

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 2043
Senate Bill 630

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House Judiciary Committee
Subcommittee on Courts

Hershey Public Library
701 Cocoa Avenue
Hershey, Pennsylvania

Wednesday, March 1, 2000 - 9:36 a.m.

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BEFORE:

Honorable Daniel Clark, Majority Chairperson
Honorable Pat Browne
Honorable Brett Feese
Honorable Edward Krebs
Honorable Steve Maitland
Honorable Frank Dermody, Minority Chairperson

ALSO PRESENT:

Dana Alwine, Esquire
Office of Majority Chief Counsel

Brian Preski, Esquire
Majority Chief Counsel - Judiciary Committee

Jane Mendlow
Minority Research Analyst - Judiciary Committee

Beryl Kuhr
Minority Chief Counsel - Judiciary Committee

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1 CHAIRPERSON CLARK: Good morning. My name is
2 Representative Dan Clark. And I am the Chairman of the
3 Judiciary Committee, Subcommittee on Courts. And this is
4 the place, date and time advertised to have a public
5 hearing on House Bill 2043 introduced by Representative Ed
6 Krebs and also Senate Bill 630 which was introduced by
7 Senator Brightbill.

8 Senator Brightbill's bill has negotiated its
9 way through the Senate and was referred to the House
10 Judiciary Committee this past November. And 2043
11 introduced by Representative Krebs was referred to the
12 Judiciary Committee on November the 8th.

13 So I believe we'll get the Subcommittee
14 hearing started. But there are two other members of the
15 Judiciary Committee that I'd like for them to introduce
16 themselves, and now we have a third. Do you want to
17 introduce yourself to the -- to the members in the audience
18 before you're seated.

19 REPRESENTATIVE DERMODY: Good morning. I'm
20 Frank Dermody from Allegheny County.

21 REPRESENTATIVE FEESE: Brett Feese from
22 Lycoming County.

23 REPRESENTATIVE MAITLAND: Steve Maitland from
24 Adams County.

25 CHAIRPERSON CLARK: And Representative Dermody

1 is the Democrat Chairman of this Committee. He failed to
2 note that in his introduction. We want to make that of
3 record. With that, why, we'd call on Representative Krebs.

4 REPRESENTATIVE KREBS: Good morning, Mr.
5 Chairman and other distinguished members of the Committee.
6 My name is Ed Krebs, and I served as Majority Chairman of
7 the House Select Committee on Eminent Domain during the
8 legislative session of 1997/1998.

9 The recommendations of the Select Committee
10 led to the introduction of House Bill 2043 in the current
11 legislative session. In addition to myself, the House
12 Select Committee on Eminent Domain was comprised of
13 Republican House members Ron Marsico, Steve Nickol, Brett
14 Feese and Jane Orie and Democratic House members Ivan
15 Itkin, who served as a Minority Chair, Bill Lloyd, Kathy
16 Manderino and Dave Levdansky.

17 Under House Resolution 180 of 1997, the House
18 Select Committee on Eminent Domain was granted the
19 authority to examine and assess the adequacy of the Eminent
20 Domain Code to properly balance the interests of property
21 owners (condemnees) and the entities which exercise eminent
22 domain power when procuring land for public use
23 (condemnors).

24 From 1997 -- from November 1997 through June
25 of 1998, the Select Committee members held eight public

1 hearings and heard extensive testimony from condemnees and
2 their legal representatives, real estate appraisers, and
3 the following condemnors:

4 We heard from PennDOT, DEP, the Game
5 Commission, Fish and Boat Commission, Public Utility
6 Commission, Turnpike Commission and local government
7 entities representing school boards, cities, boroughs,
8 townships and municipal authorities.

9 Subsequent to the hearings, a series of
10 meetings were held over a 3-month period during which key
11 staff members reviewed the current law, the hearing
12 transcripts, the 1985 proposal drafted by the Joint State
13 Government Committee, Select Committee member comments, and
14 additional information submitted by condemnors and
15 condemnees. As a result of the examination of all the
16 available data, a number of recommendations were put forth
17 for the review, comment and approval of Select Committee
18 members.

19 In crafting the recommendations which
20 ultimately became current House Bill 2043, the goal was to
21 identify the key issues which arose during the hearings and
22 to suggest changes which would rectify perceived inequities
23 in the eminent domain process without drastically altering
24 those procedures which appear to function successfully.

25 For this reason, the recommendations were

1 fashioned by changing current law and the provisions of the
2 1985 Joint State Government Commission proposal and adding
3 changes suggested by testimony and Select Committee
4 commentary. In doing so, our intention was to enhance,
5 update and demystify the Eminent Domain Code without
6 performing a systematic and possibly unwarranted overhaul.

7 The key issues that we were dealing with arose
8 during the hearings and are addressed by House Bill 2043:
9 Condemnee confusion regarding eminent domain terminology
10 and the institution and progression of the eminent domain
11 process including, but not limited to, possession of
12 property, preliminary objections, discovery limitations and
13 condemnor appraisal procedures; also the insufficiency of
14 monies available to condemnees for appraisal and attorney
15 fees; and then the process of delay compensation; also
16 business dislocation and interruption, the Assembled
17 Economic Unit Doctrine, and the loss of rental income; and
18 the board of reviews.

19 There's a whole list of things that we do,
20 recommended changes that we have -- have in this bill. And
21 I'm not going to go through all of them. But I think I'm
22 going to do what the Chairman directed as to what brought
23 this proposed bill in the Committee into existence.

24 And basically, I think the last thing that
25 brought it into existence was the controversy over -- over

1 the Dauphin Narrows project and the eminent domain
2 procedures that we -- that we were dealing with. And if I
3 can summarize, what I think we found out in our testimony
4 was that the eminent domain procedure works pretty well for
5 homeowners because homeowners normally come out at least as
6 equal as they were beforehand because they have to get an
7 equal dwelling if they lose their -- lose their house
8 during eminent domain procedures.

9 I think what happened in Dauphin Narrows and a
10 lot of business places, we do not do a good job of the
11 original appraisal of business properties. And therefore,
12 we end up with people having to hire lawyers and contest
13 the eminent domain procedure in order to get -- to get a
14 fair value for the property.

15 And we had testimony from some of the people
16 that had their property taken and some of the lawyers that
17 were involved in those eminent domain procedures in the
18 Dauphin Narrows situation. And what we have is that I
19 think it was a general feeling that maybe initially the
20 PennDOT appraisers on business properties give a lowball
21 appraisal for whatever reason.

22 And therefore, the lawyers get involved; and
23 the legal fees being that the lawyers get a third of the
24 increase in value that they're able to obtain for the
25 homeowner. And I think our most bizarre -- bizarre piece

1 of testimony that we had was in the Dauphin Narrows. All
2 of those that aren't familiar with that, there was a
3 junkyard along there as you got closer to Clark's Ferry.

4 And that person ran a business. And I think
5 his business was that he took three or four wrecked VWs
6 and made them into one whole VW. And it's my
7 understanding -- and I'm remembering back two years -- is
8 that the original -- he did not own the land.

9 His business just occupied a lot of acreage
10 along the river. And PennDOT made no offer to him because
11 he didn't own the land. And after he obtained counsel and
12 went to court, I believe he got 1.4 -- somewhere around
13 \$1.4 million for his business.

14 And in that instance, given that the fact is
15 that PennDOT offered him nothing, that meant that the
16 lawyer, I think, gets about a third, a third of the value
17 of that settlement so the lawyer -- you know, from my
18 perspective as a layman in this process.

19 And we had similar testimony from, say, a
20 garage owner in the Borough of Dauphin who was given a low
21 bid. And then you go to court, and he raised his bid
22 substantially. And again, are those owners getting the
23 true value of their -- of their property? Because that 1.4
24 million, for example, that owner, he got less than a
25 million of that.

1 And the same thing would be a garage owner who
2 may have gotten his property raised, say, \$50,000; but the
3 lawyer got a third of that. So that's a question of -- of
4 getting an initial appraisal correct. And also, the other
5 thing that people don't understand in eminent domain is
6 that when there's a declaration of taking, they -- the
7 title of the property transfers at that point.

8 They're no longer fighting over whether
9 they're going to take their property or not. They're
10 fighting over how much they're going to get for their
11 property. And we had -- I'm just going through some of the
12 bizarre things that we saw, is that the courts had
13 determined that -- the original law says 6 percent if it's
14 delay compensation.

15 Your property is taken. You're fighting
16 over what you're going to get, delay compensation,
17 interest. How much -- you've lost your property. How much
18 should you be paid on that money that you haven't received
19 while you're fighting for it? The law said 6 percent. The
20 courts had determined that they could not set a specific
21 rate.

22 And again, we had heard testimony. And the
23 courts had said I think it's -- we're going by what the
24 courts said. It's like, I think, prime plus one would be
25 the rate that we're proposing in here. But we have some

1 situations where some of the lawyers -- since -- that was
2 not written in the legislation.

3 But the law said 6 percent, and the courts
4 said that you couldn't use a fixed rate. But some of the
5 lawyers that have dealt in eminent domain cases, PennDOT
6 had settled with some people. And they had agreed to the 6
7 percent that was in the legislation but not what the courts
8 had agreed to.

9 And PennDOT had agreed to pay the 6 percent
10 even though PennDOT knew that they were supposed to pay a
11 higher rate. So we're -- what we're trying to do is
12 demystify this and so that the owner, when they're involved
13 in eminent domain, they are given a detailed outline of
14 what the procedure is beforehand of where they stand in the
15 process.

16 The other thing, since this bill has
17 not -- the Eminent Domain Code has not been updated since
18 1962 or '63, the amount that a homeowner gets for hiring a
19 lawyer and also to hire an appraiser is only \$500. And in
20 our proposed bill, we think we need to update that to the
21 cost levels of 2,000.

22 And we are proposing to increase that
23 substantially so that they can go out there and get their
24 own appraisal if they feel that the appraisal that comes
25 from -- from the entity that is -- is condemning their

1 property is too low.

2 So those are basically the reasoning behind
3 this bill. And just as an aside is that all of the members
4 that are -- that are in the General Assembly that were on
5 this Committee are -- are a cosponsor of this bill.

6 CHAIRPERSON CLARK: Thank you very much,
7 Representative Krebs. It sounds like PennDOT's in cahoots
8 with trial lawyers.

9 REPRESENTATIVE DERMODY: I don't think so.

10 CHAIRPERSON CLARK: Oh. Now, what -- what
11 would be -- all right. How would you cure that? I think
12 what you're indicating is that PennDOT is less than up
13 front with a lot of these homeowners and businesses, et
14 cetera. And how do you cure that through the legislation?

15 REPRESENTATIVE KREBS: Well, part of --

16 CHAIRPERSON CLARK: Do they have a negotiator
17 that goes out and tries to trick someone into taking 6
18 percent when PennDOT knows that it should be, you know,
19 prime plus one or something like that, you know? How, you
20 know, how do we cure that?

21 REPRESENTATIVE KREBS: Well, first of all, I
22 think that there had been some separate pieces of
23 legislation in the last session to ask for better training
24 for the PennDOT appraisers in that and different
25 certifications. And I believe we -- we deal with that in

1 there, that the PennDOT appraisers have to be better
2 trained so that, you know, that we hopefully get to a
3 clearer fair value.

4 CHAIRPERSON CLARK: I thought they put that
5 out on bid for appraisers?

6 MS. ALWINE: There's a couple levels. PennDOT
7 has in-house appraisers, and they also use independent fee
8 appraisers. We are requiring that the in-house appraisers
9 all be certified. Some of them were more or less going to
10 be grandfathered in, and we'd like them all to be
11 certified.

12 At another level, you talk about how in the
13 beginning of the process we're going to be able to have
14 more fairness. At the outset of the process, we, under
15 Representative Krebs' legislation, will require a little
16 more information given to the condemnees, the people who
17 are about to have their land taken.

18 And one would be information on the appraisals
19 that were done of their properties up front when they get
20 their notice of condemnation so that they can work from
21 that level on. If it appeared fair to them, it might even
22 help truncate the process right there because,
23 unfortunately, the time spans that were testified to were
24 just so lengthy and so debilitating to the homeowners that
25 we wanted to try to give them more information up front.

1 We're also requiring that now, as never
2 before, that they be issued information about the
3 condemnation procedure from start to finish when, again,
4 when they get their notice of condemnation.

5 CHAIRPERSON CLARK: And that's issued from
6 PennDOT?

7 MS. ALWINE: Well, we don't exactly know who's
8 going to formulate that. I would assume it would be
9 whichever agency is the condemnor. PennDOT, of course, is
10 the most famous condemnor in the state and the most
11 frequent. But in the course of our eight hearings over, I
12 believe, a 10-month period, we spoke to virtually every
13 organization in the state that -- that either has the power
14 of condemnation or that uses it with any frequency at all.

15 And that would apply to everyone. They would
16 have to get that information out to the condemnees.

17 CHAIRPERSON CLARK: And is it -- currently,
18 you can't -- a person whose property is taken can't get
19 that in-house appraisal from PennDOT?

20 MS. ALWINE: That's not part of the
21 current -- current procedure as far as when they get their
22 notice of condemnation. They're not given that information
23 up front.

24 CHAIRPERSON CLARK: And then one of the things
25 would be, number one, to get those appraisals more accurate

1 and release those to people whose property has been taken
2 so that they can look over and see how PennDOT arrived at
3 their figure.

4 MS. ALWINE: Right, right.

5 CHAIRPERSON CLARK: Does condemnation, does
6 that apply to ground that's actually taken? Or does it
7 also -- as I go through the Dauphin Narrows, you know, I
8 look at those gas stations that were not physically taken
9 but are certainly worth less because now they don't have a
10 major highway in front of them. Is that part of the
11 compensation?

12 REPRESENTATIVE KREBS: That is not part of the
13 compensation at this point if their property isn't directly
14 affected. I believe this only applies to the land that is
15 directly affected. Even though I agree with you that some
16 of those properties lose value if, you know -- but that's
17 just the luck of the -- the luck of the draw.

18 CHAIRPERSON CLARK: Okay. Can you give me
19 some examples where Game Commission, Fish and Boat, do they
20 condemn land, and for what purposes?

21 MS. ALWINE: We had them in our hearings.
22 They told us that luckily for them, almost all of their
23 condemnations are agreed upon. They make an offer, and
24 it's accepted. They are not as frequent users as PennDOT.
25 And they consider themselves lucky not to have to involve

1 themselves in the process as often.

2 REPRESENTATIVE KREBS: And if I can go, like,
3 to the Game Commission, in my -- in my county, we have
4 Middle Creek Wildlife Refuge. And that -- the Game
5 Commission condemned farmland in the '60s, and there was
6 some controversy. So it has generally been used when they
7 have large projects and, say, they -- they try to get
8 agreement and they may have -- they may be dealing with 25
9 property owners, and they get agreement with 24, you know.

10 And so they -- but then the 25th one is a hard
11 head. And so then they may have to -- then this would
12 really -- procedure would be used, you know, because the
13 more that you get agreement with, the other guy says, Well,
14 I have them now. And so he might bargain for more value.

15 CHAIRPERSON CLARK: And I guess my last
16 question -- and that's not directly related to this bill.
17 Or it may be -- is, you know, I had talked to
18 Representative Krebs about whether, you know, state land
19 was subject to the same laws of Pennsylvania as privately
20 owned land.

21 You know, I had a situation where a fellow was
22 landlocked, wanted to go across state game lands, fish and
23 boat lands. And they made it virtually impossible for him
24 to do that aside from going to court and forcing them. And
25 I don't even know if he would have been successful there.

1 MS. ALWINE: In other words, he wanted an
2 easement across the land and they were --

3 CHAIRPERSON CLARK: Yeah. And they wouldn't
4 give it to him. Or they put up so many obstacles that it
5 wasn't practical. And I don't think the guy can legally
6 get to his ground now today. But, you know, he doesn't
7 have the resources to take on the Commonwealth.

8 MS. ALWINE: Maybe I can work on that with you
9 after we're done here.

10 CHAIRPERSON CLARK: Representative Browne,
11 would you like to introduce yourself?

12 REPRESENTATIVE BROWNE: Representative Browne,
13 131st District, Lehigh County.

14 CHAIRPERSON CLARK: And also, Brian, if you'd
15 like to introduce yourself.

16 MR. PRESKI: Brian Preski, Chief Counsel to
17 the Committee.

18 MS. MENDLOW: Jane Mendlow, staff for
19 Judiciary Committee for Representative Kevin Blaum.

20 MS. KUHR: Beryl Kuhr, counsel to
21 Representative Blaum, Minority Chair on the Committee.

22 REPRESENTATIVE KREBS: And I was derelict
23 also, Mr. Chairman. I want to introduce Dana Alwine,
24 Republican Counsel to the Select Committee on Eminent
25 Domain.

1 CHAIRPERSON CLARK: Thank you very much.
2 Representative Maitland.

3 REPRESENTATIVE MAITLAND: Representative
4 Krebs, in your Subcommittee or in formulating this bill,
5 did you run across any instances where land has been
6 condemned and then never used for the purpose that it was
7 condemned for because I seem to recall hearing about some
8 cases where people would like their land back if the
9 Commonwealth or whatever condemnor takes their land and
10 doesn't use it within a reasonable period of time?

11 REPRESENTATIVE KREBS: Yes, we have -- we did
12 hear testimony. But the current law or the Legislature, we
13 do not really --

14 MS. ALWINE: We do address that.

15 REPRESENTATIVE KREBS: We do address that.

16 MS. ALWINE: Yeah, we emphasize that the
17 right to re-buy has to be there for the homeowner. And I
18 believe we require that no matter how many years have
19 passed, that the price be no more than the acquisition
20 price, I believe. I can show you that section.

21 REPRESENTATIVE MAITLAND: Thank you. That's
22 it.

23 REPRESENTATIVE DERMODY: Just a quick
24 question. You talked about PennDOT require -- should have
25 informed people that they receive 6 percent plus or there's

1 an additional interest rate that they should have received
2 and they didn't and they had appraisers or PennDOT did not
3 inform them of --

4 REPRESENTATIVE KREBS: That was for deferred
5 compensation. That was for deferred compensation. PennDOT
6 agreed to the 6 percent. And really, I guess the blame
7 would be there on the lawyer for the condemnee who did not
8 know that there had been court rulings that said the 6
9 percent was not a valid --

10 REPRESENTATIVE DERMODY: PennDOT knew that,
11 though?

12 REPRESENTATIVE KREBS: PennDOT knew that, yes.

13 REPRESENTATIVE DERMODY: Was it ignorance on
14 their part if they weren't -- they should have been
15 able to -- if the people didn't know, they should have
16 informed them, correct? Did your hearings confirm that?
17 And did PennDOT do that intentionally, I guess I'm getting
18 at, or they just --

19 REPRESENTATIVE KREBS: I don't think we got
20 a -- we didn't get a clear reading on that from PennDOT as
21 to what their motivation was. You know, it's just
22 like -- I was giving -- my impression is I didn't -- you
23 know, and I talked to a number of people in PennDOT.

24 You know, in the end, why would we
25 offer -- viewing that I'm part of government also -- why

1 would we offer the homeowner less than he's going to get
2 once he goes through the process?

3 REPRESENTATIVE DERMODY: He goes through the
4 whole process?

5 REPRESENTATIVE KREBS: Yes.

6 REPRESENTATIVE DERMODY: That's what I'm
7 wondering, too.

8 REPRESENTATIVE KREBS: You know, I'm wondering
9 because we have costs because we have to have the legal
10 staff, PennDOT has to have the legal staff or whatever and
11 go and fight -- fight this in court. So in the end, we end
12 up benefiting the lawyers.

13 REPRESENTATIVE DERMODY: Nothing wrong with
14 that.

15 REPRESENTATIVE KREBS: Both government lawyers
16 and nongovernment. And I understand I'm talking to -- not
17 all -- a few lawyers.

18 CHAIRPERSON CLARK: We certainly want to thank
19 you, Representative Krebs, for your testimony. And you
20 feel free to join us up here at the table along with your
21 counsel. The next individual scheduled to testify before
22 the Committee is Michael M. Ryan, and he is the Deputy
23 Secretary of Highway Administration.

24 And with him is William Cressler, Assistant
25 Chief Counsel, Real Property Division. And Paul Gnazzo, I

1 believe, is also -- Paul is going to sit in the back.
2 Deputy Secretary.

3 MR. RYAN: Good morning. Thank you
4 Representative Clark, members of the House Judiciary
5 Committee. We thank you for the opportunity to provide
6 this testimony on behalf of the Department of
7 Transportation. We understand that you are interested in
8 the Department's opinion on two bills now before the
9 Committee, Senate Bill 630 and House Bill 2043.

10 In addition, you've introduced Bill Cressler
11 as Assistant Chief Counsel. I do want to describe some of
12 his functions with the Department. He advises the
13 matter -- the Department in the right-of-way acquisition
14 matter and also supervises attorneys that are involved in
15 litigation.

16 So he comes very well-qualified in terms of
17 some of his experiences; although, I'm not going to go
18 there. I am not an attorney. I'm an engineer with the
19 Department of Transportation. I would like to preface my
20 remarks by noting that the Department has a large
21 right-of-way acquisition program.

22 It processes over 1,000 claims per year. Most
23 of those are small. Some of them are large. The
24 Department has an extensive system established for handling
25 these claims based in large part on federal requirements

1 that must be followed to obtain federal funds as well as on
2 the existing Eminent Domain Code and court interpretations
3 of the law.

4 Smaller condemnors, both on the state and
5 local levels of government, do not have similar systems in
6 place, nor do they have the financial resources of the
7 Department of Transportation. These smaller public
8 entities may well have problems with some of the changes to
9 the Eminent Domain Code being proposed that are not a
10 problem for the Department. And I'm referring to municipal
11 governments and public sewer authorities and folks of that
12 nature.

13 The Department endorses Senate Bill 630 as
14 written. It updates the procedures and increases certain
15 benefits to condemnees under the Eminent Domain Code and
16 represents, we believe, a fair mechanism to balance the
17 competing interests of public entities and private property
18 owners in the important area of condemnations for the
19 general welfare of the Commonwealth.

20 Senate Bill 630 incorporates all of the
21 procedural changes recommended by the Joint State
22 Government Commission in its 1985 report on eminent domain
23 and all but a few of the proposals for additional
24 compensation. Indeed, some of the compensation increases
25 in Senate Bill 630 are greater than those recommended by

1 the Commission.

2 The Task Force and Advisory Committee on
3 Eminent Domain Law that made the recommendations endorsed
4 by the Commission consisted of numerous senators and
5 representatives as well as attorneys for both condemnees
6 and condemnors that are well-versed in eminent domain law.

7 They had a series of meetings over a period of
8 years to determine what provisions of the Eminent Domain
9 Code needed addressed. The recommendations included
10 comments by explaining why the specific amendments were
11 being suggested. This was a comprehensive review by
12 experts in the field performed just after the massive
13 amount of condemnations for the interstate highway system
14 in the late 1960's and 1970's.

15 It addressed all the procedural issues
16 necessary to protect the public and private interests
17 involved. In addition to those included as recommended by
18 the Joint State Government Commission, Senate Bill 630
19 includes appropriate increases in certain damage provisions
20 not included in the Joint State Government Commission
21 report.

22 For example, the limited reimbursement of
23 expenses payable to all condemnees for appraisal, attorney,
24 and engineering fees is increased from \$500 to \$2,500.
25 Damages payable to farms and businesses that are required

1 to move due to a condemnation is increased from a \$20,000
2 maximum to a \$50,000 maximum.

3 Moreover, the payment is changed from being
4 payable in lieu of moving and other expenses to in addition
5 to those expenses. And compensation for delay in the
6 payment is increased from a 6 percent rate to prime rate
7 plus one point. These increases in payment are consistent
8 with complaints recently made about the Eminent Domain Code
9 and appropriately restore some imbalances recognized in
10 these areas.

11 In short, Senate Bill 630 properly updates the
12 procedures of the 1964 Eminent Domain Code as reflected in
13 the well-reasoned and documented Joint State Government
14 Commission's 1985 report and increases certain benefits to
15 assist all condemnees in assessing the impact of a
16 condemnation and to specifically reduce the adverse impacts
17 of condemnation on business properties.

18 It retains an appropriate and fair balance
19 between the government's need to proceed with public
20 improvements in an effective manner and the rights of
21 private property owners to just compensation and due
22 process of law as reflected in the well-grounded 1964
23 Eminent Domain Code as amended and the Joint State
24 Government Commission's report of 1985.

25 House Bill 2043 is good legislation updating

1 the Eminent Domain Code to the extent that it contains all
2 the procedural changes recommended by the Joint State
3 Government Commission in its 1985 report and includes
4 certain increased benefits demonstrated as appropriate due
5 to the passage of time since the last major amendments to
6 the code in 1971.

7 However, the bill goes too far by unfairly and
8 unnecessarily placing the public fisc at risk and
9 establishing procedures that would allow condemnees and
10 their attorneys to reap improper windfalls. House Bill
11 2043 includes numerous provisions that will expand the
12 ability of condemnees to file preliminary objections to
13 takings and thereby impede public improvements.

14 For example, it adds challenges to the amount
15 of just compensation offered by a condemnor as a
16 permissible preliminary objection to a declaration of
17 taking. This is a major procedural change that could be
18 used by condemnees to improperly delay public projects.

19 It also adds a requirement that service of a
20 declaration of taking be made on the same day as filing.
21 Now, although this appears to be a way to speed up the
22 condemnation process, it actually has the opposite effect
23 by providing a reason to challenge a taking if proper
24 service is not made in the short period of time mandated.

25 House Bill 2043 also includes numerous

1 provisions that will increase the financial burden on all
2 condemnors, both large and small. For example, damages
3 would be allowed for temporary construction impacts when
4 part of a property is taken.

5 The payment for personal property that is not
6 moved for one reason or another would be at the greater of
7 the cost to move or its in-place value. Evidence of market
8 value would be allowed on speculative methods of valuation
9 not traditionally allowed in condemnation cases.

10 And the Assembled Economic Unit Doctrine would
11 be made applicable at the election of the condemnee. This
12 would require public entities to buy personal property that
13 they do not need for their own use at the option of the
14 condemnee even where the condemnee can move and continue
15 his business.

16 House Bill 2043 also proposes changes to areas
17 where there is no apparent need and imposes unreasonable
18 requirements on condemnors without any corresponding
19 requirements on the condemnees. For example, the bill
20 requires that condemnors produce all appraisals upon which
21 it made its offer of just compensation at the time of
22 filing the declaration of taking.

23 This is unduly burdensome on condemnors, and
24 there is no requirement that the condemnees share their
25 appraisals with the condemnors. Under current law, damages

1 are not even an appropriate issue at the taking stage of a
2 condemnation. Damages are generally dealt with in the
3 second part of a condemnation, the board of viewers
4 hearing. At that point, the Rules of Civil Procedure on
5 discovery cover the production of expert reports by both
6 parties to the case. The bill also increases the number of
7 viewers from three to five for no apparent reason.

8 In short, the Department opposes many of the
9 provisions in House Bill 2043 because they improperly upset
10 the balance between the public and private interests
11 involved to the unfair benefit and advantage of condemnees
12 and their counsel. Senate Bill 630, we believe, provides
13 the appropriate balance between the competing interests.

14 In conclusion, I would like to commend both
15 Representative Krebs and Senator Brightbill for all their
16 hard work in this very complex issue. And I would like to
17 thank you again for inviting the Department to present its
18 position on these two bills.

19 CHAIRPERSON CLARK: We thank you for your
20 testimony. One -- I guess two of the points of this
21 legislation is, number one, to be fair; and number two, to
22 speed up the process. And I understand that you're not an
23 attorney, but the Rules of Civil Procedure on discovery can
24 take years.

25 And I think one of the purposes of this

1 legislation is to get everything on the table, you know,
2 show what you -- show your cards, let the person look at
3 them, let him take it to an attorney that might review it
4 for three or four hours and say, Hey, we'll check out the
5 appraisal. But, you know, this is probably in line with
6 what you're going to get.

7 And then you cut down on attorneys' fees. You
8 get just compensation, and you get it quickly. So, you
9 know, by -- if you continue to make the argument that, Gee,
10 you know, this stuff is all discoverable anyway, you know,
11 you have pretty well killed the process.

12 And if you need to go through discovery,
13 \$2,500 for attorneys' fees are going to go much higher.
14 That was, you know --

15 MR. RYAN: Do you want us to respond to that
16 statement?

17 CHAIRPERSON CLARK: You certainly may. You
18 certainly may.

19 MR. CRESSLER: Our experience has been that in
20 lots of cases, producing the appraisal and more information
21 for people actually ends up confusing the situation and
22 creating collateral issues sometimes that, you know, would
23 not otherwise be created.

24 The other thing is that what the code is
25 providing is you provide a copy of the appraisal at the

1 time of condemnation. That's very deeply into the process.
2 Once you get the condemnation, the offer has been made,
3 there's been several negotiation contacts.

4 And, you know, the -- presumably, the
5 condemnee has already gotten their own appraisal at that
6 time. And the biggest unfairness of the bill as proposed
7 is the condemnor must produce their appraisal, but there's
8 no corresponding duty on behalf of the condemnee to
9 produce -- to share their appraisal with the condemnor.

10 MR. RYAN: And our point of view is that if
11 it's important to share the appraisal, we'd like both sides
12 to trade appraisals. Okay. We don't feel that it's right
13 for us to keep ours back at the exclusion of the property
14 owner. But at the same time, we want the property owners
15 to be able to produce their own appraisals, keeping in mind
16 that appraisals are not an exact science.

17 I mean, they're based on professionals doing
18 their job; and they come to different conclusions.

19 MR. CRESSLER: Currently, at the time of
20 condemnation, there's two parts to a condemnation
21 proceeding: The right to take and then compensation. The
22 way the Eminent Domain Code is structured now in '64 and
23 how it's worked pretty well since then is that the
24 declaration of taking stage is only about the right to
25 take.

1 And then the board of viewers is where
2 you -- you get into the, you know, the monetary part of it.
3 And that's where the rules of discovery would -- that they
4 apply equally to both sides at that point.

5 CHAIRPERSON CLARK: And my concern is that
6 someone receives the declaration of taking. They go into a
7 lawyer's office. The lawyer says, Okay. You lost your
8 property. And he says, Well, will I be compensated for it?
9 Well, yeah, in about two years.

10 MR. CRESSLER: That's not true.

11 CHAIRPERSON CLARK: Okay. But that's the
12 impression through the process. And then the attorney
13 advises that person, Well, you'll have to go have your
14 property appraised because you're going to get into a
15 negotiation. I'm saying if that is done up front, the guy
16 can come in your office, says, My property is being taken.
17 The Department of Transportation wants -- or is going to
18 give me \$32,000.

19 And hey, you know, is there a line that I can
20 sign so that they can have their property and I can get a
21 check, rather than the game that goes on with appraisers
22 and who has what and what's hidden where and how do we get
23 that information, et cetera?

24 MR. CRESSLER: And that is how the
25 negotiations are. There is supposed to be information

1 disclosed during the negotiations with the property owners.
2 Now, they're told right up front that they're entitled
3 to -- now it's \$500; but the Department certainly endorses
4 increasing it to \$2,500 so that they can go out and be
5 counseled, you know, if that's the direction that they
6 desire during the negotiations.

7 MR. RYAN: So they could get an appraisal up
8 front.

9 MR. CRESSLER: That's the way it works
10 perfectly is if they -- when the offer is made, that's the
11 time they go out and are counseled, not when you're deeper
12 into the process and they have a condemnation document. I
13 mean, the reason for the limited reimbursement is so that
14 in the negotiation stage, way before we get to
15 condemnation, they're, you know, if they feel the need,
16 they can be counseled or use the money to hire an appraiser
17 to ensure that, you know, the Department isn't way off on
18 their figure.

19 Now, once the condemnation is filed, then soon
20 after that, the -- in Department procedures -- now, the
21 smaller condemners are different. Sometimes they go to
22 condemnation without appraisals because they just have a
23 different system than what PennDOT has.

24 With PennDOT then, as soon as the preliminary
25 objection period would expire on the taking, then, you

1 know, the amount that the Department has determined to be
2 the offer is offered to the people. And they receive that
3 money up front with their right within five years to file
4 for more compensation.

5 So they -- they get the Department's offer up
6 front. They don't have to wait for that.

7 CHAIRPERSON CLARK: All right. So
8 preliminarily, when you have your right-of-way design
9 completed, you identify the property owners; and you send
10 them a letter that PennDOT's going to need their property.
11 And in that letter, you say we are offering you X number of
12 dollars based on our in-house appraisal?

13 MR. CRESSLER: Or I mean, lots of times on the
14 bigger properties, we -- an independent fee appraisal is
15 obtained right up front. It's not always in-house.

16 CHAIRPERSON CLARK: But you tell them about
17 that?

18 MR. CRESSLER: Yes. We tell them the amount.
19 And there's a small description of how -- a little bit, not
20 a lot, but a little bit about how it's arrived at.

21 CHAIRPERSON CLARK: And then if somebody says,
22 Gee, how did you come at \$32,000, can I see your appraisal,
23 you probably won't give that to them?

24 MR. CRESSLER: That is up to the negotiator,
25 but the general policy is not to.

1 CHAIRPERSON CLARK: Representative Feese.

2 REPRESENTATIVE FEESE: Thank you, Mr.

3 Chairman. I'm still a little confused on the issue of
4 providing the appraisals. The testimony was that it would
5 be unduly burdensome. I don't understand how it would be
6 burdensome to photocopy appraisals.

7 MR. CRESSLER: Well, I believe the -- it's
8 burdensome in the sense that it burdens the negotiations
9 and it --

10 REPRESENTATIVE FEESE: So that's the real
11 issue, isn't it, that if we have three appraisals, we're
12 going to lowball it and we don't want to provide the higher
13 appraisals?

14 MR. CRESSLER: That's not it at all. I mean,
15 there's no lowballing that goes on.

16 REPRESENTATIVE FEESE: Then if there's no
17 lowballing and you're highballing, why not give them the
18 lower ones because won't that help your negotiations?
19 Right?

20 MR. CRESSLER: The -- I think the --

21 REPRESENTATIVE FEESE: If you have three
22 appraisals and you're not lowballing, give them the highest
23 one. And you're --

24 MR. CRESSLER: You --

25 REPRESENTATIVE FEESE: Excuse me. You're

1 basing your offer on the highest one. Give them the lower
2 ones, too. Won't that help your negotiations?

3 MR. CRESSLER: Typically, there's -- I mean,
4 under the federal procedures, there's one preapproved
5 amount. Now, on most properties, there's one appraisal at
6 this -- at this stage. On the larger properties, there's
7 two appraisals obtained.

8 Now, sometimes both of those appraisals are
9 approved because, you know, after going through a review
10 process, it's agreed that they use the correct procedures.
11 In some cases, one will be disapproved because it was, you
12 know, just done incorrectly in PennDOT's, you know, the
13 view appraisers' opinions. And the amount that's offered
14 will be based on just one of the two appraisals.

15 This legislation, as I understand it, would
16 require disclosure of the appraisals that are used to
17 determine the preapproved amount that's offered. Sometimes
18 whenever you get into litigation, then you get into more
19 multiple appraisals like you're talking about.

20 REPRESENTATIVE FEESE: Just by way of
21 background, I've been on both sides of these issues in
22 court, both condemnor and condemnee. And I know what I did
23 as a condemnor. But anyway, go ahead.

24 CHAIRPERSON CLARK: Would you like to testify?

25 MR. CRESSLER: It wasn't for PennDOT, I

1 assume.

2 REPRESENTATIVE FEESE: It was not for PennDOT.

3 MR. CRESSLER: Yeah, right. So I think the
4 biggest thing, though, is it gives an unfair advantage to
5 the condemnee. I understand what you're saying. And the
6 Department is working on a policy to be more forthright in
7 the disclosure of the appraisals where it's appropriate.

8 And, you know, to have it across the board,
9 though, what's going to happen is you're going to
10 have -- later on in litigation, you're going to have
11 situations where the condemnee is going to have, you know,
12 completely what the condemnor's case is.

13 And then you're going to have the -- in order
14 for the condemnor to get the condemnee's case to know where
15 they're coming from, you're going to have the three years
16 of discovery and all the tricks that can be done in
17 discovery to prevent disclosures.

18 MR. RYAN: So if you're looking at trying to
19 speed up the process, that doesn't necessarily accomplish
20 it. I think it just lends an opportunity for the
21 condemnees to be able to drag the process out.

22 REPRESENTATIVE FEESE: And just a comment and
23 I'm done, Mr. Chairman. I'm not so sure that -- well, your
24 testimony was, Mr. Ryan, that it would improperly upset the
25 balance between the public and private interests; that is,

1 House Bill 2043. And I'm not so sure that the interests
2 are balanced now.

3 And if in fact they are balanced, my personal
4 opinion, it should be weighted more to the condemnee
5 because I don't know of anything more serious, except
6 taking somebody's life or taking someone's freedom, that
7 the government can do than take their property.

8 So, you know, my feeling is if we have to
9 weight it, I'd rather weight it in favor of the private
10 citizen. That's all.

11 MR. CRESSLER: If I could respond to that. I
12 mean, we -- I think the Department agrees. And that's
13 what, you know -- the 1985 report from the Joint State
14 Government Commission was an attempt at that time to
15 balance it. And both bills incorporate most of the
16 provisions from there, most of which are procedural, some
17 of which are monetary.

18 In addition, the Department is agreeing to the
19 increased, you know, fees and appraisal cost and also a
20 very big increase for businesses from -- right now, there
21 is a -- the maximum is \$20,000 for this business
22 dislocation damage in lieu of moving costs and other
23 things.

24 The proposal would be to make that 50,000 and
25 in addition to all their out-of-pocket moving expenses.

1 So that, I mean, that is a very big increase that's in both
2 bills for businesses. And there was, you know, there was
3 some disparity there. And we believe that it's
4 been -- it's addressed in 630.

5 There were some imbalances, but they're
6 addressed in 630. 2043 goes a little too far in our
7 opinion.

8 REPRESENTATIVE FEESE: And I'm not picking on
9 you guys. You just happen to be the condemnors at the
10 table right now.

11 MR. RYAN: Sure. We understand.

12 REPRESENTATIVE FEESE: But thank you. Thank
13 you very much.

14 CHAIRPERSON CLARK: Representative Krebs.

15 REPRESENTATIVE KREBS: I have a question, and
16 this relates to history. After the report came out in 1985
17 on -- on the revision, which you now support maybe because
18 there's -- because there's -- 2043 is out there, the
19 reality is there were a couple of attempts made to
20 implement those recommendations during the latter part of
21 the 1980s.

22 And PennDOT fought those -- those changes, and
23 they were not implemented at that point. Am I correct in
24 my reading on that?

25 MR. CRESSLER: Yes. And there are changes

1 in -- there are changes between your bill and the 1985
2 report.

3 REPRESENTATIVE KREBS: Right. You're now
4 willing to accept the '85 changes because there may be
5 changes that direct the balance a little further in 2000.
6 So now you're -- I guess are we dragging you into the
7 future is my question?

8 MR. CRESSLER: I believe the point is that
9 there's very few provisions that were -- that the
10 Department opposed in the late '80s, in 1985; and they were
11 very important provisions. There were some changes in the
12 law, and now those provisions are incorporated in both the
13 bills.

14 There are still some provisions that are in
15 2043 from the report that are not in the 630 and so that
16 there are still provisions from the report that the
17 Department of Transportation opposes that are not in 630
18 but are in 2043.

19 REPRESENTATIVE KREBS: Could you enumerate
20 what those are?

21 MR. CRESSLER: One of those that was mentioned
22 was the temporary -- temporary impact of construction on a
23 property -- on property.

24 REPRESENTATIVE KREBS: Could you explain that
25 to us?

1 MR. CRESSLER: Yes. That is a provision that
2 was specifically addressed by the Pennsylvania Supreme
3 Court in the late '70s that it's not constitutionally
4 required to give that compensation to a property because
5 what happens during construction is that's an exercise of
6 the police power by the government, not the power of
7 eminent domain.

8 And it's something that everybody has to deal
9 with, not just the people that happen to have one square
10 foot taken from them but also the next property that may
11 not have one square foot taken from them. And they
12 also -- and plus everyone that goes through the area. And
13 it's a police power exercised by the government as opposed
14 to a power of eminent domain.

15 And it also could lead to speculative, you
16 know, speculative damages that, you know, that it's
17 improper for the government to -- to pay. And this -- and
18 this also addresses the gas station question about in the
19 Dauphin Narrows.

20 The Supreme Court and nationwide, there is no
21 right to the traffic that goes by your property's door. I
22 mean, the fact that you happen to be along a road and you
23 benefit from the fact that traffic goes by you, that's not
24 a constitutional right.

25 If the bypass is built and the cars now go

1 along the bypass and not in front of your gas station,
2 you're, you know, you haven't lost a private property right
3 because there's no right to the traffic that goes by you.
4 And if you opened up that door any time there's a project,
5 almost any business in the area would come forth and seek
6 compensation from the government.

7 The same principle is applicable to this
8 temporary interference during construction is that when
9 construction is over and you now have a beautiful road in
10 front of you and now you have more business, the government
11 doesn't seek your -- a part of your profits because now,
12 you know, the improvement has benefitted you, you know,
13 generally benefitted your property. So it's a trade-off
14 type situation.

15 REPRESENTATIVE KREBS: In reality, you don't
16 feel there should be any -- if somebody has a business
17 there and you're totally reconstructing the road and nobody
18 can get into their business basically for six months, you
19 have no legal obligation to compensate them?

20 MR. RYAN: The way you --

21 REPRESENTATIVE KREBS: Or you make a little
22 dirt path which nobody is really going to go down through?

23 MR. RYAN: Yeah, the way you described it is
24 we do provide access during construction to businesses.
25 Okay. We don't set it up so that there's no absolute

1 access at all. All right. Now, where it can be painful, I
2 think, is in the event of a detour.

3 Now, let's say we're replacing a bridge, okay,
4 and there's a business on one side of the bridge. A detour
5 route takes you out around, and the traffic does not go by
6 their house any longer. They can get to it from one end,
7 but it doesn't go by it.

8 The assertion that you made is that we denied
9 access to that business entirely, and that's not the case.
10 We do provide access during construction.

11 REPRESENTATIVE KREBS: I'm done, Mr. Chairman.

12 CHAIRPERSON CLARK: On page 3 underneath House
13 Bill 2043, could you explain that paragraph? We already
14 touched on this bill would allow for temporary construction
15 impact. Can you explain why, you know, what that is and
16 why the Department opposes it?

17 MR. CRESSLER: It's on our page 9. We're on
18 double-spaced copies.

19 CHAIRPERSON CLARK: All right. The next line
20 that talks about personal property, could you just go
21 through that, like, line by line, explain, you know, what
22 they are and what the Economic Unit Doctrine is?

23 MR. CRESSLER: The personal property one is
24 that that's in the event a property owner -- their entire
25 property is taken or they're being forced to relocate; but

1 there's personal property not attached to the land that
2 they have that they choose not -- that they can't move
3 because -- you know, this particular one is -- it gets a
4 little complicated.

5 But let's say that it's personal property and
6 they choose not to move it. The current Eminent Domain
7 Code and 2043 provides that they are entitled to
8 compensation for the group of -- its value in place as it
9 sits there or the cost of moving.

10 630 as well as the Joint State Government
11 Commission report in 1985 suggested that that -- that
12 that's not appropriate. If they're not going to move it,
13 the moving costs shouldn't have anything to do with the
14 compensation. It should be its value in place.

15 MR. RYAN: So it compensates based on the
16 intention of the property owner either to leave it there or
17 to move it.

18 REPRESENTATIVE MAITLAND: You mean something
19 like a gazebo out in the yard?

20 MR. CRESSLER: Something that's not fixed to
21 the land. In other words --

22 REPRESENTATIVE MAITLAND: Well, it would be on
23 the foundation, but it could be moved?

24 MR. CRESSLER: Right. And that gets into the
25 fixture law and what's -- it could be surgical blows. Or

1 I mean, it could be any piece of personal property
2 that -- either that they -- that they can't move because
3 there's no building to move into.

4 Or under -- under -- even under 630, personal
5 property, if the business is discontinued for some reason,
6 they can abandon their personal property there and have the
7 condemnor purchase it.

8 REPRESENTATIVE MAITLAND: So if you had a
9 bunch of birdbaths and lawn ornaments and you just decided
10 to leave them there because you're moving into an apartment
11 and you don't have a yard anymore, the condemnor would have
12 to pay for that?

13 MR. CRESSLER: This is for businesses, not
14 residential.

15 REPRESENTATIVE KREBS: Could I give an
16 example? Another example might be that there's a farm out
17 there. There's a farm out there, and it's a dairy farm.
18 And you decide that you're putting a new interstate in.
19 And, you know, and you actually go through and you
20 take -- you take his best land.

21 So in reality, he has his dairy barns yet; but
22 he doesn't have any land to grow his feed on. You would be
23 required to take the rest of the farm if it's of no
24 economic value to him. Wouldn't that be similar to that?

25 MR. CRESSLER: We wouldn't be required to take

1 it, but he could come in and seek compensation on the basis
2 that what he had left was not, you know, was not
3 functional. And it may be -- you're correct that in some
4 partial takings, it may be that you've, in essence, forced
5 the business to move, in which case these kind of benefits
6 for dislocated businesses would come into play.

7 If it were a business on the birdbaths, I
8 mean, they could abandon the property there as personal
9 property.

10 MR. RYAN: And be compensated for it.

11 MR. CRESSLER: And be compensated for it.

12 MR. RYAN: Okay. It's not a question that
13 they don't get compensated. It's one or the other.

14 MR. CRESSLER: The next one is evidence
15 of market value. This is the -- there's a provision
16 to -- right now that the law provides that testimony can be
17 presented on the three traditional approaches to value,
18 which are the market comparable sales approach, the income
19 approach, and the cost approach.

20 The 2043 would amend that to say that in
21 addition to those three traditional value -- approaches to
22 value, that testimony could be presented on any generally
23 accepted approach to value in the appraisal community. And
24 the Department's concern with that is that that would open
25 the door to speculative approaches to value appraising the

1 businesses rather than in eminent domain law, you appraise
2 the real estate, the highest and best use which has to do
3 with what you can do with the property.

4 But you're not -- the condemnor is not taking
5 the business. It's taking the real estate. And the
6 concern is that this would open the door to, you know,
7 speculative approaches to value that, you know, would
8 increase the amount of damages payable.

9 CHAIRPERSON CLARK: All right. So if you're
10 going to take a gas station, the gas station fellow goes
11 out and hires an appraiser to appraise it on one of those
12 three. And it's not proper to bring his CPA in to do a
13 5-year weighted average appraisal as to the income loss and
14 et cetera, is that what you're saying?

15 MR. CRESSLER: There's an income approach, but
16 it's not -- it's not necessarily the kind of approach that
17 you would use in other areas to value a business.

18 CHAIRPERSON CLARK: If I was going to sell the
19 business to someone, I would have the CPA come in and do a
20 weighted average or something over the past five years'
21 income. That's not proper to value that business for
22 condemnation purposes?

23 MR. CRESSLER: Right. And the reason for
24 that -- and it's, you know, 100 years of case law is
25 recently supported, you know, recently endorsed by the

1 Pennsylvania Supreme Court in a case -- is that you, you
2 know, it's fair market value that you're paying, not the
3 value to that individual landowner.

4 And this does create problems in a lot of
5 condemnation cases. But it's the -- that's the overall
6 policy of balancing the public and the private interest is
7 you're paying fair market value what the person would buy
8 for the -- buy the real estate. They're not buying the
9 business.

10 I mean, it's the real estate that -- that
11 you're looking at the fair market value of the real estate
12 at its highest and best use, which does bring in what you
13 can do on the property in the business. But just because
14 one person can make a million dollars off of a property,
15 the next guy that's not so good a businessman, he can only
16 make 200,000 off the property.

17 You know, the guy that's the good businessman
18 doesn't get more money than the guy that's a bad
19 businessman. It's what the market would pay.

20 CHAIRPERSON CLARK: So you endorse the 100
21 years of case law in the current Supreme Court ruling on
22 that?

23 MR. CRESSLER: Yes. This would -- this would
24 expand that.

25 CHAIRPERSON CLARK: Okay. Okay.

1 MR. CRESSLER: The last one is on the
2 Assembled Economic Unit Doctrine, which is -- it's a
3 principle that's pretty much confined to Pennsylvania law.
4 It's a legal fiction that says that personal property that
5 can be moved in certain circumstances will be treated as
6 part of the real estate and valued as a whole as, you know,
7 with the real estate.

8 In other words, the Assembled Economic Unit is
9 valued, not the -- not the land and buildings and the fixed
10 equipment, which is your -- the traditional situation.
11 That doctrine, you know, developed in the early '70s and,
12 you know, had developed in case law over the years to -- it
13 basically applies where there's no building for the
14 business to relocate to so that there -- it's a forced, you
15 know, closure of the business.

16 So the idea is it's not fair for a -- the
17 condemnee to have no place to move his business to. But
18 the condemnor only buys the land and the buildings and the
19 machinery that's attached to the floor. And he's stuck
20 with all of this other personal property that he can't
21 really use because there's no building for him to move to.

22 The law has created this doctrine that says in
23 that case, it's only fair that the condemnor, you know,
24 purchase the -- purchases the whole property. What 2043
25 would do would be to say that any time a business is taken,

1 the condemnee can elect to say I'm just -- you buy it all.

2 In other words, even if there is a place for
3 him to move and, you know, the case law would not say that
4 the doctrine applies because the general policy is you want
5 businesses to continue and move. What 2043 would do would
6 be go against that general policy by providing that a
7 condemnee can just say, I'm not moving. You buy it all.

8 And the Department doesn't feel that that's,
9 you know, good public policy or appropriate. The
10 condemnors would be forced to buy everything even whenever
11 the -- the property owner can move.

12 CHAIRPERSON CLARK: And that's -- that's a
13 court-created doctrine?

14 MR. CRESSLER: Yes.

15 CHAIRPERSON CLARK: But you don't agree with
16 that decision?

17 MR. CRESSLER: We agree with the -- we agree
18 with what the courts have done. 2043 goes beyond what the
19 courts have done and says it's not limited to the
20 situations where you can't move or what you move is not a
21 business whenever you move it.

22 2043 says all the condemnee has to say, I want
23 the doctrine to apply, and the condemnor is forced to -- it
24 goes beyond case law.

25 CHAIRPERSON CLARK: Representative Browne.

1 REPRESENTATIVE BROWNE: Just a follow-up, Mr.
2 Chairman, on the things you were mentioning. How does the
3 law take into account a circumstance as the Chairman
4 mentioned with a gas station, if he has to move and wants
5 to move but the geographic location that he's doing
6 business, he can't find a similar location that will give
7 him the same, you know, opportunity for the value of the
8 business?

9 Does the law itself provide for compensation
10 in that regard, or are there damages provided for
11 compensation in that regard? How does that work?

12 MR. CRESSLER: That's the -- I mean, if he
13 does indeed move but it's to a less favorable location,
14 that's what the \$50,000 benefit is for. That is a -- it's
15 called a -- it's now called an alternative business damage
16 because it's an alternative to moving costs.

17 It will -- it will -- under the both bills, it
18 would become a business dislocation damage, which is in
19 addition to all his costs to move to the new site, finding
20 a new site and moving there. The condemnees would be
21 entitled to up to \$50,000 based on -- you look at their
22 income taxes from two years prior to the move compared to
23 their income taxes afterwards.

24 And based on the formula, you know, they're
25 entitled to up to \$50,000 for basically that, you know, the

1 time it's going to take them to, you know, get their
2 business back up.

3 REPRESENTATIVE BROWNE: So it's capped at 50
4 grand regardless of --

5 MR. CRESSLER: Right now it's capped at 20,
6 and you get -- you don't get moving costs and you
7 get -- you get one or the other. And the both bills would,
8 you know, greatly increase the benefits to a business in
9 that kind of a situation.

10 REPRESENTATIVE BROWNE: Thank you, Mr.
11 Chairman. Thank you.

12 CHAIRPERSON CLARK: Chief Counsel Preski.

13 MR. PRESKI: A few questions to go back to the
14 appraisals where you started from. The appraisals, do you
15 have your own in-house PennDOT appraisers, or do you go out
16 and hire private appraisers?

17 MR. RYAN: We do both.

18 MR. PRESKI: Both? Well, then my next
19 question is this, that for the private appraisals, do you
20 have a stable that you regularly use from?

21 MR. RYAN: We have implemented -- since we met
22 and had our testimony before the Select Committee with
23 Representative Krebs, we have instituted what we call an
24 invitation to qualify in which anybody that believes that
25 they qualify to do certain levels of appraisal have an

1 opportunity to participate.

2 And they go through a process to get, quote,
3 prequalified to participate. So that -- if that's what you
4 mean by a stable, yes, we have a stable. But it's based on
5 their experiences coming to us and providing an opportunity
6 to participate in this effort.

7 MR. PRESKI: And you're the ones who qualify
8 them?

9 MR. RYAN: That's correct, right.

10 MR. CRESSLER: Basically, they have to be
11 certified under the state procedure that was referred to
12 where the certification is now any appraisal performed in
13 Pennsylvania has to be by a certified appraiser. And
14 there's two categories, residential and then general.

15 The general people can do, you know,
16 commercial and industrial. So the PennDOT policy that's
17 been implemented is there's three categories of appraisals.
18 There's simple appraisals which are, you know, typically
19 your residential. And you need a residential license to be
20 in that -- qualify for that category.

21 Then there's a complex and very complex
22 appraisals. And you have to have the general -- a general
23 certification to be qualified to do the, you know, the more
24 difficult appraisal.

25 MR. PRESKI: And my next question --

1 MR. RYAN: Before you move on, can I add to
2 that also? In the area of our own appraisers, there is now
3 state law that mandates certification. And we've gone
4 through the process to certify our own appraisers. So they
5 now carry a credential that meets state law.

6 MR. PRESKI: Well, then let me follow up. For
7 your own appraisers, since -- I think Representative
8 Clark's question was, Wouldn't it be easier to just, as
9 you -- when you give the notice of taking, also hand them
10 the appraisal? Won't you have that in your hands when you
11 make the decision on whether to take or not?

12 MR. CRESSLER: Yes.

13 CHAIRPERSON CLARK: They have it in their
14 hands long before that.

15 MR. CRESSLER: The appraisal is completed
16 before an offer is made.

17 MR. PRESKI: Last question. Since you've
18 relied upon the Rules of Civil Procedure, do you ever not
19 allow your own internal appraisal to be discovered either
20 as a work product of your own counsel or anything to that
21 sort?

22 MR. CRESSLER: That's the individual trial
23 counsel under the Rules of Procedure. You can either
24 disclose the report, or you can give a summary of the facts
25 and data and the opinions that are in the report. So once

1 a case is in litigation, the, you know, individual trial
2 counsel, you know, makes a determination on that.

3 And quite frankly, what has hit now -- it's
4 getting better since the certification procedure is now in
5 place. But historically, the Department is required under
6 federal procedures to do a pretty complete appraisal. It's
7 a 20 -- on the bigger claims, it's a 20- or 30-page
8 document.

9 And quite frankly, usually what you get back
10 from the condemnee is a 1- or 2-page little summary of what
11 the appraisal is. Now, that's changed a little bit because
12 the certification procedure requires a more complete
13 appraisal by everyone that's doing an appraisal.

14 But historically, there's been a reluctance,
15 even in litigation, to disclose the report. They will give
16 a summary, but there's been a reluctance because the
17 exchange isn't fair. Even, you know, when you get down to
18 the line, a lot of times the exchange isn't fair.

19 MR. PRESKI: And my next question, I guess, is
20 this: Is there a happy medium between 630 and 2043? I
21 mean --

22 MR. RYAN: Yeah. We're always willing to work
23 with you folks in trying to come to, you know, a compromise
24 on this. There are certain provisions in 2043 that we have
25 not talked about that we like.

1 MR. PRESKI: I guess my last question is this,
2 is that Representative Krebs, in his testimony, referenced
3 that a majority of the land acquisition costs are covered
4 by the federal government or paid for by the federal
5 government.

6 We have information in some of the research
7 we've done that it might be upwards to almost 80 or 90
8 percent of that. Is that fair?

9 MR. CRESSLER: In certain jobs.

10 MR. RYAN: Yeah, I'm not sure I can answer you
11 direct limit. I will say to you on our larger complex
12 jobs, like the Dauphin Narrows where federal funding is
13 involved, compensation for right of way is at the same
14 ratio as compensation for construction.

15 In other words, the federal government
16 participates to the rate of 80 percent. But not every
17 project involves federal participation. And in those
18 projects that do not involve federal participation, the
19 right-of-way settlements are paid for 100 percent with our
20 own funding at the state level.

21 MR. PRESKI: Okay. Thank you.

22 CHAIRPERSON CLARK: Let me have a follow-up
23 question on that. I understood from an appraiser that you
24 put appraisals out on bids. Now, when you do a big project
25 like Dauphin Narrows, did you put that out on bid for one

1 appraiser to do the whole project, or is that on parcel by
2 parcel basis or what?

3 MR. CRESSLER: It's generally on a parcel by
4 parcel basis. But sometimes they will group, like, four
5 residential properties on the same block or whatever.
6 They'll group appraisals like that. The current PennDOT
7 procedure is to generally go on a low bid basis.

8 We have three categories. The very complex
9 one -- ones are not on a -- they're -- they can be done not
10 on the low bid basis if the Department so -- so selects.
11 The typical appraisals are -- there's lots of people on the
12 list. Whenever there's a job to be done, notice is sent
13 out to everybody so that everyone has an opportunity to,
14 you know -- that's qualified -- to bid on that project.

15 Low bid gets the -- you know, typical
16 government low bid gets the appraisal. The middle category
17 is the same way except the people are more qualified.
18 They're more difficult appraisals. They can't just have a
19 residential qualification. They have to have a general
20 qualification.

21 And again, everyone, you know, is given the
22 opportunity to bid. And the low bid is, you know, it's
23 accepted. That procedure was in place before these latest
24 hearings and, you know, not the ITQ, but the low bid
25 concept. And at one point, the Department did not use low

1 bid.

2 And the allegations were that the Department
3 used the same bidders, used the same appraisers all the
4 time. So, you know, reacting to those allegations, the
5 Department went to the low bids so that it's the low bidder
6 that gets it. And it's not, you know, you can't be accused
7 of going to the same person all the time.

8 CHAIRPERSON CLARK: But if you do that on a
9 parcel by parcel basis, you might have, you know, 40
10 appraisers on a project.

11 MR. CRESSLER: You may have?

12 CHAIRPERSON CLARK: You may have 40 appraisers
13 on a project.

14 MR. CRESSLER: Sure. And that's --

15 CHAIRPERSON CLARK: Because I'm a supporter of
16 PennDOT, and I want some roads built. And when I heard of
17 this procedure, I was outraged, you know, that I had people
18 here who wanted to settle with PennDOT and wanted their
19 house appraised. And PennDOT said, Well, first of all, we
20 have to qualify these people.

21 And we have to put it out on bid. And then,
22 you know, we have to come back and go through the bids and
23 everything. It took four to six months, you know. And if
24 you're doing that on a parcel by parcel basis on a large
25 project, you're slowing that thing down.

1 MR. CRESSLER: They are encouraged to group
2 them, if they can, in the review process where a PennDOT
3 person reviews all the 40 appraisals. Part of that process
4 is to, you know, hopefully get consistency between the
5 different people that are doing it.

6 MR. RYAN: The other thing I would caution
7 you, too, Representative, is the kind of scenario that you
8 described, like the Lewistown Narrows where we've got lots
9 of property owners. We don't have a lot of those projects
10 statewide. Now, there is a cluster of them in your
11 district and adjacent to your district with I-99 under way
12 right now.

13 But that type of project is relatively few and
14 far between across the Commonwealth. So on a
15 Commonwealth-wide basis, we can manage, manage it
16 efficiently even though we still go through all these
17 steps.

18 CHAIRPERSON CLARK: I want you to come home
19 and tell my constituents how well we're doing it.

20 MR. RYAN: We'll work with you,
21 Representative. Thank you.

22 CHAIRPERSON CLARK: Any additional questions?

23 MR. CRESSLER: Could I -- there were a bunch
24 of questions earlier about the delay compensation issue.
25 And, you know, that doesn't come into play in your typical

1 acquisition because a lot of these -- you know, very few
2 cases actually go to condemnation.

3 You know, out of the about 20 percent of the
4 cases that PennDOT gets involved in actually go to
5 condemnation. The other 80 percent are settled before
6 condemnation. And delay compensation is only applicable
7 for the period of time after the government has taken
8 possession of the property.

9 And then you're successful later on in
10 obtaining more money than what was paid to you before the
11 government took possession. So, you know, there's a
12 condemnation, there's the payment of the -- you know, the
13 condemnor's offer is made. Then possession is transferred
14 to the condemnor, and the job is built.

15 There's five years after that payment is made
16 for the condemnee to come in and petition for a board of
17 viewers to get additional compensation. Those are the
18 cases where delay compensation comes into play because four
19 years later, you know, they obtain \$50,000 more.

20 It's only right. They should have been paid
21 the \$50,000 before possession was obtained. So the delay
22 compensation is to, you know, put them in the position as
23 if they would have had the \$50,000 initially when, you
24 know, that's what the offer should have been based on, what
25 the court proceeding, you know, gives rise to.

1 In almost all of those cases, there are
2 attorneys involved. And as the Representative said, these,
3 you know, delay compensation becomes a negotiable issue
4 under current law, you know, like other elements of damage.
5 And that's where there are some counsels -- condemnee
6 counsels out there that didn't do their homework
7 apparently.

8 Or lots of times, it's, you know, they don't
9 mind taking the 6 percent because interest is immediately
10 taxable, whereas if it's land, it becomes a capital gain
11 that's deferred. So if you're doing a total package
12 settlement, they might only -- I mean, they might only
13 want -- I mean, even attorneys that know that they can get
14 prime plus one, they will settle cases at 6 percent.

15 Sometimes they waive delay compensation
16 because they're looking at the total package not -- and
17 they look at the tax consequences as well as the total
18 package.

19 CHAIRPERSON CLARK: All right. We certainly
20 want to thank both of you for your --

21 MR. RYAN: You're welcome.

22 CHAIRPERSON CLARK: -- for your testimony
23 today. And I think what we'll do now is maybe take a
24 10-minute break to help out our stenographer. And we'll be
25 back here at 11 o'clock with Bill Nast, Esquire and his

1 testimony.

2 (A recess was taken.)

3 CHAIRPERSON CLARK: The next gentlemen who are
4 going to testify is Bill Nast, Esquire and William
5 Bresnahan.

6 MR. BRESNAHAN: Close enough.

7 CHAIRPERSON CLARK: Close enough. And I think
8 I'll have you gentlemen testify one after the other. Then
9 you'll both be available for questions from us. So we'll
10 start with --

11 MR. NAST: My name is William H. Nast, Junior.
12 I'm an expert on legislation, this particular legislation.
13 I am not a practitioner of eminent domain law generally. I
14 have had some cases in the past but not for some time. I
15 was counsel of the Joint State Government Commission which
16 was the source of the original 1964 Act pursuant to a task
17 force and advisory committee that was created in 1960.

18 The 1964 Act was revolutionary. Although,
19 there was a Uniform Eminent Domain Code that was -- had
20 been promulgated nationally; and some of the ideas came
21 from that. The concept of the 1964 Act, which is still in
22 place today, basically is premised on a very significant
23 theoretical premise.

24 And that is that the trade-off is that
25 condemnees should receive adequate or, in the words of the

1 Constitution, just compensation plus -- and there's a
2 plus -- something more than just compensation. And in
3 return, the condemnor should have immediate or as immediate
4 access to the property itself as it desires given its
5 particular circumstances. That was the trade-off with the
6 '64 Act.

7 In 1971 -- I did not participate in the
8 drafting of the 1964 Act; although, I did work for the
9 Joint State Government Commission until 1963. I left and
10 came back as counsel in 1968. And shortly after that, we
11 began a complete revision of the act because of the
12 circumstances that occurred in the 1960s.

13 The main one being that a bill had been
14 enacted federally. We call it the Muskie Bill. Its
15 correct title -- it's in the report at page 9 -- is the
16 relocation assistance and something act, which provided a
17 great deal of federal money to state governments for
18 payments connected with condemnation proceedings.

19 This was the era of the urban cross where they
20 tore out the heart of cities -- particularly Allegheny
21 County, Pittsburgh was one that was very famous -- and
22 other cities all across the country to put in super
23 highways that took the people right downtown. And it was
24 also a -- some say ghetto-clearing areas and things like
25 that.

1 There was a lot of money available, and the
2 federal government was willing to make it available to the
3 states. In order to do that, it was required that the
4 states reconsider their condemnation acts and that they
5 adopt their procedures to comply with some of the federal
6 requirements.

7 That was done essentially in the 1971 Act,
8 which is reported in a Joint State Government Commission
9 publication called the Eminent Domain Code as Amended 1972.
10 The original act was also -- a report was issued. In both
11 of these cases, there were extensive commentary with
12 provisions explaining how each of those provisions got into
13 the act and what the rationale was for it.

14 After the 1972 codification -- 1971 amendment
15 of the code, the Eminent Domain Code, it was decided that
16 the entire act should be reviewed late in the -- in that
17 decade. And in 1980, Senate Resolution 107 provided that
18 the Joint State Government Commission reactivate the
19 advisory committee and the task force, legislative task
20 force, and that they look at that -- at the entire act in
21 line with the case law that developed and the complaints
22 that had developed by condemnors' and condemnees' attorneys
23 and the academicians to a writing about the Pennsylvania
24 law and other condemnation laws.

25 In 1985, under the chairmanship of Senator

1 Brightbill, who was chairman of the task force, the report
2 of the Joint State Government Commission was issued. And
3 that's the -- essentially the basis for what is now Senate
4 Bill -- 1999 Senate Bill 630.

5 Senator Brightbill introduced Senate Bill 1269
6 in the 1985/86 session where it died in the Senate
7 Committee. In 1970 -- 1987/88, it passed the Senate and
8 died in the House Appropriation Committee. In '89/90, it
9 was introduced but didn't get out of Committee. In '91/92,
10 it was introduced as Senate Bill 277.

11 In 1997/98, it was introduced as Senate Bill
12 1435. And in the 1999/2000 session, Senator Brightbill
13 introduced the bill as Senate Bill 630. As you know, it's
14 passed the Senate with some amendments; and it's in the
15 House at this time.

16 Let me tell you a little bit more about
17 myself. Not only was I counsel to the Joint State
18 Government Commission for the 1971 amendments, I served as
19 the main staffer for those provisions that were drafted and
20 also for the 1980-85 period when the task force -- when the
21 advisory committee and the task force adopted the report.

22 But I also have -- I want it known that I
23 served as a consultant to Senator Brightbill in the Senate
24 for the purpose of reviewing the current law and the report
25 and Senate Bill 630. I did not participate in the drafting

1 of Senate Bill 630, but I did review it with staff and
2 briefly with the Senator.

3 I also appeared before the Senate State
4 Government Committee when the bill was there where it was
5 amended in the Senate. I've also been asked -- one other
6 credential you should know -- or I don't know if credential
7 is the right word. One other hat is I've been asked by the
8 Pennsylvania Bar Association to appear on their behalf to
9 explain to you and tell you emphatically that they are very
10 much in favor of codification of the laws, including Senate
11 Bill 630 or House Bill 2423 -- 2043.

12 They have a general policy, adopted policy by
13 the Bar Association to encourage the codifications. As far
14 as I know, they have no specific policy recommendations as
15 to any particular provision in the bill. So they're
16 not -- I'm not here on their behalf arguing for or against
17 any particular provision.

18 And I think it's essentially true that I'm not
19 here to testify as in regard to the worth or nonworth of
20 any particular provision of Senate Bill 2043 as opposed to
21 Senate Bill 630. But there are a couple of things I think
22 are very important for this Committee and for the House to
23 keep in mind.

24 One is that the Joint State Government
25 Commission has always acted -- operated -- by the way, I'm

1 retired from the Joint State Government Commission. I'm no
2 longer with the Joint State Government Commission. I am a
3 free agent. My consulting fees are not so high that I have
4 to worry about anything I say here today.

5 I can assure you this is my news. But I
6 think -- I think it's important that you note that the
7 Joint State Government Commission has always acted and
8 still acts, as far as I'm aware, on a consensus theory.
9 The advisory committee, which is listed in the
10 report -- and you have a copy of it -- you'll see consists
11 of quite a few advisors.

12 In most of the meetings of the Commission,
13 most of the members of the advisory committee were present.
14 So you are talking about a -- not only a very distinguished
15 group, three, six, nine, ten -- there's over 20-some
16 advisors -- you're not only talking about a very
17 distinguished group of practitioners, including Joe Klein,
18 who's present and I understand is going to testify -- and I
19 believe Mr. --

20 MR. BRESNAHAN: Bresnahan.

21 MR. NAST: -- Bresnahan is an associate of Mr.
22 Mendelson?

23 MR. BRESNAHAN: Correct.

24 MR. NAST: Right?

25 MR. BRESNAHAN: Correct.

1 MR. NAST: And he was a very active
2 participant on the condemnees' side in the advisory
3 committee deliberations. But we've never -- the advisory
4 committee never operated on a majority vote. We were not
5 a -- we were not a legislative body. We were working for
6 the Legislature.

7 As a result, the votes that were taken by the
8 advisory committee were consensus votes. Not to say that
9 there weren't dissents, including Mr. Klein I note
10 dissented on many occasions. But not to say there weren't
11 dissents, but it was never a 20 -- a 12-11 vote.

12 It was a significant consensus of the advisory
13 committee before a recommendation could be made. And I
14 think that's important because we started with a principle,
15 which I want to come back to a little bit later. And that
16 is that before we would change the language of the current
17 law, the '64 Code, before we would change it, there had to
18 be a consensus that it was a change worth making; it was a
19 change in substance; that it was a change that improved the
20 process of providing for -- for the eminent domain
21 procedure.

22 This is the one area, by the way, where the
23 Supreme Court has always allowed the Legislature to proceed
24 on procedural matters, unlike any other area that I know
25 of. As you're well aware, the court has a tendency to

1 strike down or suspend, as they put it, under the
2 Constitution, statutes that deal with procedure.

3 There was an unwritten rule that -- as far as
4 I know, it's still -- I know it's still unwritten. And as
5 far as I know, it's still in effect -- that the Legislature
6 can deal with the procedural aspects of eminent domain to
7 the exclusion of this report.

8 The -- so what I'm trying to say is that these
9 were changes that were well thought out, well argued out,
10 violently argued out on some occasions. And changes were
11 not recommended to the Legislature unless there was a
12 significant consensus from a group that included
13 representatives of condemnors, not only PennDOT but also
14 local governments and the various people that have the
15 condemnation powers, from the condemnees' attorneys, from
16 the representatives of the state government, and from
17 academicians.

18 Mr. Snitzer, who wrote the book on eminent
19 domain, was a member of the advisory committee, as was a
20 professor from Penn, Professor Krzywicki, and Professor
21 Feldman from Dickinson. The changes that they recommended
22 are set forth in the summary, summary of recommendations in
23 this -- in the report on page 9.

24 Most of those recommendations -- there's 11
25 recommendations that were specifically -- specifically made

1 in addition to codification. Of that, I think two are not
2 in House -- Senate Bill 630. One of those is actually in
3 House Bill 2043. And the other is -- I'm confused at the
4 moment.

5 I'm not sure if it's in either or in both or
6 in one or the other. I'm not sure. And it's a technical
7 matter, very technical matter. The -- I think that
8 my -- what I would like to address here is I think -- I'm
9 going to assume that anything that's in Senate Bill 630 and
10 in Senate -- in House Bill 2043 is probably a given.

11 So I'm not going to reargue whether it should
12 or shouldn't be in. In fact, I have no real interest in
13 that. I do have an interest in what I see as maybe three
14 or four major general issues in the -- in House Bill 2043
15 as opposed to Senate Bill 630.

16 I'd point out that I was involved in the
17 drafting of the report, which is the basis for 630. The
18 first one is -- what bothers me is that the -- there's been
19 a lot of editorial drafting changes. I think this appears
20 to be what's now known as simplified drafting in House Bill
21 630.

22 I'll give you a couple of examples. If you
23 have a copy of the bill, if you look on -- and this
24 is -- this comes down to practically every section has this
25 kind of change in it where the words are just moved around

.1 and redrafted.

2 If you look at page 12, for example, under
3 Service, Senate Bill 630 and the existing law says, "The
4 service shall be served, within or without this
5 Commonwealth, by any competent adult." The bill says,
6 "Within or without the Commonwealth, the notice shall be
7 served by any competent adult." Of no significance at all.

8 This kind of change is literally in, I would
9 say, well over half of the sections. Now, there is a
10 principle of statutory construction that says if the
11 Legislature changes the words of a statute, it must mean
12 a -- it must require a different interpretation.

13 As you recall, I said that when the advisory
14 committee was considering each of the changes, they
15 adopted -- they followed the process of not changing the
16 language from the 1964 Code unless there was an intent to
17 change something substantive in the particular section.

18 It bothers me not that these changes aren't
19 better, not that they're not 1999 stylistic changes, but
20 that we're changing existing language in existing law
21 without any purpose in changing that in a statute that has
22 been interpreted by the court since 1964.

23 And without -- you know, I just don't see the
24 reason why that's being done unless there is a substantive
25 change intended. Most of these I'm sure there isn't. So

1 that bothers me a great deal. And there's some -- there's
2 some places in there where the mere changing of this around
3 may very well lead to a different kind of interpretation.

4 For example, there's a provision that deals
5 with allowing people to enter the land to do studies,
6 tests. Current laws talk about soundings. When that's
7 changed in Senate Bill -- House Bill 2043, it says that you
8 can enter to sound. I don't know.

9 I'm not sure whether sound -- the verb is the
10 same as soundings. I think soundings to me means drilling
11 and finding out how stable the ground is, where sound might
12 be -- I don't know -- birds chirping or -- I don't know.
13 All I'm -- I'm not suggesting that this is the end of the
14 world or anything like that.

15 I'm just saying that I don't see any reason to
16 change statutory language just for the sake of changing it
17 in a bill that's been interpreted by the courts for over 35
18 years. There's other provisions which don't seem to be
19 significant, but they -- it bothered me because I think
20 they significantly impinge upon the underlying structure of
21 the statute, the 1964 Code as amended.

22 And what I'm talking about there again is this
23 dichotomy between the condemnation proceeding itself and
24 damages. And the question has come up about the right of
25 appraisals at the time that the condemnation is filed.

1 Mr. Cressler said -- and it's my understanding that at
2 least PennDOT -- I don't know about all the other
3 condemnors -- often give appraisal information before they
4 even file the condemnation.

5 But the point is the statute makes it a
6 requirement that it be done on the -- at the time the
7 condemnation is filed. That's mixing the condemnation
8 procedure; that is, whether you can condemn the property,
9 with the damages. And I think that that in the long run
10 may prove to be a very serious objection to that kind of
11 approach.

12 There's nothing -- I have no problem at all
13 with giving appraisals. I think, you know, appraisals
14 should -- they should have access to appraisals. No
15 question about it. But I think mixing up these two
16 separate concepts is very dangerous because what you're
17 doing is you're trading off against the availability of the
18 property -- property to the condemnor for really a
19 negotiating position that improves your stance on the
20 negotiations.

21 I think we'd be better served, the people of
22 the Commonwealth would be better served in the long run to
23 keep those two boxes separate. There's other such things.
24 Like, for instance, there's a definition of just
25 compensation in the definition section on page -- on page

1 6.

2 And it's almost word for word the same as the
3 definition in page -- of the substantive section on page
4 34. Why it isn't identical, I don't know. But what I want
5 to argue or what I want to present to you and argue, I
6 guess, is the fact that you have two different statements
7 in two different places in the same law, if this passes.

8 It presents the problem that if you amend one
9 of the two, do you -- and forget to amend the other
10 one -- and that happens, as you all know -- you have
11 yourself a mishmash, like which controls -- and this is
12 obviously substantive law. Definitions are definitions.

13 I know that the rationale for putting the
14 definitions in the act are to, I guess, to make it more
15 readable by laypersons. I don't know. It troubles me when
16 you put the same -- when you put substantive law in the
17 definitions. I don't think definitions are as good
18 drafting as probably the place for that.

19 There have been other occasions where that's
20 been done. So, you know, I can't say it's never done
21 because it certainly is. But it troubles me. Then to put
22 the same language in two places and not make it identical
23 makes no -- absolutely no sense to me.

24 I think that's a case of poor drafting and
25 poor theory under the drafting to put those provisions

1 in -- into a bill that doesn't -- that doesn't really
2 require it. On the area of definitions, I'm troubled by a
3 lot of the definitions that have been added in the House
4 Bill.

5 Farmhouse, as far as I can tell, appears once
6 in the bill. I don't know why it's in the definition
7 section. If it appears 100 times, sure. The definition
8 says it's the residential part of a farm operation. Gee, I
9 don't know. I sort of thought that's what a farmhouse was.

10 I don't know that it really requires a
11 statutory definition unless you intend to make it something
12 other than just the residential part of a farm. If that's
13 the intent, if that's the intent, the definition doesn't do
14 it. If that's not the intent, then why have the definition
15 if it only appears once in the act?

16 If you really want to tie this down, why not
17 put the language in the definition in the act in this place
18 where the substance requires it? I don't understand the
19 drafting behind such a thing. Same with concepts like
20 highest and best use, just compensation.

21 Some of these others are -- are common law
22 definitions that the courts have construed that use pages
23 and pages and pages of court cases to reveal. You cannot
24 compress that kind of a common law definition into two and
25 a half -- two lines in a word like highest and best use.

1 This also appears in other places in the act.

2 The Assembled Industrial Economic
3 Doctrine -- Economic Unit Doctrine -- Assembled Industrial
4 Unit Doctrine is a peculiar thing to Pennsylvania. As far
5 as I know, it doesn't appear in any law of any other state.
6 It was decided by a Superior Court at a time when they
7 thought that it was required.

8 It's been addressed by a lot of other
9 provisions in the act that deal with relocation -- business
10 relocation damages and so on. I don't think the Assembled
11 Industrial -- well, Assembled Industrial Economic Unit
12 Doctrine doesn't apply to residences. And there's several
13 other of those kind of provisions.

14 The third group of provisions that are in
15 House Bill 2043 -- and I didn't really say there's anything
16 wrong with them, except they're what I call got you
17 provisions. A lot of the -- it seems to me a lot of the
18 provisions that are added -- like, you have to serve the
19 complaint the same day that you filed it. So what happens
20 if you don't?

21 I mean, we got you. You can't go ahead with
22 the condemnation. You have to start all over because you
23 didn't serve it on the same day. That's nonsense. No
24 court will order that. So what does it mean? It means
25 that you have one more hearing. I mean, talk about delay.

1 It has one more hearing to delay the process,
2 not on the damages side, but on the condemnation side which
3 changes the negotiation position on the damage in the other
4 box because now they have to do it over. They have to go
5 back and file again. This is, of course, six weeks later
6 after the preliminary objection's been filed.

7 You have to go back and re-serve it again and
8 make sure that the same day you serve the guy in wherever,
9 a copy, a true and correct copy of the declaration of
10 taking -- I mean, it's just a got you provision. What its
11 purpose is, I don't know. There's other ones that says you
12 have to do -- the court has to do such in 30 days.

13 There is a provision in 630 that says the
14 court has to -- at the time, I told the advisory committee
15 in my view that the court would ignore that; and they have.
16 And they're going to ignore the 5-day provisions and the
17 30-day provisions. They're going to ignore those. You put
18 them in.

19 But again, it gives you like a got you thing
20 where you didn't -- the court -- you know, if somebody
21 didn't do something in the time period that was allotted, a
22 very short time period in some of those cases, then you can
23 somehow delay the proceeding.

24 It's also true of the one that
25 requires -- that makes a part of the preliminary objections

1 the -- a good faith estimate of just compensation.
2 Completely mixing the two boxes between the condemnation
3 aspect of the proceeding and the damage proceeding. I have
4 other examples of those, but I'll go on.

5 And finally, the substantive provisions. I
6 think that PennDOT suggested in their testimony that this
7 upsets the balance. I think there's no question that House
8 Bill 2043 upsets the balance. And I think I have to remind
9 you of at least back to the 1971 amendments.

10 The trade-off, as I said, was the condemnor
11 gets the property, which they're entitled to under the
12 Constitution. They're entitled to get the property.
13 There's only a very limited number of ways you can object
14 to the actual condemnation. There's four of them
15 currently.

16 There will be four plus that bad faith
17 estimate of just compensation, which has nothing to do with
18 whether they get the property. You're bringing that into
19 the other box to stop the proceeding from going ahead. On
20 the other hand -- and you're mixing the two boxes, as I
21 said.

22 In 1971, under the Muskie Bill, there was
23 clearly an understanding by the -- by both the Congress and
24 the Pennsylvania Legislature and the legislatures of other
25 states that the trade-off would be that condemnees would

1 get more than just compensation.

2 There's no way under our bill that any
3 condemnee doesn't get more than the constitutional
4 requirement of just compensation. By mixing the damage or
5 benefits provisions of one chapter of the bill in with the
6 compensation for the real estate, which is what's
7 constitutionally required by the Pennsylvania Constitution
8 and in federal cases by the Federal Constitution, you
9 are -- you may be converting the benefit and damages side
10 to some constitutional right.

11 I don't think that's really what you want to
12 do. We have a lot of money today. The Governor has a lot
13 of money. We're all anxious to spend the Governor's lots
14 of money. But there may well be a day when we desperately
15 need public projects done when we don't have so much money.

16 And I think you have to also remember that the
17 taxpayers have an interest in this whether the money comes
18 from -- I actually pay federal taxes as well as state
19 taxes. And whether the money comes from Washington or
20 comes from down here in Harrisburg, it's still my money.

21 And I think that -- my sympathy is with the
22 condemnee. The condemnee today gets more than just
23 compensation because however that's determined, they also
24 get moving benefits. They get -- in the case of
25 residences, you know, they get the mortgage payments, they

1 get interest payments.

2 They get all kinds of additional amounts of
3 money over and above what the Constitution requires. Now,
4 under this proposal, you're not only giving them
5 more -- and I don't have any objection to the fees being
6 increased. I think that's a good provision. It should
7 increase the appraisal fees and that. And there seems to
8 be no dispute about that.

9 I don't have any problem with that. But by
10 mixing up the two boxes between the right to condemn and
11 the -- and by adding the additional benefits, if you will,
12 for the condemnees, I think you're upsetting a balance,
13 which I suspect will result in the bill never being passed.

14 That's all I have to say. I will answer any
15 questions or try to answer any questions.

16 CHAIRPERSON CLARK: I think what we'll do is
17 we'll ask you some questions right now. We'll hold off on
18 you a second. I guess I'll -- an observation and a few
19 questions.

20 MR. NAST: Sure.

21 CHAIRPERSON CLARK: Maybe all observations.
22 The word changes, now, I want you to know that there are a
23 lot of staff people who work for the Senate and the House
24 who make a good living off of mixing these words around.

25 MR. NAST: I did that for a long time.

1 CHAIRPERSON CLARK: I want you to know you're
2 tramping on some serious toes here.

3 MR. NAST: I am aware of that, yeah. And I
4 did it myself.

5 CHAIRPERSON CLARK: All right. Now, the
6 next --

7 MR. NAST: I always had a rationale for it,
8 though. And I haven't seen a rationale for this.

9 CHAIRPERSON CLARK: All right. Well, it's
10 nice that you have seen the light in your previous ways
11 of --

12 MR. NAST: Oh, no. I didn't say that. I
13 didn't say that.

14 CHAIRPERSON CLARK: Now, the way I look at
15 this, okay, is we want these highways built.

16 MR. NAST: Yeah.

17 CHAIRPERSON CLARK: But we want the people
18 whose property is being taken to be compensated as promptly
19 and fairly as possible. And we don't want to mix the
20 compensation and the taking, like you said. And that
21 appraisal that is made available on a declaration of taking
22 that's filed at the courthouse should have been available
23 with that property owner long before that when that
24 right-of-way letter went out and when they sat down with
25 Mrs. Smith and said, We think your property is worth

1 \$32,000. All right. So -- so, you know, we agree --

2 MR. NAST: I'd point out that none of the
3 predeclaration of taking procedures are required by the
4 statute.

5 CHAIRPERSON CLARK: Well, I think maybe that's
6 where the statute needs to go then. All right.

7 MR. NAST: That might be. I don't know.

8 CHAIRPERSON CLARK: You know, because once
9 PennDOT files that declaration of taking, their project
10 moves on; and the people get their highway. And I can see
11 where it may be more important to continue the construction
12 of that road than it is to fool around with these people
13 who object.

14 And, you know, maybe that in the back of
15 someone's mind and subconscious that those people are going
16 to be penalized because they didn't sign on board to help
17 us build this road. And that might be there subconsciously
18 with PennDOT.

19 So I think, you know, my observations of, you
20 know, what you said is -- is, you know, PennDOT gets their
21 property, builds their highway for the public good, safety
22 issues; but the people need to get their appraisals, money
23 and that issue out of the way as quickly as possible and as
24 up front as possible and even before those actual papers
25 are taken.

1 The goal is to never have a declaration of
2 taking filed other than in the recorder's office when it's
3 agreed to.

4 MR. NAST: My guess is that if House Bill 2043
5 passes as it is today, you will have a lot more
6 declarations of taking being acquired because you're going
7 to have a lot more ways to stop the condemnation. And that
8 in turn will lead to more lawyers in the longer run, more
9 lawyers' fees, which are not paid out of the \$2,500.

10 That was a gift. That was always considered a
11 gift. I mean, it's not attorneys' fees. It's not
12 appraisal fees. It's a bone to the person who's having
13 their property taken, which is very traumatic. Someone
14 said it's like losing your life, and I agree with that.

15 My parents' property was condemned. I know
16 how traumatic that is. But that was a gift. That was
17 something thrown in to expedite the process. And I think
18 once you start putting in more ways to object to the
19 condemnation, what you're doing is delaying it.

20 And you're delaying it because the balance of
21 negotiations has shifted now from wherever it is now to
22 more in the way of the condemnees are stalling the property
23 out to get more money in the long run. The example used by
24 one of you earlier was if there's 25 properties and
25 everybody signed up but one, the one gets more.

1 And you go to Philadelphia. Remember, you
2 know, the building down there where you go into the square
3 that has the hot dog stand or the restaurant that's right
4 there where the building overshadows it? That guy never
5 did get paid because he refused to sign off.

6 I think you're looking at more declarations of
7 taking being required to be filed if you adopt some of
8 these provisions. I may be wrong. I've been wrong before.
9 But that's the way I feel. I don't think it reduces it.

10 CHAIRPERSON CLARK: Representative Browne.

11 REPRESENTATIVE BROWNE: Thank you, Mr.
12 Chairman. I'm far from an expert in this area, as you are,
13 in terms of --

14 MR. NAST: I'm an expert in the legislation,
15 not in the field.

16 REPRESENTATIVE BROWNE: Well, I think that's
17 important because of how it's applied in some of
18 the -- some of the language that's in it. You had spent a
19 little time on just compensation. That's -- in terms of
20 where I'm at at this point, that's where I have some of my
21 concerns because when I -- as somebody who's done some work
22 in accounting and finance, I would consider fair market
23 value of a condemnee's entire property interest to
24 be -- should be applied to be an economic value, what it's
25 worth to them to run the business, what cash flow they get

1 from the business on a day-to-day basis.

2 And I -- in terms of the condemnation process,
3 if a property owner's underlying real estate provides value
4 to that business, the business is location sensitive and
5 the case law in the application of this law doesn't allow
6 for that economic value to be given to the owner if he
7 can't find a comparable -- a comparable property in which
8 to run that business if it's condemned; in other words,
9 he's out of pocket, say, a couple hundred thousand dollars
10 a year, he can only be compensated \$50,000 total damage.

11 How is that -- my confusion is how could that
12 be considered just compensation?

13 MR. NAST: Well, first of all, just
14 compensation applies to the real estate. I think we're
15 mixing the real estate and the other kinds of things.

16 REPRESENTATIVE BROWNE: I guess the definition
17 confuses me then because it's fair market value on the
18 condemnee's entire property interest.

19 MR. NAST: Property interest. I don't know
20 that that includes his business.

21 REPRESENTATIVE BROWNE: Does that apply in
22 case law to mean just the real estate?

23 MR. NAST: The definition that's in the act on
24 page 34 of 2043 and also back to the definition section,
25 almost the same but not quite, is -- is essentially one

1 that's been developed with case law over the years. It's
2 in the '64 Code. And it was an attempt to codify, broadly
3 codify the concept.

4 There's also -- you have to read into the
5 general language of 703 which deals with fair market value.
6 But at one time, the business interest and -- were not
7 included in the concept of just compensation. It was the
8 real property, period, the property that you actually took.

9 And the provisions in the other chapter that
10 deal with dislocation, relocation, moving, all those
11 various benefits, if you will, damages or benefits -- I
12 think benefits to the condemnee because they get
13 them -- whatever they get for the property, they get those
14 in addition. And those are attempts to address your
15 problem.

16 They also can get under the Assembled
17 Industrial Unit Doctrine and other doctrines of other
18 concepts of law like the fixtures doctrine, all of that,
19 they also can get those kind of values. They also get
20 values under the unity of use where if they have one piece
21 of real estate that they're doing their business on and
22 next door there's another piece of real estate that
23 services that but they're not taking that, there's a
24 doctrine -- there's provisions in all of the -- both of the
25 bills that deal with that.

1 There's other kinds of ways to address that.
2 But the definition of just compensation is sort of
3 time-honored constitutional language that the courts have
4 developed since 1776 or before -- 1789 or before.

5 REPRESENTATIVE BROWNE: You're saying in terms
6 of the application of the statute, in terms of condemnation
7 procedures, a business owner can be put at whole, can be
8 put at whole and doesn't have to close?

9 MR. NAST: Oh, yeah, because first of all, he
10 can move the business. And then he gets paid for moving.

11 REPRESENTATIVE BROWNE: Yeah. But paid for
12 moving and the economic value of that property that he
13 would lose by moving are not the same thing. Taking your
14 real estate, taking your fixtures and moving them from one
15 site to another is not the same as what that site-sensitive
16 location and the value of that location is. If moving --

17 MR. NAST: It's what a willing buyer and a
18 willing seller would have paid for it.

19 CHAIRPERSON CLARK: No, it isn't. No.

20 REPRESENTATIVE BROWNE: And I think
21 that's -- my opinion what's -- how Representative Krebs'
22 bill addresses that is by increasing the damages from 25 to
23 50.

24 MR. NAST: Oh, I have no problem with that.
25 Yeah, I have no problem with that.

1 CHAIRPERSON CLARK: But in a lot of cases -- I
2 guess in some cases, that wouldn't, you know -- it depends,
3 I guess, on the circumstances.

4 MR. NAST: Yeah. It's the fair market value
5 before and after the condemnation. If you look on page 35
6 of the bill at 703, Fair market value shall be the price
7 which will be agreed to by a willing and informed seller
8 and a buyer taking into consideration, but not limited to,
9 the following factors. And there's a list of factors
10 spelled out. That's in the law. It is the law.

11 REPRESENTATIVE BROWNE: Just in theory --

12 MR. NAST: It is the law now.

13 REPRESENTATIVE BROWNE: Just in theory, I'm
14 just a --

15 MR. NAST: Are you going to the different ways
16 of valuing market value that PennDOT complained about
17 opening the door to, other than the enumerated ones that
18 are currently in the law, methods of valuation of property?
19 I don't really know about that.

20 It strikes me that -- we went through a
21 significant period of litigation where any kind of
22 expertise -- expert testimony was allowed. And we got
23 some -- there are some who would say we got some extremely
24 bad cases -- bad results. I don't know whether this is a
25 way of preventing that kind of thing in this area.

1 I don't know. I have no real judgment about
2 that -- that aspect.

3 REPRESENTATIVE BROWNE: Thank you.

4 CHAIRPERSON CLARK: Representative Krebs.

5 REPRESENTATIVE KREBS: I just have one
6 question. In your statement that you're saying that all
7 condemnees get more than just compensation, do you have any
8 data to support such a broad statement?

9 MR. NAST: Well, just compensation is what
10 they're entitled to by the law. And they get that either
11 by negotiation, by a hearing before a board of view that
12 isn't appealed, or by a trial de novo in front of a court,
13 or by appeal from that trial de novo to the Superior Court,
14 or by the Supreme Court on certiorari or on allocatur.

15 They always get that. However that -- or
16 whatever that amounts to, they always get --

17 REPRESENTATIVE KREBS: You're saying by
18 definition, they get --

19 MR. NAST: They always get just compensation.

20 REPRESENTATIVE KREBS: They get the definition
21 of just compensation. But I was looking at it from a
22 layman's standpoint.

23 MR. NAST: You mean they don't get as much as
24 they want, is that the definition?

25 REPRESENTATIVE KREBS: That they don't get as

1 much as they personally value the property.

2 MR. NAST: Well, I can't respond to that. I
3 mean, my parents thought their property was worth a million
4 dollars. The Commonwealth gave them 19,000. They couldn't
5 get an appraiser that said it was worth more than 19,000.

6 REPRESENTATIVE KREBS: I'm just saying that
7 I'm not sure by legal definition they -- they get just
8 compensation.

9 MR. NAST: They're required to by the
10 Constitution.

11 REPRESENTATIVE KREBS: That's right. But the
12 point is, but that just compensation is defined by -- by a
13 lot of maybe legal precedents and that over a long period
14 of time. But that does not necessarily mean that they got
15 the value. That is really a tax to them personally. They
16 got the legal definition of --

17 MR. NAST: Well, Representatives Krebs, your
18 statement is applicable to anything. If I don't get what
19 I want, then does that make it wrong? I mean, they
20 get -- they get what they agreed to by negotiation. Or
21 they get what the board of view, which is a point -- I
22 noticed in the bill that the number of the board of view is
23 raised from three to five.

24 I don't know if the counties know that because
25 they're the ones that pay that. I don't think they're

1 going to be too happy about that, but that's a -- they get
2 what the jury awards them. Or they get what the Superior
3 Court provides if it's on appeal. I mean, how else can
4 you -- Commonwealth Court. Pardon me. Commonwealth Court.

5 How else can you measure just compensation
6 except to say it's what the law gives them, which they're
7 entitled to? And then in addition to that, they do get the
8 other things. But that's my point. They always get more
9 than just compensation because they're also entitled to the
10 various benefits that they get under the other chapter.

11 They get those whether they're happy with just
12 compensation or not.

13 REPRESENTATIVE KREBS: Or there's the
14 situation because the procedure is so complicated and so
15 time consuming that they finally say I'll sign here because
16 of their frustration. And they do not get the true value
17 because some of them are -- they're either intimidated by
18 the system or they're frustrated by the time constraint
19 that is imposed on them; that the lawyers on the other side
20 know how to drag it out; that they wait till the last day
21 before they file, and then they file an objection to -- or
22 something to extend it out.

23 And this person, his life is on hold because
24 you have decided -- we as a society have decided to do
25 something.

1 MR. NAST: Representative Krebs, I hate to
2 disagree with you. But first of all, they've already lost
3 the property if you're past the declaration of taking
4 point. The property is gone. Secondly, they've already
5 received, quote, estimated just compensation. They've
6 already received part of the money at least.

7 What they're arguing about is the surplusage,
8 the addition on top of what an appraiser -- I mean, do we
9 assume that the Department doesn't act in good faith? Do
10 we assume that certified real estate appraisers don't act
11 in good faith? And if we do, where do we draw the line on
12 that? I mean, who acts in good faith?

13 Can't we make some assumptions at least the
14 representative of government acted in good faith?

15 REPRESENTATIVE KREBS: Well, I think we have
16 proven in history at times that representatives of
17 government have not always acted in good faith.

18 MR. NAST: That's true. But do we make that
19 assumption as to the future as to all of them? I mean,
20 that troubles me a great deal.

21 REPRESENTATIVE KREBS: Okay. Well, some of
22 your statements trouble me a great deal, too.

23 MR. NAST: I'll be glad if you question me
24 about it.

25 CHAIRPERSON CLARK: Mr. Bresnahan.

1 MR. BRESNAHAN: I think I'll move over here,
2 if I might. I will be brief. My name is Bill Bresnahan.
3 I am a lawyer from Pittsburgh with a statewide practice,
4 started out as a condemnor's attorney with the Court
5 Authority of Allegheny County and then the Urban
6 Redevelopment Authority of Pittsburgh and then for the last
7 30-some years have been a plaintiff's attorney principally;
8 although, I do do trial work for the Pennsylvania Turnpike
9 Commission as an independent counsel.

10 My feelings about these two bills are very
11 simple. I do not favor either of them. If I had to favor
12 one over the other, I would favor the Senate Bill over the
13 House Bill. In brief, the reasons why I do not favor the
14 House Bill have been mentioned. And I'll simply mention
15 the categories to you.

16 First of all, it mixes the boxes; that is, the
17 taking issue versus the damage issue. And I think that is
18 a substantial mistake. Secondly, it is very sloppily
19 written. My apologies to the authors if they are present.
20 It is very sloppily written and I believe contains actual
21 errors of law, particularly in the area of the Assembled
22 Economic Unit Doctrine definition.

23 I have problems with going to different
24 methods of valuation because the different methods of
25 valuations have been overruled by the courts in the past,

1 and I do not believe they will be allowed by the courts. I
2 have problems with the preliminary objections the way they
3 are drafted because the preliminary objections are too
4 broad.

5 I have problems with the estimate of just
6 compensation concepts. I have problems with the got you
7 provisions that this past gentleman mentioned. And I have
8 problems with the increase in the number of viewers, which
9 I don't find to be a -- I just see no reason for it.

10 I don't think our problems are at the viewer
11 stages in the eminent domain area. And lastly and probably
12 an overall suggestion is I have problems in that it really
13 dramatically upsets the balance between condemnor and
14 condemnee. The condemnee is given too many ways to hold up
15 a project.

16 However, I can't favor Senate Bill 630 either.
17 And the main reason I can't favor it is it does not address
18 one of the critical problems that exists for condemnees in
19 the state. The normal condemnation case does not have the
20 problems that we're looking at. They are the exceptions.

21 I am betting you that 90 out of 100 cases that
22 go through don't have any of these problems. And out of
23 the remaining 10 cases, out of the 10 percent of the cases,
24 one percent are dramatically a problem. And by that, I
25 mean the taking of commercial properties.

1 With great regularity, we're finding that
2 these people are simply being destroyed, not hurt,
3 destroyed. They are being put out of business. They
4 cannot find a substitute property. When the offer comes
5 and it is inadequate to buy a substitute property, then the
6 moving provisions don't assist them.

7 To move the personal property and to be unable
8 to find a substitute property is a disaster. So that if
9 you have a good commercial enterprise, many of them that
10 have been in existence for 30 years, and all of a sudden
11 they get an \$800,000 offer on their real property, and
12 along with that the condemnor says, And we'll move you to
13 your relocation property, thank you very much.

14 I'm going out now and look for a relocation
15 property, and I've found one. I found three of them. One
16 is at \$2.6 million, and one is at \$1.9 million. What do I
17 do to make up the difference between the \$800,000 and the
18 2. or \$1.9 million? And that is, you can't do anything.
19 You're getting killed.

20 And we can't allow that to continue. I
21 believe that House Bill -- or Senate Bill 630 does not
22 address it. The \$50,000 that Representative Krebs has
23 recommended all along is a major improvement over the
24 \$20,000, but it doesn't solve the problem.

25 Now, go back to the gentleman sitting on my

1 far left who raised an issue a few moments ago. The
2 problem is that historically, Pennsylvania doesn't pay for
3 profits, the business losses. They just don't. The law
4 has been that and has been that solidly.

5 And the fact is that that's where the people
6 are getting killed. We have to do something more than just
7 a blanket \$50,000, which brings me to my last point. And
8 that is that I don't believe either of these bills should
9 be passed and either of these bills should even be
10 considered until there is some meshing.

11 By that, I mean there are two opportunities
12 that's available to you gentlemen before you pass anything.
13 One is to send it back to the advisory committee for
14 thoughts about what has been mentioned here, exceptions
15 that have been taken here.

16 The second is a committee, a very, very good
17 committee that has not been utilized at all by anybody that
18 I am aware of. And that is, the Pennsylvania Bar
19 Association has a real property section; and that real
20 property section has an eminent domain committee.

21 I was the chairman of that until I was very
22 recently unceremoniously dismissed by the new head of the
23 committee. That committee is constantly looking for work.
24 It is composed entirely of people who do eminent domain for
25 a living, both condemnors and condemnees.

1 I would think that this -- either of these
2 bills should be sent to them for comments prior to it going
3 any further, okay, because those are the people making
4 their living doing this. And I think you'll get nothing
5 but interesting comments coming back, helpful comments
6 coming back.

7 So I am not speaking on behalf of the
8 Turnpike, by the way. I'm an independent counsel. I'm
9 here speaking to you as a lawyer who works on both sides.
10 I could not support House Bill 2043 because of the reasons
11 I've told you. I could not support the Senate Bill because
12 it doesn't go far enough, even though it is a major
13 improvement on what it's done.

14 CHAIRPERSON CLARK: Thank you very much. Do
15 you think we need a separate set of rules for commercial
16 real estate?

17 MR. BRESNAHAN: No. No, I don't think we
18 should go separate at all. However, I think we
19 should -- and maybe I'm misinterpreting your question. Do
20 I think that we have to have specific provisions dealing
21 with commercial entities? The answer is yes.

22 CHAIRPERSON CLARK: Yes?

23 MR. BRESNAHAN: But it has to be part of this
24 overall --

25 CHAIRPERSON CLARK: That's correct. That's

1 correct. But a different section.

2 MR. BRESNAHAN: Correct.

3 CHAIRPERSON CLARK: When you hit a commercial
4 property, you can get your CPA in here; and you can average
5 the incomes or weight them or whatever to get a fair market
6 value for the business rather than just have the real
7 estate appraised.

8 MR. BRESNAHAN: But make sure you understand
9 what you're saying when you say that because that's going
10 to be a big dollar number.

11 CHAIRPERSON CLARK: Right. Yes, it is. Yes,
12 it is.

13 MR. BRESNAHAN: But I like where you're going
14 because this doesn't do it.

15 CHAIRPERSON CLARK: But that is what a willing
16 seller and a willing buyer may do.

17 MR. BRESNAHAN: If they were buying the entire
18 entity; that is, the real estate plus the business, you're
19 absolutely right.

20 CHAIRPERSON CLARK: Isn't that what they're
21 condemning?

22 MR. BRESNAHAN: No. That's the problem see.
23 People think that's what they're condemning. And the
24 effect may be that they are condemning it if they can't
25 find a substitute property to move to.

1 CHAIRPERSON CLARK: And you say they can't
2 find a substitute property because the appraisal's for
3 \$800,000 and the next piece of property is 2.6 million. My
4 question is, How do you get an \$800,000 property when a
5 comparable sitting out there is 2.6 million?

6 MR. BRESNAHAN: Which is the exact same
7 question I posed to you in my address to you. I don't
8 pretend to have the solution. I'm suggesting to you that
9 it must be solved with this amendment.

10 MR. PRESKI: Mr. Bresnahan, in your practice
11 and in your work with the Bar, have you ever seen either a
12 state that you think that's got it right and considers this
13 or a provision like the one you would like to see
14 somewhere? I mean, do other states, I mean, basically take
15 into account the lost profits or the other costs?

16 MR. BRESNAHAN: Some states do; some states do
17 not. The states that do have found that they are getting
18 killed in a courtroom. And if we decide to pay for
19 business loss, it may well be that they should get killed
20 in the courtroom because they're not doing good appraisals.

21 But I will also tell you that there is no
22 statute in existence that I'm aware of that solves the
23 problem.

24 MR. PRESKI: Okay. Well, then let me ask you
25 this: Given, Mr. Nast, what you said, that basically just

1 compensation is, almost to paraphrase, whatever the courts
2 after the Superior Court and allocatur appealed to the
3 Supreme Court say it is --

4 MR. NAST: No. It's what a jury says it is,
5 the board of view says it is.

6 MR. PRESKI: Well, in these cases, though, if
7 the statute was rewritten to allow for consideration of the
8 lost profits or the other costs that we're talking about
9 here, wouldn't that become then the just compensation?

10 MR. NAST: Just compensation is a real
11 property concept. It's always been.

12 MR. BRESNAHAN: I would disagree with this
13 gentleman on that subject.

14 MR. PRESKI: Would you comment?

15 MR. BRESNAHAN: The code defines just
16 compensation to be what he says, plus whatever damages are
17 available in this code. It has been amended. So it's much
18 broader than it used to be. This was certainly what it was
19 at one point in time.

20 But as we have added special damages to the
21 general damages, those special damages are now a part of
22 the concept of just compensation.

23 MR. NAST: That's -- conceptually, I think the
24 gentleman is correct. I think that's bad because the one
25 is required by the Constitution and the other isn't. The

1 other you can increase or decrease or the Legislature
2 could --

3 MR. BRESNAHAN: I agree with you.

4 MR. NAST: -- deal with it in the future.

5 MR. BRESNAHAN: I agree with you. The
6 Legislature has dealt with it in broadening it by the
7 statutory amendments.

8 MR. NAST: And they do go to the lost product.
9 I agree with Mr. Bresnahan that that -- and I can assure
10 you that the advisory committee from 1980 to 1985 spent
11 hours and hours with his former associate, Mr. Mendelson,
12 being one of the most articulate advocates of this kind of
13 approach.

14 And I think he's very honest in front of you
15 when he says that. If you notice on page 42 that the
16 business damages -- you get amount equal to the average
17 annual net earnings. You're talking about net earnings of
18 the business. But it's capped at \$50,000 because if it
19 wasn't capped at \$50,000, it could be, you know, it could
20 be all your -- all your surplus in the -- in the budget.

21 A jury could award it. And it's a question of
22 dollars. And if you want to make 50,000 into 100,000, if
23 you want to make 50,000 into a million, you're still going
24 to have a case where a million isn't sufficient, that it
25 should have been 2 million. And all you have to do there

1 is argue with the budget office as to how many dollars
2 they're willing to spend on this. I suspect that they're
3 not willing to spend a lot.

4 MR. PRESKI: Mr. Bresnahan -- thank you -- we
5 did send these, both of these bills to the Bar Association
6 and to the real property --

7 MR. BRESNAHAN: Nothing was sent to the
8 eminent domain committee.

9 MR. PRESKI: Well, this is --

10 MR. BRESNAHAN: It was never passed down
11 because it would have come to me.

12 MR. PRESKI: This is a continuing -- not a
13 problem that we have. But ultimately, from the Bar
14 Association, we have to wait for the committee to decide.
15 And the committee takes it to the Board of Governor. And
16 the Board of Governor apparently takes it to the full
17 membership.

18 And the session is completed by the time we
19 get an answer from the Bar. Can you provide me -- I've
20 given you my card, and you have my address -- can you
21 provide me with a list of those members? And I will
22 individually send it to them and ask them for comment.

23 MR. BRESNAHAN: I can do that.

24 MR. PRESKI: Thank you.

25 MR. NAST: I think the Bar -- I'll certainly

1 check with the Bar as to why it was not sent to the eminent
2 domain subcommittee. I assumed it was. And I must say
3 when the '85 report was done, there were representatives
4 from the Pennsylvania Bar Association on that advisory
5 committee. And they were --

6 MR. BRESNAHAN: I would add just one other
7 thing. I serve on the Supreme Court's Appellate Court
8 Rules of Procedure Committee and formerly served on its
9 Civil Rules of Procedure Committee. And before we change
10 rules dealing with any area of the law, we publicize it in
11 the advance sheets so that the lawyers in the state can
12 comment on it.

13 It doesn't take long at all. All you do is
14 put it in the advance sheet. They come out once a week.
15 And we put it in in its full form, whatever way we're going
16 to change it. And the reports that come back, the replies
17 that come back are excellent. You may want to consider
18 that as well.

19 CHAIRPERSON CLARK: One last question. We
20 talked about setting up a separate section to handle
21 commercial real estate, and one way is to set up a
22 different rule of valuing that commercial real estate. The
23 other -- but then you get into, you know, an unlimited
24 amount in cases. The other solution of that is to increase
25 the \$50,000 cap.

1 MR. BRESNAHAN: Yes.

2 CHAIRPERSON CLARK: Those are the offers.

3 MR. BRESNAHAN: But as Bill said, there's
4 going to be a case that the 100,000 cap doesn't cover
5 either.

6 CHAIRPERSON CLARK: That's correct. Yeah.

7 MR. BRESNAHAN: But my only point to you is
8 that you may not have to do as much changing as you think.
9 For example, if you were to say that in the cases of
10 commercial usage of property that business profits are a
11 consideration, when you jump over the hurdle -- because the
12 hurdle rate now is as soon as anybody attempts to enter any
13 damages on business profits, the courts will stop it and
14 say you can't do that.

15 They are not entitled to those damages under
16 the Pennsylvania Eminent Domain Code. If they were
17 entitled to those damages under the Pennsylvania Eminent
18 Domain Code, then that type of evidence could be
19 introduced. So it may not be as difficult as we're making
20 it out to be, but it may be extremely expensive.

21 MR. PRESKI: And that becomes a battle of
22 experts then.

23 MR. BRESNAHAN: Correct. As does anything in
24 the area of real estate taxation or real estate
25 condemnation.

1 CHAIRPERSON CLARK: And then the expense of
2 these projects have a possibility of getting out of
3 control.

4 MR. BRESNAHAN: Absolutely.

5 CHAIRPERSON CLARK: Unless you cap them like
6 we do with the \$50,000, just cap them someplace?

7 MR. BRESNAHAN: Correct. The whole concept is
8 that if we are truly interested in what you said was your
9 goal -- and that is to move the project along and to fairly
10 compensate the individual -- what I'm saying and I believe
11 many of us are saying is that there are individuals who are
12 not being fairly compensated.

13 CHAIRPERSON CLARK: That's correct. And
14 what -- in a perfect --

15 MR. NAST: And in that case --

16 CHAIRPERSON CLARK: In a perfect world --

17 MR. NAST: -- I would --

18 CHAIRPERSON CLARK: -- where we have unlimited
19 revenues, that is what we would do.

20 MR. NAST: And I don't disagree with him in
21 context, no.

22 CHAIRPERSON CLARK: We need to cap that maybe
23 someplace?

24 MR. NAST: I'm not sure. I think you have to
25 check with Mr. Cressler. I'm not sure whether -- does the

1 federal government, they wouldn't pay -- do they pay more
2 than -- do they pay for this added damage without a cap?

3 MR. CRESSLER: There's only so many dollars to
4 go around.

5 CHAIRPERSON CLARK: They allocate X number of
6 dollars to the project, and that has to satisfy --

7 MR. CRESSLER: Well, no. They allocate so
8 much per year. And that, you know, PennDOT uses that
9 allocation up. But, you know, that shouldn't get in the
10 way of compensating people by any means.

11 MR. NAST: We were not -- we were not aware of
12 this problem. I hope I make that point, that we tried all
13 sorts of -- there were various suggestions and alternatives
14 as to how to approach this. And I do agree with Mr.
15 Bresnahan. There are bad cases.

16 MR. PRESKI: Mr. Bresnahan, a follow-up just
17 on what Chairman Clark said. The universe for these cases
18 is, the big ones, is infinitesimally small, isn't it?

19 MR. BRESNAHAN: Small in the sense of the
20 number of the cases or the dollar figures?

21 MR. PRESKI: The number of cases juxtapose
22 against every other condemnation.

23 MR. BRESNAHAN: I think the term infinitesimal
24 is erroneous.

25 MR. PRESKI: What percentage then would you

1 give it?

2 MR. BRESNAHAN: I think it's close to 5
3 percent.

4 CHAIRPERSON CLARK: Thank you very much.
5 Thank you very much.

6 MR. NAST: Thank you.

7 CHAIRPERSON CLARK: The next gentlemen to
8 testify are Joseph A. Klein and Mark Silver. I believe
9 you're from the same law firm in Harrisburg?

10 MR. KLEIN: Yes, sir. Chairman Clark, let me
11 thank you and the other members of the House who have made
12 these hearings possible. And I want to contrast the manner
13 in which the Senate Bill was passed and the manner in which
14 the House addressed the bill.

15 First of all, none of us were ever invited to
16 appear before Senator Brightbill's committee. Now,
17 reference has been made to the fact that this is merely a
18 recodification of the 1985 proposed bill. Let me tell you
19 that I was a member of the Joint State Government
20 Commission during the years 1982 to 1985.

21 Now, what you heard from Mr. Nast was pretty
22 much the way all of this was jammed through that particular
23 committee. There was only two -- there were only two
24 attorneys who were members of the Bar and practiced on
25 behalf of condemnees, and that was Mr. Dempsey and me.

1 The rest of the Commission was jammed with
2 condemnors that had no real significant interest in this,
3 people who represented pipeline companies, water companies.
4 Every breed of condemnee and their counsel were there, and
5 yet only two people who did regular condemnee
6 representation were permitted to be members of that
7 committee. So it was a stacked deck.

8 And the product you see, Bill 630, is the
9 product of a stacked deck. My partner Mark Silver and I
10 have been doing eminent domain work. I started in 1964
11 when the new bill came out with PennDOT. Mark started a
12 couple years after. So we've done both sides of the fence.

13 Currently, most of our practice is on behalf
14 of condemnees; although, we also have represented
15 condemnors such as Adams County and PP&L. So we do get the
16 view from both sides of the fence. First thing I want to
17 try to set out -- and we have put together a memorandum
18 which we addressed to your counsel in which we compared the
19 provisions of the two bills.

20 Let me start off by saying that condemnees do
21 not ask to have their property taken. They are the
22 victims. And it's under a philosophy of the greater good
23 for the greater number. And I don't quarrel with that.
24 However, when we start defining what is just compensation,
25 that, gentlemen, is your role.

1 It's not Mr. Nast's role to give up X or Y
2 dollars or PennDOT's role. You must make a determination
3 on how you want to treat your taxpayers and whether you're
4 going to treat them fairly. That's why I am encouraged
5 with the fact that House Bill 634 -- excuse me -- House
6 Bill 2043 makes the first genuine attempt to do so, not
7 Senate Bill 630.

8 I want to just take a couple of minutes to
9 talk about some responses to testimony that's been
10 proffered by PennDOT and by Mr. Nast. First of all, let me
11 tell you that the act that was proposed back in 1985 was
12 fought tooth and nail by PennDOT. They didn't want to see
13 it come to committee.

14 They had two members on the Joint State
15 Government Commission who fought every piece of legislative
16 change on the basis, Well, that wasn't the law. Well,
17 that's why you have a new act, to make new law in order to
18 balance the interests of both the condemnee and the
19 condemnor.

20 Attorneys for condemnees wouldn't exist if the
21 condemnors did their job right. We are the ER of the
22 condemnees. They come to us when they have been beaten up
23 by PennDOT or some other condemnor and they have no other
24 way of getting any type of relief at all.

25 The money we make insofar as doing contingency

1 work on our fee schedule is because PennDOT allows us to
2 and because we have a system that doesn't treat condemnees
3 fairly. You were told by Mr. Cressler that don't worry
4 about getting copies of the condemnors' appraisals. They
5 have to be supplied in discovery. Wrong. They don't.

6 In discovery, a party is entitled to ask
7 another party's expert the facts upon which they propose
8 testifying -- excuse me -- the conclusions they propose
9 testifying to and the facts upon which they are based. The
10 answering party then has a choice. He can either answer
11 that, which is what PennDOT always does, or supply a copy
12 of the appraisal.

13 We're simply saying supply a copy of the
14 appraisal. If the thought is that supplying it as of the
15 date of condemnation along with the other provisions
16 required under the declaration of taking isn't correct,
17 then I must assume that you want to get it earlier; that
18 the objector to that, which I believe was Mr. Nast, it
19 ought to be provided very early in the game.

20 When you make a determination you're going to
21 take somebody's property, tell them what your offer is
22 going to be and give them a copy of the appraisal. The
23 only information that is currently available to condemnees
24 throughout the Commonwealth relative to PennDOT's appraisal
25 is a breakdown between direct damages; i.e., the amount of

1 the offer that is related to the actual land and
2 improvements taken, and the severance, the effect on the
3 property that remains in the event there is not a total
4 taking.

5 That information is wholly inadequate. Just
6 simply doesn't do the job. We make it a practice, whenever
7 possible, of sharing appraisal information with PennDOT.
8 We feel that helps narrow the gap. We note also, despite
9 the testimony proffered here today on behalf of PennDOT,
10 that condemnees are still not being told that, Hey, if you
11 go to court, don't worry, you're going to at least get
12 simple interest based on prime rate plus one percent.

13 I attended the testimony offered before the
14 House Select Committee in which PennDOT appeared. And the
15 Chief Counsel of PennDOT, Andrew Gordon, said if the
16 condemnee was unlucky enough or stupid enough to get an
17 attorney that was ignorant of the law, why do we have to
18 tell him he's entitled to get more than 6 percent?

19 It's there of record. The members of that
20 Committee were aghast at the consummate, dare I say,
21 hutzpah of Mr. Gordon in stating that. Furthermore, we
22 don't negotiate as to how much is delay compensation and
23 how much goes to actual damages. If we did, we would be
24 defrauding the federal government because they carry two
25 different tax classifications.

1 Delay compensation is simply interest, which
2 is taxed on their income. When you are getting paid for
3 damages accruing due to the taking of your property, that
4 is considered involuntary conversion. It is a capital gain
5 and in fact can be deferred if it's reinvested within, I
6 think, 18 months after payment. So there are differences.

7 When they talk about a review process being
8 performed, it's being performed by PennDOT. These
9 so-called independent fee appraisers have to turn their
10 appraisals in to some people who are not even as of this
11 time certified. And then they pass on whether they like
12 their numbers or not.

13 If they don't, they get them sent back.
14 PennDOT can refuse to pay the appraisers for this. And
15 certainly, they are told -- and it's in their own
16 literature. And we have copies of it at the office, and
17 we'd be happy to supply your Committee -- that if enough
18 occurrences appear where you simply do not meet our
19 expectation as to what your appraisal should provide, we
20 simply are going to take you off the guaranteed list.

21 Now, how are these people selected? Almost
22 unanimously they are selected on a low bid basis. Think
23 about it. Think how you would like to choose your
24 physician based on low bidder. And there's a reason why.
25 If they're low bidder and they're getting paid only a

1 minimal amount to perform their appraisal, they're going to
2 be more dependent on PennDOT to give them comparable sales
3 to rely upon.

4 They're going to be more amenable to the
5 suggestions of PennDOT. And we found that that has
6 happened. Now, the condemnee does present his case before
7 a board of view. So the contention that somehow PennDOT
8 will never know what the condemnee's case is, we put the
9 appraisers on right in front of the board of view. They
10 read from their appraisal.

11 They're subject to cross examination on any
12 documents they utilize during the course of their
13 testimony. There has been some comments from both Mr. Nast
14 and Mr. Cressler challenging the concept of being -- of
15 adding a different method of appraisal under the evidence
16 factor. And I want to look at that section specifically.

17 I think it's under Section 1105. The House
18 Bill, unlike the Senate Bill, permits the qualified
19 valuation expert to consider, quote, any other method of
20 appraisal practice generally accepted in the appraisal
21 profession, close quote. The judge would act as a
22 gatekeeper.

23 And we have law in the Commonwealth of
24 Pennsylvania that says "generally accepted." And that's
25 Columbia Gas Transmission Corp. v. Piper, and that's cited

1 on page 8 of our comments. So it's already there. PennDOT
2 does not want to accept that in certain instances.

3 But yet I have had cases in which we used the
4 development approach in arriving at a fair market value,
5 and PennDOT said that made sense. And that is when you
6 have a residential subdivision which has been approved by a
7 municipality, you take a look at what is the number of
8 units involved, how much is it going to take to develop
9 them; i.e., put in the infrastructure, the roads, the water
10 lines, sewer lines, et cetera, how much is it going to take
11 in order to pay your appraisers and engineers to provide
12 the services, what is your time delay both in getting an
13 approval and in selling out the lots, and you apply a
14 discount rate to that.

15 And that then becomes the fair market value of
16 your property. And you're comparing it to other
17 subdivisions. This is what people do in the real world.
18 If you talk to any real estate developer, he's going to
19 tell you, I follow these macerations.

20 If I go to see Farmer Jones and say, Hey,
21 that's a nice 180-acre tract you have, I'd like to buy it,
22 my figure is going to be dependent on what I can put in
23 there, how much it's going to cost me to do it, how long
24 it's going to take me to sell it out.

25 So to say that we're adding new features and

1 creating some hobgob of case law that's going to come in,
2 it doesn't happen. And in fact, our courts are used to
3 acting as gatekeepers in every form of scientific testimony
4 that's presented to them, be it medical, engineering, what
5 have you.

6 Twenty percent of cases going to condemnation
7 was the figure quoted, I believe, by one of the witnesses
8 on behalf of PennDOT. My guess is that almost all of them
9 are commercial properties. We don't deal with residential
10 single family-type condemnations. And the reason is they
11 are more than adequately protected under the code.

12 They are given a feature which is absent in
13 business condemnations. Their properties, their homes are
14 replaced by safe, sanitary housing. That's required by the
15 federal government. None of this is done based on the
16 largess of PennDOT. These are things imposed upon them by
17 the federal government in consideration for having their
18 projects funded 80 or 90 percent, in some instances, by our
19 federal tax dollars.

20 There isn't anything that even compares to
21 that in -- in the current code. And I think earlier, you
22 asked both Mr. Nast and Mr. Bresnahan how you would deal
23 with it. Well, my partner and I talked about that the
24 other day.

25 And even though it's not in our proposed

1 testimony, we suggested one of the ways you can view it is
2 providing them with enough funds to relocate their business
3 at a site where they would recapture their current
4 customers and where they would have, in the instance of
5 having maybe even statewide customer base such as car lots,
6 et cetera, the same type of visibility, the same type of
7 traffic pattern, and a similar sized facility insofar as
8 the building from which they conduct their business.

9 That would be a starting point. And that's
10 not a lot different than what's being done under the
11 replacement of housing for single family housing residents.
12 In order to qualify for safe, sanitary housing replacement,
13 you have to have a house of sufficient size to accommodate
14 your family; it has to be hooked up to water, sewer; it has
15 to pass all types of safety tests; it has to pass the type
16 of testing that is imposed on all new housing that comes
17 about.

18 And that is to ensure that even though he may
19 have had a subpar residence, he may have been living in a
20 broken-down trailer. We've had people that have come to us
21 in that situation, and they've ended up in \$120,000 homes.
22 Now, the place they lived, they couldn't get \$20,000 for
23 it.

24 Most of the people we represent don't get that
25 type of benefit because they are business people. When you

1 talk about what are the benefits that are so graciously
2 granted under the Eminent Domain Code, \$500 currently for
3 reimbursement of appraisal, engineer and attorney fees,
4 \$500.

5 Mr. Nast will tell you, Well, gee whiz, just
6 compensation, that -- they're getting a bonus. In
7 Florida -- in Florida, condemnees are reimbursed their
8 counsel fees. And you might say, Well, isn't that going to
9 make a big headache for the funding agencies involved?

10 And the answer is no because they get that
11 reimbursement only if they improve the recovery from that
12 which is offered. We go on contingent fee agreements. If
13 you're offered \$100,000 and you fight through a board of
14 view and a jury trial and appeals to the Commonwealth
15 Court, by the way, and not Superior Court, and maybe even a
16 petition for allowance of appeal to the Supreme Court, what
17 is wrong with 33 1/3 percent above that, which was
18 initially offered?

19 Why not have that as a reimbursement because
20 even \$4,500 doesn't do it? In the instance of real
21 commercial appraisals, it doesn't even cover the cost of
22 the appraisal. When you have partial condemnations, you
23 both need the real estate appraiser and you need an
24 engineer in many instances because you're going to have
25 costs intended to bringing the property up to the -- to the

1 grade that you need it.

2 And you're going to need an engineer to do
3 that. You're going to have construction costs, et cetera.
4 So all I'm suggesting is just compensation is making people
5 whole. Maybe you can't recreate their life. And
6 certainly, there's no two properties that are the same.
7 But you certainly can do an awful lot to alleviate their
8 misery.

9 Mark and I were both counsel for the seven
10 businesses -- seven of the businesses which were located in
11 the Route 22/322 corridor called the Dauphin Narrows. Our
12 testimony two years ago before the House Select Committee
13 is replete with horror stories.

14 They happen, folks. They are real. The
15 gentleman with the car collection, he picked up scrapped,
16 damaged, wrecked Volkswagens and on a basis of 3 to 1 would
17 pull apart the body and parts and recreate a used
18 Volkswagen. When his property where he conducted his
19 business was condemned -- and his girlfriend owned the real
20 estate -- he wasn't even offered moving expenses by
21 PennDOT.

22 Then PennDOT sent out one of their independent
23 fee appraisers -- and I put that in quotes -- who wrote a
24 note to PennDOT, and we found it during the course of
25 discovery. And that note said to the PennDOT right-of-way

1 administrator, Hey, you better get a machinery and
2 equipment appraiser and an automobile appraiser out here.
3 This guy has got a ton of inventory, machinery, equipment
4 and fixtures.

5 And the response, which was written on the
6 bottom of it, was to the effect, Mind your own business.
7 So the offer was zero, and they paid a million and a half
8 dollars to this guy. Now, we did not take one third
9 because we didn't think that was fair. We took a
10 much -- less than half of that.

11 But we hope we don't have to have horror
12 stories like that. There are enough instances where
13 there's a genuine dispute between condemnor and condemnee
14 that can be resolved in a crucible fire, so to speak, in
15 front of a board of view and ultimately a jury without
16 having these.

17 So in a way, we're talking against our own
18 interest. If we didn't have PennDOT, someone once said
19 you'd have to invent them. Now, how do they differ from
20 the other condemnors? First of all, many of their projects
21 are funded by the federal government.

22 And under -- and I'm trying to remember the
23 full name of the act, but it's the Federal Relocation
24 Assistance and Real Property Act. That's the one that
25 governs the provisions of 601(a) in the current code, the

1 replacement and relocation assistance.

2 They require that unlike under the
3 Pennsylvania Code where you don't have to pay EJC or
4 estimated just compensation until after condemnation and at
5 a time when you seek possession, they say, No, no. You do
6 several things different if you want our money.

7 Number one, you go out and get an appraiser.
8 You make certain that appraiser has the condemnee
9 accompanying him through the property. Number two, the
10 appraiser himself must come up with a competent appraisal.
11 Number three, you must negotiate with the condemnee.

12 And if all of that fails, then you can file a
13 declaration of taking. Now, much to do has been made of,
14 Gee whiz, this onerous provision of amending the
15 preliminary objection section of the Eminent Domain Code to
16 allow a contest on whether the estimate of just
17 compensation has been made in a correct manner, that simply
18 is putting that argument up front.

19 And you'll see that we address it in our
20 comments. What you haven't been told by either Mr. Nast or
21 Mr. Cressler is that under Section 407 of the Eminent
22 Domain Code, in order to gain possession of a property, a
23 condemnor must tender his estimate of just compensation.

24 And if the condemnee says, Hey, that's not
25 fair, you're not treating me correct, they then go to the

1 court. And they ask the court to issue a writ for a rule
2 of possession granting them the right of possession. It is
3 then that a condemnee has a right to contest that offer.

4 And when that offer is contested, everything
5 stops. They don't get possession of the property. All we
6 have suggested is, Why not put it in up front as part of
7 the preliminary objections and have everything taken care
8 of at once because right now you have a two-step operation?

9 You can contest preliminary objections and we
10 believe based on the -- whether or not there's been a fair
11 market value appraisal made in good faith, among other
12 bases. And then if that's turned down by the court, you
13 can come back when possession is being sought by the
14 condemnor on the basis that the offer of just compensation
15 was made in palpable bad faith.

16 And if the court so finds, PennDOT or whatever
17 condemning authority there is -- because it now applies to
18 all of them -- simply doesn't get possession of the
19 property. So anybody that tells you that this is going to
20 sew up the process just isn't being candid with you.
21 That's all I can tell you. Or he doesn't understand the
22 process.

23 Mr. Cressler, I think, understands the
24 process. What we're trying to do is shorten the time
25 frame. And if we have that appraisal even before filing

1 the declaration of taking, how much easier it would be for
2 the condemnee, a businessman, to go to his accountant or
3 his lawyer and say, Hey, I need somebody to tell me what
4 this property is worth. Am I being treated fairly? This
5 is what PennDOT's offered me, and they've given me the
6 appraisal they've settled upon.

7 If I'm an appraiser -- and I've worked with
8 enough appraisers -- I'd like nothing better to see what
9 the other side has to say. Have I missed something? Is
10 there a sale out there I didn't know about if I'm going
11 under the comparable sales or market approach?

12 Am I viewing it from the wrong income stream
13 if I'm doing it on the capitalization of net income
14 approach? These are the things I would want to know. And
15 you shorten it. And frankly, all you do is get there 20
16 steps earlier than having to wait till the board of view
17 proceeding and then ask all these questions on cross
18 examination of PennDOT or the other condemnor's appraiser
19 and then say to him, Ah, I see you have a document in front
20 of you. What is it? Oh, it's my appraisal. Can I see it?

21 Well, the board of view will generally let you
22 see it. And then you read what you want to into the
23 record, and you ask questions. So ultimately, it will
24 surface. What has proved absolutely amazing to us has
25 been, in those instances where we've challenged on

1 preliminary objections, the failure of PennDOT to make an
2 offer of just compensation in good faith.

3 The type of appraisals we've seen, the
4 comments contained in PennDOT's files -- we're currently
5 doing one now in the -- Northampton County. It's the Route
6 33 bypass. The initial offer to the condemnee who owned a
7 combination restaurant, office building, golf driving range
8 and miniature golf course off of the William Penn Highway,
9 if you're familiar with that area outside of Easton, was
10 \$133,000.

11 I will tell you that for a period of four
12 years before filing that -- that declaration of taking and
13 long before Mark and I were ever involved, PennDOT's
14 representatives were presented with engineering studies by
15 the most preeminent engineer in that area of Pennsylvania,
16 which said the access to this property that you're going to
17 be providing is going to be inadequate.

18 It won't meet your own standards for a medium
19 volume driveway. And you're either going to have to
20 demolish the restaurant which lies in the path of that
21 driveway or you're going to have to widen the road that is
22 perpendicular to that form of access in order to gain
23 access that way.

24 Wouldn't listen. Wouldn't look. Didn't care.
25 So they filed a declaration of taking. We filed

1 preliminary objections. We take the deposition of their
2 engineer. And guess what he says? Duh, I made a mistake.
3 I couldn't calculate trip ends in order to determine what
4 type of driveway would be required onto a state highway.

5 PennDOT's appraiser says, Duh, I relied on
6 what he told me. And I even kept my appraisal open hoping
7 I could generate some information to tell me what the
8 ultimate cost would be. Guess what? We're still waiting,
9 and we're still in front of a court. And it still hasn't
10 been resolved.

11 These are not unusual stories. Tragically
12 enough, they occur with too much frequency. And if Mark
13 and I aren't able to pick them up, just think of those
14 situations where, as Mr. Gordon would call, they have
15 stupid counsel who doesn't know anything about eminent
16 domain and doesn't understand the process. Just think what
17 happens to those people. Well, you know, they're the ones
18 that get 6 percent simple interest on delay compensation
19 after they go through litigation.

20 Let me just highlight a couple points before I
21 turn it over to my partner. And again, what we attempted
22 to do was simply highlight the differences between the two
23 bills. We find, first of all, that the House Bill 2043 is
24 so much more comprehensive, so much more fair to condemnees
25 and makes much more ultimate sense than that bill cobbled

1 together by Senator Brightbill.

2 One thing that I do agree with some of the
3 commentaries, that you're going to have a difficult time
4 finding five viewers, particularly in smaller counties. I
5 think three does the job. And sometimes it's difficult
6 setting a time to have a view and a hearing when you have
7 three because you're going to have attorneys for the
8 condemnor, you may have more than one condemnee involved if
9 you have a tenant, and then you have the three board
10 members. And then you got to worry about whether the
11 president judge of the county is going to give you a
12 courtroom in which to hold your viewers proceedings.

13 Fair market value, again, when you talk about
14 it and you talk about the Assembled Economic Unit Doctrine,
15 you have to recognize that you have condemnees who are
16 involuntary participants in the judicial process. They
17 don't want to give up their businesses. They don't want to
18 give up their homes.

19 And in the instance of business people, they
20 may not be able to relocate to a site suitable,
21 particularly since there really isn't any avenue for them
22 getting compensated for getting the type of location and
23 building they need to maintain their competitive advantage.

24 We have proposed that let's cut through the
25 whole Assembled Economic Unit Doctrine and get to the real

1 issue. Does this condemnee who didn't ask to be condemned,
2 who did not ask to be dislocated from his business, does he
3 want to relocate somewhere else? Or does he just want to
4 say, Hey, that's it, I cash my chips in?

5 Now, in the normal course of business, at such
6 time as that condemnee would be ready to retire, he'd offer
7 his business up for sale. And he'd be paid for goodwill
8 and the profit that he made out of the business, as well as
9 the mortar and bricks and the machinery and equipment.

10 That's no longer available to him. He's not
11 going to be paid for goodwill. He's not going to be paid
12 for what his real profits were except maybe up to 50,000
13 and currently only up to 20,000. So why not give him the
14 option of saying, Hey, I've looked around. I'm 62 years
15 old just like Joe Klein. I'm not about to start up anew in
16 my life. PennDOT, you got it.

17 It's a lot easier. And attempting to
18 differentiate between what is personalty and what is
19 fixtures is one of those things which would befuddle a
20 rabbinical counsel. The case law on what is fixtures and
21 what is personalty in Pennsylvania is a dog's breakfast.
22 Why not even bother with it?

23 Because essentially, whether you're looking
24 for payment under 601(a) for personalty in the property or
25 whether you're getting it under the Assembled Economic Unit

1 Doctrine, it doesn't really make any difference. You
2 should be paid for value in place and in use.

3 So we're not saying that every piece of
4 equipment has a use nor that you should be paid for having
5 all the faucets in your lavatory. It has to play a role in
6 the business, and it has to be there. The actual rule on
7 the Assembled Economic Unit Doctrine is that in order to
8 have it apply, you have to have the type of business that
9 can be relocated to an existing structure within your
10 marketing area.

11 And you have to be able to take along a
12 sufficient amount of machinery, equipment and fixtures that
13 fit into that location in order to comprise an economic
14 unit capable of carrying over your business. Now, I've
15 done that kind of -- and I hate to use the term lay terms;
16 but generally, that's what it provides.

17 It's difficult to find those buildings. It's
18 difficult to find them in areas where you have your market.
19 It's difficult to find them in a configuration in which you
20 could fit all your machinery, equipment and fixtures or at
21 least a sufficient number of them in order to have a going
22 business. So let's do away with it.

23 Why put a condemnee in a position of having to
24 litigate out five years, perhaps, before finding out
25 whether his machinery, equipment and fixtures are going to

1 be paid for by PennDOT or whether that rusting group of
2 them which he hasn't used in five years then belongs to
3 him?

4 Some of the other matters which I find kind of
5 strange is the expedited appeals in eminent domain
6 proceedings. One of the things that has always been
7 honored in the breach is when you have preliminary
8 objections, the code currently provides that the court
9 shall make a determination within 30 days. Not. Never
10 happens. Can't happen. Why?

11 Mr. Cressler hit on one of the issues, that's
12 discovery. I want to get your documents. You have 30 days
13 to produce them. The 30 days would be up before the -- and
14 the court would have to make a determination. It's an
15 oxymoron. Most courts are interested in moving things
16 along.

17 They know that there's public pressure to have
18 roads come in. They know that condemnees are anxiously
19 determining what their fate is going to be relative to
20 these preliminary objections. The courts behave relatively
21 well. That isn't a problem.

22 What is one of the problems is what happens if
23 the condemnee loses before the trial court, the Court of
24 Common Pleas, and he takes an appeal? The condemnor comes
25 in and says, Ah-hah, we won this round. We're now

1 demanding possession. Here's our offer. Okay.

2 Now, the offer may be fine. But there might
3 be basis in the preliminary objections that go well beyond
4 whether it's a fair offer or not. They may be taking more
5 land than they need. They may not be authorized to take it
6 in the beginning.

7 The current code says -- and it's encompassed,
8 I think, in the bill proposed by the House -- is that
9 preliminary objections, quote, warranting delay, close
10 quote. If they are pending, then possession is not
11 granted. Now, by definition, if they weren't delay, the
12 court shouldn't have ruled on the matter adversely to a
13 condemnee.

14 Although arguably, there is a provision
15 currently in Pennsylvania that allows a lower court, a
16 trial court to certify a matter up because it is complex
17 and they believe that Appellate Court needs to hear it.
18 And I think the certification rule should apply here under
19 the Eminent Domain Code.

20 I think I've talked myself hoarse. I
21 apologize for the volume of my voice. I thank you for your
22 attention, knowing that the worst time to go to a jury is
23 right before the lunch hour. I invite any questions.

24 CHAIRPERSON CLARK: Does Mr. Silver have
25 something he wants to add?

1 MR. SILVER: Following that it's close to
2 lunchtime and you're the jury, I'll be very brief. Do you
3 want me to proceed before you ask the questions, Mr.
4 Chairman?

5 CHAIRPERSON CLARK: Yeah, go ahead.

6 MR. SILVER: That's fine. I'm just going to
7 try to highlight a few of the things that I've heard
8 previously and as well that Mr. Klein has touched upon. I
9 note in the prepared remarks by Deputy Secretary Ryan on
10 behalf of PennDOT a concern by the Department that the
11 House Bill upsets the balance or would seek to upset the
12 balance between the public and private interests.

13 I'm here to tell you after being a
14 practitioner in this area since I first started with
15 PennDOT in 1971, left there in 1979, and in large part have
16 represented condemnees; although, we do represent
17 condemnors from time to time, as Mr. Klein explained, there
18 is no balance between condemnors and condemnees.

19 It doesn't happen. The wherewithal that every
20 condemning authority in this Commonwealth has far outweighs
21 any businessman, any corporation that does business or owns
22 real estate in the Commonwealth. So there is no level
23 playing field. There is no fundamental fairness. There's
24 no equity of positions.

25 The proposed bills, both of them, go a long

1 way, further than the existing Eminent Domain Code of 1964
2 and as it's been amended over the intervening years. But
3 it doesn't go far enough. We've heard the horror stories
4 of business owners. Mr. Bresnahan has talked. Mr. Klein
5 has talked.

6 You even heard the Commonwealth
7 representatives talk about problems with the business
8 owners. They die on the vine. The business dislocation
9 damages that the new proposed bills seek to increase from
10 the existing 20,000 to 50,000 do nothing.

11 Those aren't paid for until after the business
12 relocates, if it can, and is up and running, if it can, for
13 a year. Only then can it file the necessary documents with
14 the condemning authority; in most instances, PennDOT, to
15 seek payment. And even in those instances, it's not
16 guaranteed to get the full amount of \$50,000.

17 So Chairman Clark, as you described the
18 scenario where you have the \$800,000 offer and it's going
19 to cost you \$2 million to replace just the real estate, let
20 alone the building, the costs for architectural engineering
21 fees, permitting, your driveways, your landscaping and your
22 lighting and finally open your doors, not only have you
23 lost your income for that entire intervening time but
24 you've had to expend money that you may not really have had
25 with a promise to the banker that, Hey, look, I'm going to

1 get some money here from the condemning authority, probably
2 from PennDOT, so that I can afford to be in a business.

3 And then I get to apply for \$50,000. It
4 doesn't work. We haven't found a business yet, no matter
5 whether it's a mom and pop pizza shop or a large commercial
6 entrepreneur, restaurant, hotel, office building, who can
7 actually afford to go out there, replace the property, wait
8 the year, and then file the application.

9 Do they? Sure they do because they're going
10 to look for any dollars that they can find in that basket
11 of benefits. But they're not on an equal footing. They
12 haven't been replaced. So not only do you have the whole
13 burden of going out, buying the property, improving it,
14 constructing your new facility, and hopefully going back
15 into business and preserving some of that clientele, which
16 in the interim has now found other places to buy their
17 cars, ice cream or shirts, and change their patterns,
18 you've got to try to reestablish that clientele.

19 You also have intervening debt service, costs
20 that went out to professionals. Hopefully, you got
21 approval from PennDOT for having occupancy permits and from
22 your local municipality for building permits and occupancy
23 permits. And now some large number of months later, you
24 open your doors.

25 And then you have to be in business for

1 another year before you can even try to get that \$50,000.
2 It doesn't work. As Mr. Bresnahan stated, the businesses
3 are dying. And regardless of whether it's a business that
4 you or I might patronize or someone else might patronize,
5 one has to acknowledge that business people stay in
6 business because they make money in that location.

7 And location is the secret, as we know, of
8 commercial businesses. And although, as the Commonwealth
9 representative spoke, no business owner has an absolute
10 vested right in the traffic that passes by his or her real
11 estate on which they have their business located, that's
12 why they went there in the first place.

13 That's why they spent the money to establish
14 the business there time one because, as we know, certain
15 businesses require average daily traffic counts high
16 numbers because those highway-oriented businesses
17 are -- the profits that they make are generated by the
18 traffic.

19 That's why McDonald's and Hardy's and used car
20 lots and the Advanced Auto Parts stores and the Wal-Marts
21 locate where they do because they're close to rooftops,
22 they're close to customers, and they're close to traffic
23 and good highway access.

24 But when "A" company or "B" company are
25 acquired and PennDOT says, Well, here's this appraisal we

1 got from our low bidder, even if they show it to you and
2 it's 50-, 60-, \$100,000 -- and they can't touch an acre of
3 property anymore in a commercial area anywhere in this
4 Commonwealth for less than 250 at the minimum and probably
5 close to \$350,000 -- there's no way they can relocate.

6 And then look at the things they had to spend,
7 the business person had to spend in the interim to try to
8 get to that point to even try to be eligible to apply for
9 the business dislocation, had to engage an appraiser, had
10 to engage an attorney, probably had to engage an engineer
11 and maybe a surveyor and maybe some other personnel.

12 And what does the code provide? Existing,
13 \$500 limited reimbursement. New proposals, \$2,500. No
14 question. It's a 500 percent increment, and that sounds
15 great. But it doesn't do enough. Our experience recently
16 is that the Commonwealth expends anywhere from \$4,600 to
17 \$26,000 for commercial appraisers in commercial property
18 cases.

19 How in the world is there a level playing
20 field when at most a condemnee, who never asked to be
21 acquired, might get is \$2,500 in reimbursement? It doesn't
22 work. And as your chief counsel, Mr. Preski, indicated
23 earlier in a comment, it becomes a battle of experts when
24 you talk about your engineers, perhaps costs to cures to
25 remaining property after condemnation if it's only a

1 partial taking, your appraiser when it's a total taking.

2 Sure, it's a battle of experts. And how can
3 that battle be played on a level playing field when the
4 condemnee is maybe on a good day going to get as much as
5 \$2,500 reimbursement and the Commonwealth will spend many
6 multiples of that to secure its appraiser?

7 MR. KLEIN: You're playing against the House,
8 and the House is playing with your money.

9 CHAIRPERSON CLARK: I've heard that before.

10 MR. KLEIN: I thought this was an original.
11 Pardon me, Mark.

12 MR. SILVER: I want to just move to one other
13 area because we've sort of been over most all of this. And
14 I apologize if I'm repeating. Chairman, you said your job
15 for what your constituents elected you is to have highways
16 built to service your people, as it is across the
17 Commonwealth in every legislative district.

18 Let me tell you who your biggest enemy is.
19 It's not Mr. Klein and myself. It's not the condemnees.
20 It's the condemnor. Horror story in Blair County, Kentucky
21 Fried Chicken, excellent location. Father and two sons
22 operate three Kentucky Fried Chickens in the general area.

23 It's been two years since the first appraiser
24 for the Commonwealth came to their property to inspect it
25 and brought along a machinery and equipment appraiser to

1 inspect the very high tech machinery and equipment
2 installed within that location.

3 We haven't held it up. The condemnees haven't
4 held it up. The Commonwealth can't get their act together
5 to get an appraisal completed and then to have that
6 appraisal, once it's finally submitted, reviewed by what
7 they call review appraisers, of which there apparently are
8 fewer than one handful that service the entire
9 Commonwealth.

10 Every appraisal that comes in over some
11 number -- and for sure it's going to be a number that's
12 going to be involved in any and every commercial
13 acquisition -- has to go in front of a central office
14 review appraiser. And they're not just situate in
15 Harrisburg. They're in other locations around the
16 Commonwealth.

17 But things are so bad, they don't have enough
18 people to review their own appraisals.

19 MR. KLEIN: Let me tell you what's happening
20 to this guy while we're waiting. He's a franchisee of
21 Kentucky Fried Chicken. They've come in. They've looked
22 at his operation. And they said, You have to put in every
23 couple years new equipment. Where is it? Well, PennDOT's
24 going to condemn me. But PennDOT hasn't condemned him.

25 So he is in Dante's Inferno. He doesn't have

1 the money to build a new location with new equipment.
2 They're going to pull his franchise because PennDOT won't
3 even make a payment to him to get him started doing that.
4 And we sit, and we wait. Delay. It's them. Excuse me,
5 Mark.

6 MR. SILVER: That's all right. Final issue
7 I'd like to address very briefly is that of delay
8 compensation. Delay compensation, as well as many of these
9 other dollar parts of just compensation, are statutory.
10 They are payable to you as a matter of right.

11 So whether you have the best lawyer in town or
12 the worst lawyer in town should not matter a bit. It is
13 the Commonwealth's obligation to say to you, Property
14 owner, you know what? You didn't get your final payment
15 for four and a half years after the declaration of taking
16 was filed. We paid you a couple thousand dollars on
17 account. You're going to get the appropriate rate of
18 interest, whatever that might be at the time. You're going
19 to get the appropriate rate of interest on top of those
20 dollars that represent the damages.

21 Oh, thank you, Commonwealth. At least you
22 handled me directly and appropriately and under the statute
23 by which you're bound. For the Commonwealth, when I was
24 with the Commonwealth for eight and a half years, we were
25 required to inform condemnees' counsel of what the rate of

1 interest was.

2 Now, it's true that at that time it was the
3 statutory 6 percent. But some condemnee counsel, for
4 whatever reason, didn't even know that; nor did they know
5 how to calculate it because they didn't deal with it every
6 day.

7 MR. KLEIN: And 13 years ago, Supreme Court of
8 Pennsylvania in a case called Hughes v. Department of
9 Transportation said 6 percent is unconstitutional; it's
10 confiscatory; it ought to be based on the prevailing market
11 interest rate, what does it cost you to go out and get a
12 loan.

13 Mr. Cressler instructed his people for years
14 to disregard the Supreme Court. I dealt with PennDOT
15 attorneys who said Supreme Court just doesn't understand.
16 We're going to go on paying 6 percent. And when they found
17 the attorneys, the dummies as they called them, who were
18 willing to accept it, they stuck it to them.

19 Now, finally, we're coming on the golden age.
20 And we're hooking onto Rule 238 of Rules of Civil Procedure
21 in Pennsylvania in which in personal injury claims and a
22 number of other instances, wrongful death, you get
23 compensated at the rate of interest based on the Wall
24 Street Journal's first edition of the year plus one
25 percent.

1 Even then, you're only getting simple
2 interest. The world doesn't exist on simple interest. The
3 real world is compound interest. So I -- I'm sorry, Mark.
4 I had to interject that.

5 MR. SILVER: That's fine. That's really
6 everything that I have.

7 CHAIRPERSON CLARK: I guess an observation is
8 that the primary problem is with commercial real estate.

9 MR. KLEIN: Yes, sir.

10 CHAIRPERSON CLARK: And we could have the
11 federal government pass rules to treat commercial owners
12 the same as residential owners making them whole and also
13 ask the federal government to give us the money to go along
14 with that.

15 MR. KLEIN: I don't know that the federal
16 government doesn't already have a mechanism in effect.
17 We've talked to people from PennDOT who tell me that the
18 federal government doesn't understand why we are being
19 compensated on such a terribly low basis in the instance of
20 the commercial relocations.

21 So yeah, it's there. Go out and get it. The
22 money can be obtained. Nobody says that the Commonwealth's
23 going in the hole because they're now going to be paying
24 \$50,000 for loss of income rather than the 20,000, which it
25 came into effect in, when, 1964?

1 CHAIRPERSON CLARK: So you think the federal
2 government rules are there --

3 MR. KLEIN: I think -- I think --

4 CHAIRPERSON CLARK: -- that adequately
5 compensate them, or the money is there, or both?

6 MR. KLEIN: Both. Somehow PennDOT, which is
7 the major condemnor and deals with condemnees unlike any
8 other condemnors we've run across, believes that every dime
9 is theirs. And they are very begrudging in seeing that the
10 condemnees are compensated.

11 We have two cases we tried last week. In one
12 case -- and again, along the infamous Dauphin Narrows
13 corridor -- the initial offer was 67,000. By the time we
14 got to board of view, it had been bumped to 167,000. The
15 other one, the initial offer was 405,000. By the time we
16 got to board of view, it had been increased to \$594,000.
17 Okay.

18 Now, in that latter one, nothing had changed
19 except we were going to board of view. And the appraiser
20 finally fessed up that she hadn't done her homework the way
21 she should have. And all of a sudden, we got the bump that
22 was required to bring it in reality.

23 They're still \$350,000 below us. But at least
24 it's a move in the right direction. Suppose they didn't
25 have counsel who said to them, Hey, you know, we'll look

1 out for you. Now, we don't consider ourselves to be the
2 avenger or the equalizer as the TV show provides; but we
3 are offended when people are mistreated.

4 And I would be happy -- I'd be delighted to
5 see the day when the number of the people that are raped
6 this way by PennDOT are just almost all eliminated. I
7 mean, then I'll hang up my mask and gun and ride off into
8 the sunset.

9 CHAIRPERSON CLARK: Well, maybe you were
10 here -- maybe you weren't here earlier today when during
11 PennDOT's testimony I asked them if they were tied into the
12 trial lawyers because they seem to be making money for
13 them. Maybe -- so we made that, you know -- we made that
14 connection, which we'd like to eliminate and so would you.

15 MR. KLEIN: Yes.

16 MR. PRESKI: Just a question. I asked Mr.
17 Bresnahan this, Mr. Klein. How big do you think the
18 universe is of these cases that, you know, cause these
19 problems, these commercial cases? Is it 5 percent of all
20 the condemnations?

21 MR. KLEIN: I can't give you the number of the
22 commercial cases compared to the overall. I can tell you
23 probably that the overall cost of land acquisition is less
24 than 1 percent of the entire budget of putting a highway
25 through, less than 1 percent.

1 MR. PRESKI: And this is my next question:
2 For something --

3 MR. KLEIN: But excuse me. There were some
4 figures generated, I think, by the Deputy Secretary at the
5 hearings two years ago before the House Select Committee
6 which indicated the number of condemnation cases involving
7 commercial properties which went on to a board of view.

8 And they were relatively high, certainly
9 compared to the single family residences which are almost
10 negligent.

11 MR. PRESKI: My next question is this: You
12 talked about how the feds basically give money for the
13 compensation. They budget that into their project cost or
14 they budget it in the money they give to the state.

15 MR. KLEIN: They reimburse.

16 MR. PRESKI: They reimburse. And they
17 reimburse, I think you said, on the average of 80 to 90
18 percent?

19 MR. KLEIN: It depends on the project. There
20 are some projects, I'm certain, where there's small
21 projects where there's no reimbursement. The standard on
22 any of the big highway projects you look at is 80 percent.

23 MR. PRESKI: Okay. I guess the question that
24 I have or what I'm trying to wrestle with is, if you're
25 getting that money back anyway from the feds, what's the

1 impetus to either come in low or to put up the fight if
2 your actual cost -- and you talked about you went from
3 500,000 to 694 -- is really only going to be 80 percent of
4 that number, which if you take it to 200, it's only about
5 \$40,000 more to the state?

6 Do you have any comment on that, I mean, or
7 what do you see from the other side is the impetus to the
8 fight or the impetus to the, I mean, what you would call
9 the lowballing of the number?

10 MR. KLEIN: I have talked to PennDOT
11 employees. And I am not condemning them as a group.
12 There's some very fine, honest and disturbed PennDOT
13 employees, many of whom will call Mark and I up and say,
14 Hey, your guy is taking a royal hosing out here at such and
15 such a place. This is what we've done to them.

16 The answer is -- and pardon me if I offend
17 anybody with the English. But I have a print at home that
18 Mark brought me from I guess it was Nantucket when you were
19 up there?

20 MR. SILVER: San Francisco.

21 MR. KLEIN: San Francisco. And it shows a
22 Labrador twisted around in a position where it is engaged
23 in licking itself. And the answer is because it can. What
24 we have on the part of PennDOT is an us versus them
25 universe. We are PennDOT. These people are all out to

1 cheat us, and we're going to get them. They are the
2 Labrador in my print.

3 MR. PRESKI: Okay. My next question --

4 CHAIRPERSON CLARK: Well, excuse me. That's
5 an attitude that we used to have over at DER, which we have
6 cleaned up considerably in the last four or five, six
7 years. And if it's, you know, if it's a matter of
8 attitude, we have a way of bringing that around.

9 MR. KLEIN: And it's endemic. Let me tell
10 you, our practice is statewide. We currently have cases
11 running in District 9, we have them in District 5, we have
12 them in -- is it District 4? -- District 8. And wherever
13 we go, we see the same thing.

14 And they will tell you that they have come out
15 with a new program to change everything. Well, that new
16 program, alleged new program, which is really a program
17 they had in effect a long time ago, didn't have any effect
18 on those two people we had and represented this past week
19 who got lowballed in their numbers. I don't know.

20 I mean, you can give them the best of all
21 equipment. But if you don't have the driver fully
22 cognizant of what his obligations are, I don't know how you
23 change it. I do know that as punishment, right-of-way
24 personnel throughout the state were forced to view the
25 testimony presented by Mr. Silver, me, and a former PennDOT

1 attorney named Kathy Stevenson as part of their training
2 program. I haven't seen that anything has changed.

3 MR. PRESKI: Are you generally successful in
4 your actions?

5 MR. KLEIN: Mr. Cressler will have to answer
6 that. I mean, that's a matter of how you judge it. I
7 think we do a good job for our clients, yes.

8 MR. PRESKI: And then my next question was
9 just to clear up something that you talked about. You had
10 talked about basically the procedure where they have
11 someone come in with an appraisal. If they don't like it,
12 they send it back. And they've basically told them if we
13 send too many of them back, we're going to take you off of
14 the approved list.

15 Do you know of anyone who's been taken off of
16 that approved list?

17 MR. KLEIN: I can tell you that we recently
18 had one in District 5 on that Route 33 bypass where the
19 original number by one of the appraisers was \$620,000. He
20 went into review. He came out with his \$250,000 appraisal,
21 and they still wouldn't use it, using somebody at 130-some
22 thousand.

23 I know of appraisers who have told me that
24 they have been advised that their services would not be
25 utilized in the future if they did not know how to play

1 ball. I'm not going to betray them because that's a
2 betrayal of confidence. The answer is yes.

3 MR. PRESKI: You don't necessarily represent
4 to anybody in the committee that it's just because their
5 numbers are different? There could be other reasons that
6 PennDOT has for not using them?

7 MR. KLEIN: Well, let me suggest that if you
8 have a professional appraiser -- in many instances, some of
9 these appraisers are certified by the Institute, members of
10 the Appraisal Institute, MAI. And when MAIs are told by
11 some flunky at PennDOT who has no certification and no real
12 experience other than working for the Department that he
13 doesn't know how to appraise property and his numbers are
14 too high, I tell you the inmates have taken over the
15 prison.

16 MR. PRESKI: That's it. Thank you.

17 CHAIRPERSON CLARK: All right. We thank both
18 of you gentlemen. And that will conclude our hearing for
19 this morning. Thank you.

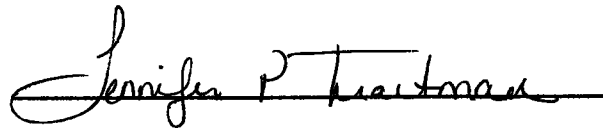
20 MR. KLEIN: Thank you very much for hearing us
21 and putting us on the agenda.

22 (Whereupon, at 1:02 p.m., the hearing
23 adjourned.)

24 * * * *

25

1 I hereby certify that the proceedings and
2 evidence are contained fully and accurately in the notes
3 taken by me during the hearing of the within cause and that
4 this is a true and correct transcript of the same.

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11 JENNIFER P. TROUTMAN

12 Registered Professional Reporter

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16 My Commission Expires:
17 April 30, 2001

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