning of any property lying in the path of planned roads or highways. The court explained that the only purpose of the ordinance was to depress land values.

105. In Mayor & City Council v. United Five & Ten Cent Stores, 250 Md. 361, 243 A.2d 521 (1968), the Court of Appeals considered the problem of when such diminution in value must occur in order to be considered in determining value. The condemnor argued that, even where the diminution is caused by the announcement of the taking, the diminution still must occur between the granting of legislative authority for the taking and the date of the taking to be compensated under section 6. The court rejected this argument, interpreting the language of the section to mean that diminution is taken into account if it satisfies two alternative tests: (1) if it occurs between the granting of legislative authority and the date of the taking or (2) if it is proximately caused by the public announcement of the taking. The court
provide compensation for the double expenses incident to the timely acquisition of substitute property, for rentals lost as a result of vacating tenants or for the other types of damage which he may suffer.

After the proceedings have terminated and the condemnee has been paid what the jury feels his property is worth, and perhaps something more which may pay a portion of his expenses, he is by no means in the same financial position as he would have been had his property not been taken, because of today's inflationary economy. If he buys or builds a replacement for the property which has been taken from him, it is more than likely that it will cost him more than he received for his former property. Moreover, it is distinctly possible that any new mortgage which he will need in order to build or buy replacement property will contain a higher interest rate than one which may have existed on the condemned property. If he decides to lease, the amount of rent which he must pay will probably be higher than the rental value of his former property.

If the condemnee has operated a retail establishment on the property which is condemned, he may suffer a loss of goodwill when forced to move to a new location. This loss is not compensated as a part of the condemnee's moving expenses and cannot be reflected observed that under the condemnor's interpretation, the Mayor could announce the taking, wait until the resulting diminution in value has occurred and then obtain legislative authority, thereby depriving the condemnee of any compensation for the diminution. This question would, of course, be moot if the condemnor has continuing authority to condemn. In such cases, section 6 measures the "effective date of the legislative authority" by the "administrative determination" to condemn. Practically speaking, this administrative determination must always precede the public announcement.

106. The effect of the higher cost of replacement property has been somewhat reduced with respect to owner-occupied single- or two-family dwellings as a result of the enactment of Md. Ann. Code art. 33A, § 6A (1971), which was added to the Condemnation Code by ch. 466, § 1(6A), [1968] Md. Laws 849. The new section provides owners of such property with an allowance, not to exceed $5,000, for the amount by which the "average costs, within the same political subdivision, of a decent, safe and sanitary dwelling" exceeds the fair market value of the property taken.

107. Md. Ann. Code art. 33A, § 12(a) (1971), expressly excludes from moving costs any lost profit or good will which results from the taking or any compensation for the acquisition of a new location.

108. See note 107 supra. The moving expenses authorized by article 33A, section 12 are quite limited. Section 12(a) provides that "any person at whose expense any personal property, dead body, grave marker or monument must be removed as a reasonably necessary consequence of...condemnation or purchase in lieu of condemnation, shall be entitled to receive from the condemnor or purchaser a pecuniary allowance for the reasonable costs of removing and placing the same to another location within a reasonable distance..." This allowance cannot reflect any loss of good will resulting from the move to a new location. It cannot exceed the fair market value of the personal property which is moved. Md. Ann. Code art. 33A, § 12(c) (1971). It must be reduced by the cost attributable to moving such personal property to an "unreasonable location," Md. Ann. Code art. 33A, § 12(d) (1971). For the moving allowance to be available, the transported property must have been used by the condemnee in his old location and must be intended for use by him at his new location. Md. Ann. Code art. 33A, § 12(c) (1971). Section 12 does not require the condemnor to compensate the condemnee for damages to his personal property incurred as a result of the condemnation. Ridings v. State Roads Comm'n, 249 Md. 395, 240 A.2d 236 (1968). Dispossessed tenants who are obligated by their lease to remove all personal property from the premises at the end of their term cannot receive full compensation for their moving expenses unless five years of their term, including options to renew, remain at the time of the taking. The moving allowance is reduced by one-fifth for each year by which five years exceeds the number of full years remain-
in the valuation of the property because it falls within the prohibition against estimating fair market value of property under condemnation on the basis of gross sales or profits generated by a business conducted thereon. The justification usually given for this proscription is that the capitalization of business profits is evidence only of the value of the business; it is the property, rather than the business, which is the subject of condemnation. While it is quite true that the success of a business cannot be attributed only to its location, it is equally clear that a property's location will have an effect, often significant, on the success of the enterprise. Certainly a prospective

ing in the tenant's term. However, this adjustment cannot reduce the moving allowance below $2,500. Md. Ann. Code art. 33A, § 12(b) (1971).

A recently added section of the Condemnation Code provides additional relocation benefits for owners whose property is taken for State-financed highway projects. Md. Ann. Code art. 33A, § 6B (1971). This section, which was enacted during the 1969 legislative session (ch. 242, [1969] Md. Laws 699), and which must be renewed each year by the General Assembly (see, e.g., ch. 268, [1970] Md. Laws 647), places owners of property condemned under State-financed highway programs in the same position as owners of property taken for federally financed highway programs, who enjoyed the more substantial relocation benefits provided by 23 U.S.C. §§ 505-07 (1964).

However, section 6B has now been rendered obsolete by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. No. 91-646, 84 Stat. 1894), which as of January 2, 1971, consolidated the federal relocation assistance programs and thereby repealed 23 U.S.C. §§ 505-07 (1964). This new relocation assistance law could have a significant impact on the relocation benefits available to Maryland condemnees.

First, owners and lessees of property condemned by a federal agency will receive (1) actual reasonable moving expenses, (2) compensation for actual direct losses of personal property as a result of moving or discontinuing his business or farm operation, and (3) actual reasonable expenses in searching for substitute property. In addition, the condemnee can elect, in lieu of accepting these actual expenses, to receive a fixed relocation allowance. The new relocation law also provides generous allowances for replacement housing for displaced homeowners and tenants who occupy condemned dwellings.

Second, the new relocation law extends these benefits to owners or tenants who are displaced by state programs receiving federal financial assistance. The federal agency which is to provide such assistance cannot approve any grant or agreement extending such assistance until the appropriate state agency provides "satisfactory assurances" that the specified relocation benefits will be provided by that state agency. The cost incurred by the state in providing those benefits are included as part of the cost of the program for which the financial assistance is extended. The statute further provides that the states must by July 1, 1972, revise their laws to enable their agencies to provide the "satisfactory assurances" required as a prerequisite to receiving federal assistance. Section 12 of the Maryland Condemnation Code currently provides that a condemnor can pay moving expenses in excess of those authorized by the Code if the condemnor will be wholly or partially reimbursed for such payments by federal funds. Md. Ann. Code art. 33A, § 12(i) (1971). Condemnors involved in projects in Baltimore City are specifically authorized by this section to comply with the terms and conditions required by federal law as a prerequisite to federal financial assistance. A bill has been introduced in the 1971 Session of the Maryland General Assembly which would amend section 12(i) so as to extend such authorization to all Maryland condemnees as of July 1, 1971. See H.B. 379. A bill which would provide a more precise compliance with the new federal legislation is currently in the drafting stage.

Third, the Maryland General Assembly may see fit to extend the benefits afforded under the new federal statute to condemnees under State-financed programs. A precedent for such legislative action was set by the enactment of Md. Ann. Code art. 33A, § 6B (1971), which extended the relocation benefits afforded by federal highway assistance programs to condemnees of State-financed highway programs. See Bergeman v. State Roads Comm'n, 218 Md. 137, 146 A.2d 48 (1958); State Roads Comm'n v. Novosel, 203 Md. 619, 102 A.2d 563 (1964).


buyer of business property, whose proclivities are the very essence of the definition of fair market value, will give considerable weight to the success of the business located on that property in deciding what to pay for the property. This factor was given limited recognition by the Court of Appeals in *State Roads Commission v. Novosel*, where an appraiser was permitted to consider the volume of business transacted on the condemned property in reaching his opinion of its value. The court perceptively observed:

> With the increasing vogue of leases of business property reserving rentals computed on a percentage of the volume of business transacted by the tenant, it would be artificial and illusory to reject an expert opinion of rental value that takes into account the volume of business which experience has shown a particular piece of property is capable of producing; and, of course, the resulting profits may be, if anything, even more pertinent to the question of value.

After taking this enlightened viewpoint, however, the court affirmed the lower court ruling which had admitted an expert’s appraisal based in part upon his consideration of business volume and profits, but which had precluded the expert from testifying as to the actual figures involved. In *Brinsfield v. Mayor & City Council*, this rule was contrasted with rulings in other states which either permitted or absolutely proscribed expert reference to business profits: “Maryland, however, has adopted an intermediate course and allows experts to base the opinion of value at least in part on a consideration of gross sales, but does not permit the expert, at least on direct examination, to reveal the amount of the gross sales so considered.” Thus, while the Maryland courts permit use of business profits as a partial basis for expert appraisals and leave the evidentiary weight of a business profit factor to the jury, they deny the jury the raw material for the efficient execution of this weighing process by refusing to admit the actual profit figures, thereby opening the door to speculation. This “intermediate course” appears to embody the less desirable aspects of the two extremes. If the fair market value of a condemned retail property is to reflect any loss of good will occasioned by the condemnee’s forced change of location, and thereby more closely conform to the concept of just compensation, the expert appraiser should be permitted to analyze before the jury the actual business volume and profits which his study finds to be related to the advantageous location of the condemned property.

The most direct cost to an owner involved in condemnation proceedings is, of course, the expense incurred as a result of the actual litigation. While the Maryland Condemnation Code currently provides for the payment of litigation costs by the condemnor, such costs

112. *Id.* at 624, 102 A.2d at 565.
114. *Id.* at 70, 202 A.2d at 337.
include only the usual per diem jury fee, the cost of transporting the jury to view the property, the cost of furnishing meals for the jury if so ordered by the court, the cost of recording the required documents, and normal court costs.\textsuperscript{116} However, the most significant costs to a condemnee in defending a condemnation action — the legal fees and compensation for expert witnesses — are, under the current statutory scheme, paid by the condemnor only if the judgment is for the condemnee on the right to condemn.\textsuperscript{117} Thus, where, as in most condemnation actions, the condemnee has no basis for challenging the condemnor's right to take the property, he must anticipate substantial legal and appraisal fees if he decides to judicially contest the sufficiency of the condemnor’s offer for the property. Because these expenses can be relatively substantial and because he must pay these expenses from the increment in price, if any, which he may obtain through litigation, the condemnee may accept the price offered rather than undergo the gamble inherent in a trial. Surely it is no more than fair to require the condemnor to pay the condemnee's reasonable legal and appraisal fees, at least in those instances where the condemnee succeeds in procuring an award greater than the condemnor's highest offer as well as where he prevails in litigating the issue of the condemnor's right to condemn.\textsuperscript{118}

Unfortunately, the law still considers the property taken as if it were in a vacuum and smugly assumes that the constitutional guarantee of just compensation to the condemnee is fully satisfied if he is given the "fair market value" of his property.

VI. CONCLUSION

It is an undeniable reality of the Maryland condemnation scheme that property owners who are designated by the State to relinquish their property for the public good often must undergo financial hardship as a consequence. Although recent federal legislation has contributed to the reduction of the more direct financial consequences of condemnation,\textsuperscript{119} the Maryland condemnee still faces the very real prospect of significant financial loss when his property is condemned or sold under threat of condemnation. In his attempts to mitigate this potential loss, the condemnee is hindered by procedural and evidentiary formalities which are often archaic and inappropriate. While the condemnee's financial sacrifices do not result from any deprivation of legal or constitutional rights under the relevant Maryland authorities, it seems truly unfair that a condemnee should be obliged to suffer such financial losses simply because his property is needed for the common good.


\textsuperscript{118} A bill which would have effected this result was introduced at the 1970 Session of the Maryland General Assembly, S.B. 471, but was reported unfavorably by the Legislative Council.

\textsuperscript{119} See notes 1 & 108 supra